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

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OF THE

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[1] Became Circuit Judge March 18, 1918.
[2] Appointed March 21, 1918.
[3] Appointed April 12, 1918.

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[1]Appointed April 6, 1918.

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*

CASES REPORTED

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

HARMON et al. v. BARBER.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1918.)

No. 3037.

1. CARRIERS ⟸308—CARRIAGE OF PASSENGERS—DUTY OF CARRIER.
   Where a passenger purchased a ticket entitling him to transportation over two lines, and the ticket created two separate and independent contracts, one by each of two railroads, the original carrier, which transported the passenger to a common junction point, owes him some measure of accommodation in connection with the opportunity to effect a transfer at the junction to the line of the second carrier.
2. CARRIERS ⟸308—CARRIAGE OF PASSENGERS—INITIAL CARRIER—CONNECTIONS.
   Where defendant had no direct line to a passenger's destination, but made connections with another road, it and its station agents had the right to guarantee time for immediate connection with the trains of the second railroad at the point of junction.
3. TRIAL ⟸141—PROVINCE OF COURT AND JURY.
   Where the testimony as to a certain issue was not conflicting, the question was for the court.
4. CARRIERS ⟸308—CARRIAGE OF PASSENGERS—DUTY OF CARRIER—CARE.
   Defendants, who as receivers operated a railroad having no direct line to Columbus, sold plaintiff a ticket entitling him to transportation to Columbus by way of Piqua. The ticket contained two coupons, one for carriage to Piqua over the line of defendants, and the other from Piqua to Columbus over the line of another company. The ticket also contained a stipulation that in selling the ticket for passage over other lines, or in checking baggage upon it, defendants acted only as agents, and were not responsible beyond their own line. When the passenger arrived at Piqua, he was given an interdepot transfer ticket, entitling him to be carried by motorcar to the station of the connecting carrier. Compensation for such transfer was paid by defendants. *Held* that, as the transfer occurred about 4:30 in the morning, and as the time was extremely limited, and it not appearing that decedent read or knew the contents of the transfer ticket, it must as matter of law be deemed defendants were liable for negligence of the motorcar driver; the provision that defendants should not be liable beyond their own lines relating obviously to other railroad transportation.
5. TRIAL ⟸194(18)—INSTRUCTIONS—REFUSAL.
   Where the evidence was conflicting as to decedent's position in a motorcar provided by defendants to transfer passengers from their trains to

the station of another company, a charge that as a matter of law decedent was guilty of contributory negligence in standing on the running board was properly refused.

6. CARRIERS ⊂⊃330—PASSENGERS—NEGLIGENCE.
A passenger in a motorcar provided by defendants to transfer their passengers to the line of another company is not guilty of contributory negligence because he took no steps to lessen the speed of the motorcar; the passenger having no control over the driver.

7. CARRIERS ⊂⊃339—CARRIAGE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE—DEFENSES.
Contributory negligence of a passenger will not bar recovery for his death, unless it directly and proximately contributed to the injury.

8. TRIAL ⊂⊃261—INSTRUCTIONS—ERRONEOUS REQUESTS.
In an action for the death of a railway passenger, killed when a motorcar in which he was being transferred from defendants' station to the station of a connecting company overturned, the court charged that, if the accident was caused directly by decedent's standing on the running board, there could be no recovery. *Held* that, while "contributed to" would have been a better expression than "caused," yet as the court twice charged in substance that if decedent was guilty of contributory negligence there could be no recovery, and the court's attention was not called to the use of the word "caused," and defendants' own requested instructions on contributory negligence were faulty, the refusal of such instructions cannot be deemed prejudicial.

9. CARRIERS ⊂⊃344—ACTIONS—BURDEN OF PROOF.
Burden of proving contributory negligence of a passenger is on the carrier.

10. COURTS ⊂⊃348—FEDERAL COURTS—PRECEDENTS.
The rule that the burden of proof of contributory negligence of a passenger is upon the carrier is one of general law, and will be enforced by the federal courts, even where the rule of state practice is otherwise.

11. COURTS ⊂⊃366(23)—FEDERAL COURTS—PRECEDENTS.
A decision by a state court that the violation of a statute limiting the operation of motor vehicles is negligence per se is binding on the federal courts, as a construction of a state statute.

12. CARRIERS ⊂⊃295(7)—INJURIES TO PERSONS ON STREETS—MOTOR VEHICLES.
A violation of Gen. Code Ohio, § 12604, providing that one operating a motor vehicle at a greater speed than 8 miles an hour in the business and closely built up portion of a municipality, or more than 15 miles an hour in other portions, shall be fined, amounts to negligence per se, and should be so declared in an action for the death of one resulting from the overturning of a motorcar operated in violation of law; the statute being designed, not only for the protection of those using the streets, but those within the car.

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

Action by Lucinda Barber, administratrix of the estate of James C. Barber, deceased against Judson Harmon and another, receivers of the Cincinnati, Hamilton & Dayton Railway Company. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Waite, Schindel & Bayless and Herbert Shaffer, all of Cincinnati, Ohio, for plaintiffs in error.

Matthews & Klein, of Cincinnati, Ohio, and Reese Blizzard and John F. Laird, both of Parkersburg, W. Va., for defendant in error.

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

KNAPPEN, Circuit Judge. The plaintiffs in error, as receivers (hereinafter called defendants), through their agent, sold and issued to decedent, Barber, a ticket entitling him to transportation from Toledo, Ohio, to Columbus in that state, by way of Piqua. The ticket contained two coupons—the one for carriage from Toledo to Piqua, over the line of the Cincinnati, Hamilton & Dayton Railway Company; the other from Piqua to Columbus, by way of the Pennsylvania lines. At Piqua the receivers' agent issued and delivered to decedent a ticket for transfer from the Cincinnati, Hamilton & Dayton depot to the Pennsylvania depot, about a mile distant. While on the interdepot journey the automobile in which decedent was riding was, through the asserted negligence of its driver, overturned and decedent thereby killed. This action is for damages for the death. The case was tried to a jury, resulting in verdict and judgment for the plaintiff administratrix.

The primary and most important question is whether the trial judge rightly held that, upon the record as presented, the defendants' contract of carriage included the transfer between the two depots at Piqua, or whether, as claimed by the defendants, the contract of interdepot transfer was that of an independent transfer company—the defendants, in issuing the transfer, acting merely as the transfer company's agent. This question is rightly treated by counsel for both parties as one of law.

[1-4] The ticket given decedent at Toledo contained the stipulation that in selling the ticket "for passage over other lines or in checking baggage on it, this company acts only as agent and is not responsible beyond its own line." The automobile in which decedent was being transferred from one station to the other was operated by a concern known as the Robbins Transfer Company, engaged in running a line of automobiles, including interdepot transfers in Piqua.

It may be conceded that defendants would not be liable for a negligent injury to decedent while being carried by the Pennsylvania Company from Piqua to Columbus. Auerbach v. N. Y. C. & H. R. R. Co., 89 N. Y. 281, 42 Am. Rep. 290; Pennsylvania Co. v. Loftis, 72 Ohio St. 288, 74 N. E. 182; Nashville & Chattanooga R. Co. v. Sprayberry, 8 Baxt. (67 Tenn.) 341, 35 Am. Rep. 705. It may also be conceded that, had the ticket contained a coupon for transfer by the Robbins Company between the two railway stations, defendants would not be liable for the transfer company's negligence; but the ticket would be regarded as evidencing distinct contracts of carriage with the two railway companies and the transfer company. The ticket, however, contained no coupon or other provision relating to transfer from depot to depot.[1]

[1] While a witness testified that there was attached to the ticket a "pink slip," which was exchanged at the Piqua ticket office for the transfer ticket, defendants conceded on the trial, and by brief in this court, that the ticket given decedent in Toledo consisted only of the body and the two railroad coupons.

Defendants contend that the disclaimer of responsibility contained in the ticket applied, nevertheless, to the interstation transfer. Several considerations make strongly against this contention. The natural meaning of the expression "over other lines" would be "other railroad lines," not only under the doctrine of exclusion, but because such lines are alone mentioned in the ticket, which was silent as to transfer. The form of the ticket differs materially from that of the coupons attached to the railway ticket, in that, while both show their issue by the Cincinnati, Hamilton & Dayton Railway (or its receivers), the interdepot transfer ticket shows on its face that it is "good for one through passenger and baggage * * * from C., H. & D. Railway depot to P., C., C. & St. L. Railway depot," and is signed by defendants' general passenger agent; while the railroad coupons not only omit the words "good for," but are without the general passenger agent's signature. Defendants' answer admits that the transfer was issued "in consideration of the purchase price of" the railway ticket. The undisputed testimony of the automobile driver, introduced by defendants, is that on the arrival of the Cincinnati, Hamilton & Dayton train at Piqua "he read the forms of the ticket off to the ticket agent, stating where the party had come from, where he was going, and the form of the ticket," upon which the interdepot transfer ticket was issued. The undisputed testimony of a member of the transfer company, who was defendants' witness, was that the compensation between that company and "the Cincinnati, Hamilton & Dayton is conducted by transfer tickets; we collect these monthly. The chauffeur has charge of the collecting of the transfer tickets." There was otherwise no testimony of the terms of the arrangement between the railroad company and the transfer company; the defendants' answer precludes a defense (which, indeed, is not asserted) that decedent was the passenger of the Pennsylvania Company, or that the latter company contributed toward the payment of the transfer company's charges. The only reasonable interpretation of the record is that defendants made the arrangement for the transfer and paid the transfer company therefor—the amount of such payment, however, not appearing, nor how much, if anything, was added on that account to what decedent would otherwise have paid for the railroad transportation. Presumably defendants charged the passenger, in the aggregate, no more than his through fare on the competing roads. But it is clear that decedent was not to make, and did not make, any payment directly to the transfer company, or have any relation with it other than here stated. If the two roads had had actual rail connection, and were the ticket a through one, it would have been defendants' duty, broadly speaking, in the absence of special contract otherwise, to carry decedent to the end of their own line and deliver him to the Pennsylvania Company. Railroad Co. v. Manufacturing Co., 16 Wall. 318, 324, 21 L. Ed. 297; Pennsylvania Co. v. Jones, 155 U. S. 539, 15 Sup. Ct. 136, 39 L. Ed. 176. What in such case would amount to a delivery to the succeeding carrier we have no occasion to define. But treating the ticket as creating two separate and independent contracts, one by each of the two railroads, for carriage over its own road only, defendants would still have owed decedent some

measure of accommodation in connection with opportunity to effect a transfer, even at a common junction point. Texas & Pacific Ry. Co. v. Bigger, 239 U. S. 330, 335, 338, 36 Sup. Ct. 127, 60 L. Ed. 310; and see Chicago, etc., R. R. Co. v. Stephens (C. C. A. 6) 218 Fed. 535, 545, 546, 134 C. C. A. 263. It was plainly to defendants' interest to provide through connection, in view of the short interval between the arrival of their train and the departure of the Pennsylvania train, and the presumed competition of other shorter, and actually through lines between Toledo and Columbus. Defendants had an undoubted right to guarantee time for immediate connection with the Pennsylvania Railroad at Piqua; indeed, the regular Toledo ticket agent would have had such authority. Hayes v. Wabash R. R. Co., 163 Mich. 174, 177, 128 N. W. 217, 31 L. R. A. (N. S.) 229.

The proposition that the railroad ticket was not in fact a through ticket, but that (as affecting the matter of transfer between depots) decedent had the right to stop at Piqua, loses its force, not only, to some extent, through the fact that the carriage had to be finished the day following the issue of the ticket (which following day was that of the transfer and injury), but especially through defendants' treatment of the ticket (at Piqua) as a through ticket, by delivering to decedent at that place an interdepot transfer ticket showing on its face that it was issued on "through ticket"; and the necessary inference from the record is that defendants' regular practice was to furnish this interdepot transfer on through tickets between Toledo and Columbus, and presumably decedent understood that the price of the transfer was included in the amount paid for his ticket. It must be conceded that, in the absence of contract or custom, defendants would have been under no obligation to transfer decedent to the Pennsylvania station; yet, taking into account all the elements stated, there is, to our minds, but one consideration lending substantial support to defendants' asserted freedom from responsibility, viz. that the transfer contained the words "On account Robbins Transfer Company." But controlling force cannot be given to these words alone, not only because they do not clearly import an agency on defendants' part for the transfer company, but are fully as consistent with an identification for accounting purposes only between defendants and that company, but for the further reason that it does not appear that decedent ever read the transfer or knew that it contained words of the purport stated. The natural inference is to the contrary, for defendants' train was late, and there were but a few minutes to make the transfer to the Pennsylvania depot, and that at about 4:30 o'clock on a March morning; and the testimony is that the issue of the transfer and the taking of the automobile were hurried. The receipt of the transfer under such circumstances was not, in our opinion, enough of itself to make a contract between decedent and the transfer company, nor to advise the former that defendants were relieved from responsibility, or were acting merely as agents for the transfer company therein. In view of the not unusual practice of railroad companies to issue, as a part of through tickets, coupons for transfer lines wholly independent of the railroads, we think decedent, upon the record presented, would naturally have regarded the interdepot transfer (not provided for by

ticket coupon) as the act of defendants. There was no substantial conflict of testimony affecting the point we are considering, and the court had to decide it as matter of law. Indeed, defendants asked for direction in their favor on this question only as matter of law. While the question is not free from difficulty, upon a consideration of the entire record, we think the District Court rightly held that defendants assumed to provide transportation from their station to the Pennsylvania station, and that, so far from defendants being merely the agents of the transfer company, the latter was an agency of defendants, adopted by them for carrying their own passengers to the Pennsylvania station. The instant case is in many respects sui generis. The authorities cited by defendants, with one exception, do not sustain their contention of nonliability, and the doctrine of the excepted case we cannot approve.

[5, 6] 2. There was testimony that previous to and at the time of the upsetting of the car decedent was standing on the running board; that the accident occurred while the machine was descending a long grade and running at from 30 to 35 miles an hour. The court refused to charge, as matter of law, that decedent was guilty of contributory negligence. There was no error in this refusal, for the reason, if for no other, that there was affirmative testimony (which the jury had the right to believe) that decedent was sitting crosswise in the lap of another passenger (who was on the front seat), and thus on the edge of the machine, with his left foot on the inside, his right foot on the outside, and his head inside the car. The testimony as to the speed of the car ranged all the way from 10 to 15 miles up to 35 miles. Decedent was not guilty of contributory negligence from the fact that, as a passenger, having no control over the driver, he took no steps to lessen the speed. Monongahela, etc., Co. v. Schinnerer (C. C. A. 6) 196 Fed. 381, 117 C. C. A. 193.

[7, 8] Complaint is also made of the refusal of certain requests upon the subject of contributory negligence. Their subject-matter was fully covered by the charge, unless in the fact that the effect of decedent's standing upon the running board was thus stated:

"If the accident was directly caused by his standing on the running board, the plaintiff cannot recover."

Decedent's contributory negligence would bar recovery, if, but not unless, it directly and proximately contributed to the injury. Toledo, etc., Ry. Co. v. Kountz (C. C. A. 6) 168 Fed. 840; 94 C. C. A. 244. "Contributed to" would have been a better expression than "caused." However, the court at least twice charged, in substance, that if decedent was guilty of contributory negligence plaintiff could not recover. The court's attention was not called to the criticism now made. Presumably, had that been done, the language would have been suitably modified. We find no reversible error in this respect. Indeed, defendants' request on the subject of contributory negligence was faulty, in omitting the words "directly and proximately," or their equivalents.

[9, 10] 3. The trial court properly charged that the burden of proof of contributory negligence was on defendants. The rule is one of general law, enforced by the federal courts, even where the rule of the

state practice is otherwise. Central Vermont Ry. Co. v. White, 238 U. S. 512, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; Erie R. R. Co. v. Weinstein (C. C. A. 6) 166 Fed. 274, 92 C. C. A. 189.

[11, 12] 4. The Ohio statute (G. C. § 12604) provides that one operating a motor vehicle at a greater speed than 8 miles an hour in the business and closely built up portions of a municipality, or more than 15 miles an hour in other portions thereof, shall be fined not more than $25. The accident occurred within the municipal limits. The trial court charged that the operation of the automobile at more than 15 miles an hour was negligence, and would be actionable if it brought about the injury. Defendants criticize this instruction, first, as making an unlawful speed negligence per se, instead of merely evidence of negligence, and, second, on the ground that the statute was designed for the protection of those using the streets, and not for those within the car. We cannot agree with this contention. True, in Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, it was said, speaking of the violation of a city ordinance, that the better and more generally accepted rule is that:

"Such an act on the part of a railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence."

The Supreme Court of Ohio, however, in Schell v. Du Bois, 94 Ohio St. 93, 113 N. E. 664, L. R. A. 1917A, 710, in construing this very statute, held, as stated in the syllabus, that:

"The violation of a statute passed for the protection of the public is negligence per se, and where such act of negligence by a defendant is the direct and proximate cause of an injury not directly contributed to by the injured person, the defendant is liable."

This we think a construction of the Ohio statute, and as such binding upon the federal courts. Nor do we agree with the proposition that the opinion of the court makes it clear that the purpose of the statute was not to protect those within the machine, but only those without. Such distinction would not, in our judgment, be a reasonable one. The construction thus put upon the statute in question is in harmony with the rule frequently announced by the Supreme Court of Ohio and by this court, in construing frog-blocking and other protective statutes, viz. that the breach of a statute designed for the protection of the public is negligence per se.[2] Section 12603 does not, in our opinion, modify the effect of section 12604.

The judgment of the District Court is affirmed.

2 Variety, etc., Co. v. Poak, 89 Ohio St. 297, 306, 106 N. E. 24; Krause v. Morgan, 53 Ohio St. 26, 43, 40 N. E. 886; Toledo, etc., Ry. Co. v. Kountz, 168 Fed. 838, 94 C. C. A. 244; Cooper v. B. & O. Ry. Co., 159 Fed. 82, 86, 86 C. C. A. 272, 16 L. R. A. (N. S.) 715, 14 Ann. Cas. 693; Sterling Paper Co. v. Hamel, 207 Fed. 300, 302, 125 C. C. A. 44; Crucible Steel Forge Co. v. Moir, 219 Fed. 151, 154, 135 C. C. A. 49.

VASCACILLAS v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 3035.

1. RAILROADS ⟸330(2)—CROSSING ACCIDENTS—GATES—PRESUMPTIONS.
Ordinarily, where safety gates maintained by a railroad company are open, there is an implied invitation to persons traveling the street to enter upon the crossing, and, while such persons are not relieved from the duty of taking reasonable precautions to avoid injury by moving trains, they may reasonably presume that the railroad company's servants have performed their duty in ascertaining that the crossing is safe, and hence, where the safety gates were open and plaintiff's view was obstructed, he was warranted in driving upon tracks, assuming that defendant's servant had discharged his duty and that the crossing was clear for his passage.

2. RAILROADS ⟸350(30)—CROSSING ACCIDENTS—"NEGLIGENCE PER SE."
It is not "negligence per se" to cross in front of a moving train, when the distance and the speed of the train are such as not to render the crossing unsafe.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence Per Se.]

3. APPEAL AND ERROR ⟸927(7)—REVIEW—DIRECTED VERDICT—PRESUMPTION.
On motion for an instructed verdict, the testimony must be viewed in the light which is most favorable to the adverse party.

4. RAILROADS ⟸350(28, 30)—CROSSING ACCIDENTS—JURY QUESTION.
Where plaintiff, who drove onto defendant's tracks when safety gates were raised, saw a train approaching on the track in front of him, but, as it was a considerable distance away, drove across the track, and was caught when the gates towards which he was driving were lowered, the question whether plaintiff was guilty of contributory negligence in so driving on the tracks, and whether he was negligent in alighting from his vehicle, it appearing that he was injured when his team, frightened by the train, began to run after the gates were raised, *held* for the jury.

5. NEGLIGENCE ⟸72—CONTRIBUTORY NEGLIGENCE—ACT IN EMERGENCY.
One exposed to sudden danger is not chargeable with negligence simply because he does not adopt the safest course to avoid the injury.

In Error to the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Action by Antone Lewis Vascacillas against the Southern Pacific Company, a corporation. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

The plaintiff, a teamster, was driving a team, with a wagon loaded with lumber, on a street running north and south in the city of Reno, when he approached a railroad crossing where the defendant had five tracks running east and west. On both sides of the crossing the defendant maintained gates, which were operated by a watchman in a tower. The gates being open, the plaintiff proceeded on his way across the tracks. His view to the left was obscured by box cars standing on the tracks. When he had reached the third track, and his team was, as he testified, on the fourth track, he discovered a freight train, then distant about two city blocks, approaching from the east on the fourth track. The plaintiff urged his horses to increase their speed, and he would have passed over all the tracks before the train could have reached the crossing, had not the defendant's gate tender lowered the south gates. Those gates descended three or four feet in front of the horses,

while they stood upon the fifth track and the wagon was on the fourth track. In the meantime the freight train was being brought to a halt, and there was much noise from escaping of steam. The horses became frightened, and began to rear and plunge. The plaintiff testified that he tried to make the horses break through the gate, but they would not go, so he jumped off on the fifth track, and on the east side of the team for fear of being hit by the train. When he jumped off, he had the lines in his hand, and thereafter was trying to hold his horses, and was alternately looking up to the tower to see if the gateman was going to raise the gates and watching his horses. The gates were raised after having been down about a minute, and immediately the horses started upon a run. The plaintiff tried to hold them, and steer them, but when they turned he was thrown under the wagon and injured. The trial court directed the jury to return a verdict for the defendant, holding that the plaintiff was negligent in attempting to cross in front of the oncoming train, and also that he was negligent in not remaining upon his wagon, or in not getting on the wagon again before the horses started.

J. B. Dixon and M. J. Scanlan, both of Reno, Nev., for plaintiff in error.

Frank Cleary, of San Francisco, Cal., and Brown & Belford, of Reno, Nev., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] It is the general rule that the fact that safety gates which are maintained by a railroad company at a street crossing are open is an implied invitation to persons traveling the street to enter upon the crossing, and that, while it does not relieve such persons from the duty of taking reasonable precautions to avoid injury by moving trains, it qualifies that duty to the extent that they may reasonably presume that the company's servants have performed their duty in ascertaining that the crossing is safe. Delaware & H. Co. v. Larnard, 161 Fed. 520, 88 C. C. A. 462; Erie R. R. Co. v. Schultz, 183 Fed. 673, 106 C. C. A. 23; Erie R. Co. v. Weber, 207 Fed. 293, 125 C. C. A. 37; Conaty v. New York, etc., Railroad, 164 Mass. 572, 42 N. E. 103; Glushing v. Sharp, 96 N. Y. 676. In Sager v. Railway Co., 70 Kan. 504, 79 Pac. 132, the court held that open gates tended by a gatekeeper of the railway company, where a public street crosses its tracks, are affirmative assurance to a traveler on the street that his safety will not be imperiled by the descending of a gate arm. In that case the plaintiff, when he approached the railway crossing, found the gates on the south side up, indicating that the tracks were clear for passage over them. When he approached the gates at the north side, one of the gates was lowered about four feet in front of him. He dodged back, and an iron prod attached to the wooden arm of the gate struck him in the groin, causing his injuries. The court said:

"His cause of action rested on the negligence of the gateman in letting down the east arm of the north gate after the two south arms of the gate and the railway tracks had been passed. The only question of contributory negligence which could possibly come into the case under the evidence before us must have relation to the knowledge of plaintiff below respecting the falling of the gate which hurt him. If he neglected to avoid the injury, when it was imminent, by stopping his horses or jumping from his buggy, provided he had

sufficient notice of the impending danger, and it was practicable to do so, he was guilty of contributory negligence. * * * We can see no element of contributory negligence in the case, unless it might have arisen at or about the time the east arm of the north gate began to descend, as before stated."

The purport of the decision was that the question of the plaintiff's contributory negligence was for the jury to decide. In Strotjost v. St. Louis Bridge Terminal Ry. Co. (Mo. App.) 181 S. W. 1082, the court held that, where gates are maintained at a crossinig of a public highway by a railroad, one in the highway may regard the opening of the gates as an invitation to him to go forward in safety. In that case the defendant lowered the gate at the other side of the crossing, so the plaintiff's horse veered to one side, overturning the wagon, resulting in injuries to the plaintiff. The court held that the defendant failed to exercise ordinary care for plaintiff's safety. In Gray v. N. Y. Cent. & H. R. R. Co., 77 App. Div. 1, 78 N. Y. Supp. 653, the defendant's gateman raised the gate and beckoned to plaintiff to come on, and just before plaintiff reached the tracks he suddenly lowered the gate, frightening the horse as a train came from the opposite direction. The court held that whether one who drives forward after such signal, watching only the horse, the crossing, and the gateman, and not looking up the tracks for a train, view of which was substantially obstructed, was guilty of contributory negligence, was a question for the jury. The court said:

"When one of its servants has given such assurances as these of safety, it does not lie with the defendant to complain because the traveler has not been alert to discover conditions which are at variance with those which he has been told exist."

In Balto. & Ohio R. Co. v. Stumpf, 97 Md. 78, 54 Atl. 978, the court held that the fact that safety gates at a railway crossing are open is a notice to the public that the crossing is safe, and a traveler who, after looking and listening for approaching trains in either direction before he goes upon the tracks through the open gates, the watchman being absent, is not guilty of contributory negligence, as a matter of law, because he did not stop his horses, as well as look and listen, although the full view of the tracks was obstructed by standing cars. In Gerg v. Pennsylvania R. R. Co., 254 Pa. 316, 98 Atl. 960, the court held that the duty of a watchman at the railroad grade crossing requires him to know the situation as to safety at the crossing, and parties desiring to cross the track may assume and act on such knowledge, they each, however, exercising proper vigilance for their safety under the circumstances, and that the watchman's signal to cross is an invitation to every one present within a reasonable distance waiting and desiring to cross the track. In Smith v. Atlantic City R. R. Co., 66 N. J. Law, 307, 49 Atl. 547, the gates were open when plaintiff began to cross, but as she reached the end of the crossing she was struck by a descending safety gate. The gateman did not see her, but there was no obstruction to his view of her while crossing. It was held that the question of the gateman's negligence was for the jury, and that the question of the plaintiff's contributory negligence in failing to look further at the gates as she crossed was prop-

erly submitted to the jury. In Woehrle v. Minnesota Transfer Ry. Co., 82 Minn. 165, 84 N. W. 791, 52 L. R. A. 348, it was held that open gates at the railroad crossing are an assurance of safety upon which the plaintiff might to some extent, but not entirely, rely and act, within reasonable limitations, upon the presumption that it was safe for him to go upon the crossing. The court said:

"Upon the question whether the plaintiff could have seen the train in time to have avoided the accident, or whether he looked for it, the evidence was conflicting, and sufficient to warrant the submission of the question to the jury. The sole question, then, for our decision, is whether, in view of the facts of this case, the plaintiff, in the exercise of ordinary care, was bound, as a matter of law, to stop his team and listen before driving upon the crossing. Are the inferences to be drawn from the facts doubtful? Is there no reasonable chance for fair-minded men to draw different conclusions from them? Unless it be clear that the last two questions must be answered in the negative, the main question must also receive a negative answer."

[2-5] The plaintiff, when he drove through the north gateway, the bars of which he found standing erect, had the right to assume that the defendant had discharged its duty, and that the crossing was clear for the passage of his team. He had the right to assume also that, having started to cross the tracks, the south gates would not be closed so as to imprison him thereon. When he was half way across, he saw coming at a distance of two city blocks a freight train which was approaching on the fourth track. Negligence should not be imputed to him from the mere fact that he proceeded to cross that track ahead of the approaching train. He had ample time to do so, and the evidence leaves no doubt that, had the south gates been open, he would have safely passed through, and would have incurred no risk of injury. It is not negligence per se to cross a track in front of an approaching train, when the distance and speed of the train are such as not to render the crossing unsafe. But the circumstances which complicate the present case are that, when the plaintiff was about midway of the tracks, he not only saw the approaching train, but he saw that the south gates had commenced to descend, and he heard the alarm bell. There is some conflict in the testimony as to his position at that precise point of time. He testified that his horses must have been at that time on the track on which the train was coming. There was other evidence that the horses had not quite reached that track.

On a motion for an instructed verdict, the testimony must be viewed in the light which is most favorable to the adverse party. The court below found the evidence to be that the gates began to descend before the team reached the fourth track. But if, in fact, when the gates had begun to descend, the plaintiff's horses had not quite reached the fourth track, that fact, we think, does not materially alter the situation. The question is whether it should be ruled, as a matter of law, that he was guilty of contributory negligence in proceeding as he did. What knowledge did the movement of the gates and the ringing of the bell import to him? He may have understood them as a visible and audible warning to him of danger from some source other than from the approaching train, and that they were notice to him to

proceed as speedily as possible to get off the crossing, and that the gates would not be so lowered to intercept him. He may also have relied upon the watchfulness of the man in the tower, and undoubtedly the watchman, if he, in accordance with his duty, observed the situation, could have arrested the lowering of the gates in time to permit the passage of the plaintiff's team. In Erie R. Co. v. Weber, 207 Fed. 293, 125 C. C. A. 37, the court said:

"The decedents may not unreasonably have felt that to turn back entailed as much danger as to go forward. Moreover, they had the right to take into account, in determining the question of safety, the practical invitation to cross, and the qualified assurance of safety given by the raising of the gates."

In Blount v. Grand Trunk Ry. Co., 61 Fed. 375, 9 C. C. A. 526, Judge Taft said that the attention of the driver of a horse and vehicle "is necessarily divided between the control of the horse and observation of the track, and his reliance upon the gates and the flagman must, in the nature of things, be greater than in the case of a pedestrian."

We are of the opinion that upon the evidence in the case, the question of the plaintiff's contributory negligence should have been submitted to the jury. In the situation in which the plaintiff was placed, and under the stress of such circumstances, we think it should not be held, as a matter of law, that the plaintiff's act in proceeding as he did with all possible speed, or his subsequent act in descending from the wagon under the excitement incident to the occasion was either the proximate or a concurring cause of his injury. One exposed to sudden danger is not chargeable with negligence simply because he does not adopt the safest course to avoid injury. Byars v. Wabash R. Co., 161 Mo. App. 692, 141 S. W. 926; Sprowles v. Morris Township, 179 Pa. 219, 36 Atl. 242; Lewis v. Long Island Railroad Co., 162 N. Y. 52, 56 N. E. 548; Kane v. Worcester Consolidated St. Ry., 182 Mass. 201, 65 N. E. 54; Pennsylvania Co. v. Stegemeier, Adm'x, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136.

The judgment is reversed, and the cause is remanded for a new trial.

LOUIE DING v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 2921.

WITNESSES ⊂⇒44—COMPETENCY—RULES.

While, under Judiciary Act, Act Sept. 24, 1789, c. 20, 1 Stat. 73, a change in the state rules as to competency of witnesses cannot affect the rules as to competency in the federal court, the rules of the states as to competency of witnesses in force when the federal courts sitting within the borders of such state were created should govern; hence the common-law rule that a witness is incompetent who has no belief in a Supreme Being who will reward or punish for acts in this world does not apply in the Federal District Court for Washington, as Const. Wash. art. 1, § 11, declares that no person shall be incompetent as a witness in consequence

of his opinion in matters of religion, and Laws Wash. 1854, p. 186, §§ 289–293, now found in Ballinger's Ann. Codes & St. §§ 5990–5993, which was in force when the federal court was first established in Washington, makes incompetent as witnesses only persons of unsound mind, those intoxicated when produced, and children under 10 years of age incapable of receiving correct impressions.

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 was convicted of conspiring with others to violate Act Cong. 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 alien Chinese persons not entitled to be or remain in the United States, and he brings error. Reversed and remanded for new trial.

Walter S. Fulton and William R. Bell, both of Seattle, Wash., for plaintiff 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. Louie Ding asks reversal of judgment of conviction for conspiring with certain others to violate section 11 of the Act of Congress of May 6, 1882, as amended by Act of July 5, 1884, the purpose being to bring into the state of Washington from British Columbia certain alien Chinese persons not lawfully entitled to be or remain in the United States.

William Kirkland was indicted with Ding and Toy and others, but having pleaded guilty was not on trial. The government called Kirkland as a witness, but before he was sworn counsel for the defendant Toy, also on trial, objected upon the ground that Kirkland did not believe in "a Supreme Being who would reward or punish him for his acts in this world." After examination by the court it was held that the question of competency of the witness was to be determined by the common law and that "inasmuch as the witness did not believe in a God who is the rewarder of truth and the avenger of falsehood he could not testify." Thereafter counsel for the defendant Ding offered Kirkland as a witness, but the court declined to allow him to testify unless the government agreed. Counsel for the government objected, and the court declined to allow him to testify.

We are of the opinion that the exclusion of the offered witness was erroneous, in that the court should not have determined the competency of the witness by the rules of the common law as in force in the respective original states of the Union when the Judiciary Act of 1789 was passed, but should have applied the rules which governed the competency of witnesses and the admissibility of evidence in force within the territory of Washington when that territory was admitted to the Union. In United States v. Reid, 12 How. 361, 13 L. Ed. 1023, the Supreme Court, after commenting upon the fact that Judiciary

Act 1789, § 29, provided for the manner of summoning the jurors and that the jurors shall have the same qualifications as are requisite for jurors by the law of the state of which the jurors are citizens observed that neither the Judiciary Act nor the Crimes Act of 1790 (Act April 30, 1790, c. 9, 1 Stat. 112) makes any express provision concerning the mode of conducting the trial after the jury are sworn. The court thought that it must have been the intention of Congress to refer the courts "to some known and established rule which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous," and that such rule was that which was then known to be in force in the *respective* states (italics ours) and which obtained in daily and familiar practice in the state courts. Chief Justice Taney also said that as the courts of the United States were, in respect to qualifications of jurors and the mode of selecting them, to be governed by the laws of the several states, "it would seem necessarily to follow that the same principles were to prevail throughout the trial, and that they were to be governed in like manner in the ulterior proceedings after the jury was sworn where there was no law of Congress to the contrary."

We have not lost thought of the further expression of the court that "the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed," and that no law of a state made since 1789 could affect the mode of proceeding or the rules of evidence in such cases. But as in 1789 there were no known and established local rules of evidence in force in what afterwards became the territory of Washington, it would seem unsuitable to apply a rule which was in force in any of the original states. On the other hand, there is little difficulty in ascertaining the rules which were in force and which the federal courts found were known and established when the new state was taken into the Union. And the principle of the Reid Case, supra, is but adhered to in following such a practice. It could readily be put into use in this matter, for it appears that in the territory of Washington the only persons incompetent to testify were those of unsound mind, or who were intoxicated when produced as witnesses, or were children under 10 years of age and incapable of receiving just impressions or relating them truly. Laws of Washington 1854, p. 186, §§ 289–293; Code of Washington 1881, §§ 388–391; Ballinger's Annotated Codes, §§ 5990–5993. The Constitution of the state (section 11 of article 1) provides:

"No religious qualifications shall be required for any public office or employment; nor shall any person be incompetent as a witness or juror in consequence of his opinion in matters of religion, nor be questioned in any courts of justice touching his religious belief to affect the weight of his testimony."

We are not without authority in accord with our opinion. In Withaup v. United States, 127 Fed. 530, 62 C. C. A. 328, the Court of Appeals for the Eighth Circuit through Judge Van Devanter cited the Reid Case, supra, and Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, and held that admissibility of certain evidence offered in a criminal case tried in the state of Colorado was

governed, not by the statute of Colorado, enacted in 1893 (Laws Colo. 1893, p. 264), but by the common law, which by reason of the territorial act of 1861 (Laws Colo. 1861, p. 335) was the law of Colorado in 1876, when Colorado was admitted into the Union, and that such rules applied as established and known in Colorado.

Logan v. United States, supra, presented the question of the competency of witnesses in a criminal case tried in the federal courts in Texas, and it was held that the rule of decision should be the common law rather than the law of Texas which had been in force before the passage of a statute which had been referred to and was in force at the time of the admission of Texas into the Union as a state. If, as pointed out by Judge Ward in a dissenting opinion in Rosen v. United States, 237 Fed. 810, 151 C. C. A. 52, the question of competency was to be determined under the common law, it would seem as if the witnesses called should have been held incompetent upon the ground that the judgment of conviction in each case showed that the witnesses had been convicted of common-law felonies. In Knoell v. United States, 239 Fed. 16, 152 C. C. A. 66, the Circuit Court of Appeals of the Third Circuit held that, in the absence of a federal statute on the subject, the competency of a witness stood or fell by the law of Pennsylvania at the date of the first Judiciary Act; that is, the state having then no relevant statute, by the rules of the common law. Logan v. United States and Reid v. United States, supra, were cited.

But we do not understand that in the general statement, to the effect that the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed, the Supreme Court ever intended to establish a guide which would prevent the application of the rule as we have before indicated; the test is what local law obtained at the time of the creation of the state, rather than that which obtained at the time of the enactment of the Judiciary Act of 1789. Wigmore on Evidence, § 6 (see notes 9 and 10). In Maxey v. United States, 207 Fed. 327, 125 C. C. A. 77, the Circuit Court of Appeals for the Eighth Circuit considered the question of competency of a witness who had been convicted of a felony, and who was offered as a witness in the trial in the federal court in the district of Arkansas, and it was held that the competency of the witness was to be determined by the common law of the state where the trial was had, as it was when the United States courts were established, except where Congress provided otherwise.

While the decisions upon the question discussed are not as clear as they might be, yet, when we accept the doctrine of Reid v. United States, supra, to be that neither the common law as it existed at the time of the emigration of the colonists nor the rule which at that time prevailed in England is controlling upon the subject, but that the known rules which were in force in the respective states at the time of their creation are, unless Congress has specially otherwise provided, it leads to the view that the court should have followed the rule which the local courts adopted in their usual daily practice when the state of Washington was admitted into the Union.

The judgment is reversed, and the cause remanded for a new trial

UNITED STATES v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1918.)

No. 3031.

1. POST OFFICE ⊂⊃9—POSTAL EMPLOYÉS—BONDS.

Where a post office employé stole three registered packages of unsigned national bank notes, and the United States, pursuant to post office regulations, paid on account of the loss $150, its right of recovery upon a bond given by the postal employé, conditioned for the faithful performance of his official duties, is not limited by the amount the government had to pay its patrons, but extends to the full penalty of the bond, limited only by the amount of the actual injury suffered, not merely by the government itself, but by its patrons, and the government holds the amount recovered, above the amount it has so paid, in trust for the benefit of its injured patrons; the right of recovery resting, not only upon the legal right of an ordinary bailee for hire to recover the full value of the subject of the bailment from one who has wrongfully obtained it, but upon the right of the United States as parens patriæ, and upon principles of public policy, in the performance of its moral duty to protect patrons of the postal service against theft by unfaithful employés.

2. POST OFFICE ⊂⊃12—POSTAL EMPLOYÉS—BONDS—RECOVERY BY UNITED STATES.

Rev. St. § 4058 (Comp. St. 1916, § 7607), declares that whenever the Postmaster General is satisfied that money or property stolen from the mail, 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 Laws and Regulations, § 143, based upon such section, requires the immediate forwarding to the chief inspector, not only of all moneys received from mail robbers or other offenders against the postal laws, but also moneys received, by suit or otherwise, on account of money taken from the mail or losses therein, and provides that the chief inspector shall determine upon satisfactory evidence the proper persons or owners to whom the moneys shall be restored. A postal clerk stole three registered packages of bank notes from the mails, and the United States, having paid $150 on account of the theft, sued on the bond of the clerk. Judgment was rendered in favor of the United States for the full penalty of the bonds, with award of execution for collection of the judgment in full, but with the proviso that the claim of the United States should be discharged by payment by the surety into the registry of the court of the full amount of the judgment, and by withdrawal therefrom by the United States of the sum of $150, with interest, but that the remainder should be held in the court's registry, subject to the further order, and to any lawful claims that may be established thereto by interpleader, by any one claiming an interest in the remainder. *Held* that, in view of all the powers conferred on the Postmaster General, the provisions in the judgment for the payment of moneys into court and for interpleaders were improper, and the United States was authorized to recover the full penalty of the bond, as limited by its loss and that of its patrons.

3. INTERPLEADER ⊂⊃17—JURISDICTION TO ENTERTAIN.

A federal District Court, sitting as a court of law in an action on the bond of a post office employé, has no power to entertain a proceeding for interpleader by persons injured by the employé's theft of registered packages, and who might be entitled to participate in the recovery.

4. INSURANCE ⊂⊃606(1)—GENERAL RULE—SUBROGATION.

It is a general rule, applicable to insurance and indemnity contracts of all kinds, that the insurer, on paying to the assured the amount of the loss, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss.

5. INSURANCE ⊂⊃606(5)—THEFT BY POSTAL EMPLOYÉS—SUBROGATION.
Where a clerk in a post office stole registered packages of bank notes, and the United States paid $50 on account of the theft of each package, an insurer of safe transmission of the notes, having indemnified the sender, the United States had the right to protect the insurer, by way of subrogation, in recognition of the same moral obligation, and the same principles of public policy, as in the case of the patron itself.

6. POST OFFICE ⊂⊃12—BONDS OF EMPLOYÉS—RECOVERY.
Where an insurer of the safe transmission of registered packages indemnified the senders, the packages having been stolen by post office employé, and the United States for the benefit of the senders and the insurer sued on the bond of such employé, the questions as to which insurer's liability was primary are for determination by the chief postal inspector, under Rev. St. §§ 4058 (Comp. St. 1916, § 7607), and Postal Laws and Regulations, § 143, providing for forwarding of moneys recovered to the chief inspector, and directing that he shall determine upon satisfactory evidence the proper persons or owners to whom the money shall be restored, and such questions cannot be determined by the federal District Court in an action on the post office employé's bond.

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action by the United States against the United States Fidelity & Guaranty Company. There was a judgment in part for the United States, and the United States brings error. Reversed and remanded, with directions.

Perry B. Miller, U. S. Atty., and S. M. Russell, Asst. U. S. Atty., both of Louisville, Ky.

Keith L. Bullitt, of Louisville, Ky., for defendant in error.

Sidney Chubb, of New York City, and John C. Doolan, Attilla Cox, Jr., and Edmund F. Trabue, all of Louisville, Ky., for interveners.

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

KNAPPEN, Circuit Judge. A clerk employed in the United States postoffice, at Henderson, Ky., stole from the mails three registered packages, each containing unsigned national bank notes printed by the United States Treasury Department for the Henderson National Bank, of Henderson, Ky., and by the department delivered to the Riggs National Bank, of Washington, D. C., as the agent of the Henderson National Bank, and by the Riggs Bank mailed to its principal. Notes of the face value of more than $4,000 were never recovered, more than $3,000 thereof having been put into circulation by the thief and his accomplices. Pursuant to the post office regulations, the United States paid on account of the loss, $150, viz., $50 for each package stolen. The Marine Insurance Company, Limited, had indemnified the Riggs Bank against loss in connection with the mailing of the packages, and accordingly paid to that bank the entire amount of the loss, presumably less the $150 paid by the government. The United States Fidelity & Guaranty Company had given the United States a bond in the penalty of $1,000, conditioned for the faithful performance by the clerk of his official duties, including the delivery of all matter coming into his hands by virtue of his position in the

postoffice. The United States brought suit in the court below for the recovery of the penalty of the bond. The Fidelity Company admitted its liability for the $150 paid by the United States, but denied further liability. Judgment was rendered in favor of the United States for the full penalty of the bond, with interest and costs, with award of execution for the collection of the judgment in full, but with proviso that the claim of the United States should be discharged by the payment by defendant, into the registry of the court, of the full amount of the judgment, interest and costs, and by the withdrawal therefrom by the United States of the sum of $150, with interest and costs, but that the remainder should be held in the court's registry subject to its further order and to any lawful claims that might be established thereto, by interpleader, on the part of any one claiming an interest in such remainder, especially the National Bank of Henderson, the Riggs National Bank, and the Marine Insurance Company, Limited.

The United States presents error, complaining of so much of the judgment as provides for the retention of the remainder thereof above the $150, interest, and costs, directed to be paid directly to the United States. The Fidelity Company has taken no steps to review the judgment. Since the government sued out this writ of error, the two banks and the Marine Insurance Company, Limited, have filed petition of intervention in the court below, praying that they be adjudged entitled to the fund remaining in court (the banks' claims being presented on behalf of their indemnitor, the Marine Insurance Company, Limited) and for execution against the Fidelity Company.

It was rightly conceded, in argument, that the stolen notes were subject to redemption, and so were property of value, notwithstanding they were put in circulation without the signatures, or upon the forged signatures, of the bank's officers. Act July 28, 1892, c. 317, 27 Stat. 322, U. S. Comp. Stat. 1916, § 9755; Wiggains v. U. S. (C. C. A. 8) 214 Fed. 970, 131 C. C. A. 266.

[1] It is well settled that, while the United States was not, in the first instance, liable on account of the theft, to either the Riggs Bank or the Henderson Bank, as patrons of the post office establishment, for more than the $150 it has actually paid, its right of recovery upon a bond of the character of the one here in suit is not limited to the amount the government has so paid to such patrons, but extends to the full penalty of the bond, limited only by the amount of the actual injury suffered, not merely by the government itself, but by its patrons, and that the government holds the amount recovered, above the amount it has so paid, upon a trust for the benefit of its injured patron. This right of recovery is rested, not only on the legal right of an ordinary bailee for hire to recover the full value of the subject of the bailment from one who has wrongfully converted it, but upon the right of the United States, as parens patriæ, and upon principles of public policy, in the performance of its moral duty to protect the patrons of its post office establishment against theft by its unfaithful employés. National Surety Co. v. United States (C. C. A. 6) 129 Fed. 70, 74, 63 C. C. A. 512; United States v. American Surety Co. (C. C. A. 4) 163 Fed. 228, 232, 233, 89 C. C. A. 658; Gibson v. United States (C. C. A. 1) 208 Fed. 534, 537, 538, 125 C. C. A. 536; U. S. Fidelity,

etc., Co. v. United States (C. C. A. 8) 229 Fed. 397, 143 C. C. A. 517; 23 Op. Atty. Gen. 476.

[2] The District Judge, however, while recognizing that the bond was given for the benefit of the private patrons of the post office establishment, as well as of the government, and that the latter would hold whatever balance it received above its own immediate money loss as trustee for its patrons, yet expressed himself as knowing of "no definite proceeding by which that trust can be enforced by the beneficiaries," and as being, accordingly, of opinion that the claim of the United States should be discharged by the payment of the actual damage it has sustained, viz., the $150, with interest and costs, and opportunity be given the Henderson Bank and its subrogees to intervene in the instant suit for their protection.

We are unable to agree with this view which we think opposed to well-considered authority. United States v. American Surety Co., 163 Fed. 233, 89 C. C. A. 658, in our opinion, lends no support to the view that the recovery for the full penalty of the bond must be discharged upon the payment of the actual damage sustained by the government. The language there used is "upon the payment of such special damages as may have been proven to exist." This we think refers to the specific losses not definitely proven on the trial of the action upon the bond, in spite of which failure of proof, judgment in form for the penalty of the bond was sustained.

Revised Statutes, § 4058 (U. S. Comp. St. 1916, § 7607), provides that, whenever the Postmaster General is "satisfied that money or property stolen from the mail, or the proceeds thereof, has been received at the department, he may, upon satisfactory evidence as to the owner, deliver the same to him"; and section 143 of the Postal Laws and Regulations 1913, based upon section 4058 of the Revised Statutes, and in force when the proceedings below were had, requires the immediate forwarding to the chief inspector not only of all moneys received from mail robbers or other offenders against the postal laws, but also "moneys recovered by suit, or otherwise, on account of moneys taken from the mail or losses therein," and for the daily deposit of such moneys with the Superintendent Division of Finance, office of the Third Assistant Postmaster General, and that the "chief inspector shall determine, upon satisfactory evidence, the proper persons or owners to whom the moneys shall be restored," and requires the Superintendent Division of Finance above mentioned to make payments in accordance with the schedules furnished and approved by such chief inspector under the authorization of the Postmaster General.

This remedy, in our opinion, clearly applies to the situation before us. Such has been the construction put upon the statute not only by the courts, but contemporaneously by the officers of the government. Gibson v. United States, 208 Fed. at page 538, 125 C. C. A. 536. Such we infer to have been the decision of the Court of Appeals of the Fifth circuit, as indicated by its memorandum opinion in American Surety Co. v. United States, 133 Fed. 1019, 66 C. C. A. 679. See, also, Laws v. Burt, 129 Mass. 202; 10 Decisions of the Comptroller of the Treasury (1904) 872, 876, which involved the disposition of the moneys which were the subject of the recovery in National Surety Co. v.

United States, supra. In Laws v. Burt, supra, the court refused to entertain a bill in equity, brought against a postmaster by one who had stolen money from the mails, to enforce a trust deed given by plaintiff which conveyed to defendant the proceeds of such money in trust to pay claims arising out of the theft and return the balance to the plaintiff, Mr. Justice Morton saying (129 Mass. 204):

"We are of opinion that the statute applies to this case; and that, when the property named in the plaintiff's deed was transferred to and came to the possession of the defendant Burt, the jurisdiction of the Postmaster General attached. It became the duty of the defendant to pay it over to, or to hold it subject to, the order of the Postmaster General. The defendant * * * has no right to determine who is entitled to the property, nor can this court determine that fact, which is within the exclusive jurisdiction of the Postmaster General."

[3] The court below, as a court of law, had no power to entertain a proceeding for interpleader. McKemy v. Supreme Lodge A. O. U. W. (C. C. A. 6) 180 Fed. 961, 965, 966, 104 C. C. A. 117. Whether, under the 1915 amendment to the Judicial Code (Act March 3, 1915, c. 90, 38 Stat. 956, U. S. Comp. St. 1916, §§ 1251a and 1251b), the interpleader proceeding contemplated by the judgment could, in the absence of the federal statute in question, be by suitable amendment of pleadings converted into an equity hearing, we need not decide, for we think the statute provides a definite proceeding for the purpose.

The question presented to us is simply whether the statute, which in express terms provides for administrative action through the department, should be superseded by the intervention of the court. On the face of things, there seems no basis for such departure. No satisfactory authority is cited in support of it. In view of the statute, of the government's uniform attitude with reference to its enforcement, and its specific attitude in this case here, it must be conclusively assumed that the department will fully recognize its duty to make proper disbursement. We entirely concur with the view expressed by Attorney General Knox (in 23 Op. Atty. Gen., supra, at page 484) that:

"The government is morally bound to recover from a dishonest official the entire amount of his embezzlement, and, of course, is equally bound in conscience, as the statutes recognize, to return to the owner of the registered letter the entire amount thus recovered from its dishonest employé or from his surety."

The government was thus entitled to collect and disburse the entire amount of the judgment against defendant, unless, as the latter contends, the principles, rules, and decisions which we have cited fail of application, from the fact that the banks have been reimbursed by the Surety Company and so have no direct, personal interest in the recovery.

[4, 5] It is the general rule, applicable to insurance and indemnity contracts of all kinds, that the insurer, on paying to the assured the amount of the loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. Travelers' Ins. Co. v. Gt. Lakes Engineering Wks. Co. (C. C. A. 6) 184 Fed. 426, 429, et seq., 107 C. C. A.

20, 36 L. R. A. (N. S.) 60; Turk v. Ill. Cent. R. Co. (C. C. A. 6) 218 Fed. 315, 134 C. C. A. 111; U. S. Fed., etc., Co. v. Union Bk. & Tr. Co. (C. C. A. 6) 228 Fed. 448, 143 C. C. A. 30.

It is urged, however, that the Marine Insurance Company is not legally entitled to recover as subrogee from the United States, for the asserted reason that the doctrine of the moral obligation of the government (which counsel terms a legal fiction) to protect its patrons from loss should not be indulged in when the patron itself has suffered no loss.

We are not impressed by these contentions. Indeed, if they are good, the judgment for the penalty of the bond, which defendant is not seeking to review, would be bad, for in such case there could be no damage beyond what the government has paid under the registered mail regulations. But surely the United States has the right to extend to the surety of its patron a recognition of the same moral obligation and the same principles of public policy which sustain a right of recovery in favor of the patron itself; we know of no equitable principle thereby violated. Indeed, if the now asserted right of subrogation is not of legal quality, but is based on merely moral considerations, the jurisdiction of a court of law or even of a court of equity is scarcely apparent; and this consideration emphasizes the propriety of submitting to the statutory tribunal provided by the government the settlement of the questions of moral obligation and public policy now raised.

[6] Defendant urges, however (and this seems to be its real reason for seeking to sustain the provision for interpleader), that it has the same right to be subrogated to the bank's rights against the Marine Insurance Company as the latter has to be subrogated to the rights of the bank against the Fidelity Company. On the other hand, the Marine Insurance Company, which is represented here by counsel, insists that the liability of the defendant as surety on the postmaster's bond is primary, and that the liability of the Marine Insurance Company to the banks is secondary, or inferior to the liability of the postmaster's surety; and this contention furnishes the substantial issues now in the case. If, however, we are right in the view that the statute provides, under the circumstances presented here, the primarily exclusive forum for the determination of claims to the fund recovered, and that the court below thus had no jurisdiction to make the order of interpleader, it necessarily follows that this court has no jurisdiction to determine questions of priority between the respective indemnitors.

It results from these views that the judgment of the district court was correct so far as it adjudged defendant liable for the amount of the penalty of the bond, with interest and costs, but was erroneous in providing for a release of plaintiff's interest upon receiving the $150 it had paid, plus interest and costs, and in providing for an interpleader in the court below for determining conflicting claims to the remainder.

The judgment of the District Court is accordingly reversed, and the record remanded to that court, with directions to enter an unconditional judgment in favor of the plaintiff, and against defendant, in the sum of $1,000, plus interest and costs.

HOSHAW v. COSGRIFF et al.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1917.)

No. 4949.

1. CONTRACTS ⊜93(2)—WRITTEN CONTRACTS—DEFENSES.
   A person who, having the capacity and opportunity to read a contract, signs it without reading, cannot avoid the contract on the ground of mistake, where there were no special circumstances excusing his failure to read it.
2. EVIDENCE ⊜441(8)—PAROL EVIDENCE RULE—ADMISSIBILITY TO VARY WRITTEN INSTRUMENT.
   Where a written contract, signed by representatives of a corporation which subsequently became bankrupt, recited that a warranty deed executed by the corporation and placed in escrow should be delivered and become absolute in the event of the corporation's failure to comply with certain conditions, the contract cannot be changed by oral evidence under the circumstances above stated.
3. BANKRUPTCY ⊜302(1)—PREFERENCES—WHAT CONSTITUTES.
   A complaint attacking a warranty deed, executed by a corporation which subsequently became bankrupt, is insufficient to show that the deed was voidable, as preferential, where it was not alleged that the grantees had reasonable cause to believe that to enforce the deed at the time it became absolute would effect a preference.
4. BANKRUPTCY ⊜302(1)—COMPLAINT—INSTRUCTION.
   In an action by trustee in bankruptcy to recover property conveyed by the bankrupt, a recital in the complaint that an involuntary petition in bankruptcy was filed, alleging that the warranty deed given by the bankrupt was given to prefer the grantee, the bankrupt being insolvent, is not a direct averment of those facts, sufficient to show that the transfer was preferential.
5. BANKRUPTCY ⊜161(1)—PREFERENCES—VALIDITY.
   A Wyoming bankrupt on February 21st conveyed land in Wyoming, the deed being recorded March 5th. An involuntary petition in bankruptcy was filed July 3d. Under Comp. St. Wyo. 1910, §§ 3653, 3654, the deed was valid, except as to subsequent purchasers in good faith, though not recorded. *Held* that, as such deed was executed more than four months before the filing of the petition, it was not subject to attack as preferential under Bankruptcy Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (Comp. St. 1916, § 9644), declaring that if a bankrupt shall have made a transfer of any of his property, and if at the time of the transfer, or of the recording or registering thereof, if by law recording or registering is required, and being within four months before the filing of the petition in bankruptcy, the bankrupt be insolvent, and the transfer, if preferential, shall be voidable by the trustee, there being no subsequent purchaser in good faith before the court.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action by William B. Hoshaw, successor to George W. Hoyt, as trustee in bankruptcy of the estate of the Cook Bros. Company, a bankrupt, against Rose M. Cosgriff, as administratrix, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The trustee in bankruptcy of the estate of Cook Bros. Company, a bankrupt, brought this action against appellees to recover certain property which it was claimed belonged to said estate. The appellees filed a motion to dismiss the complaint for want of equity. The motion was granted, and the trustee appealed.

Omitting mere argument and legal conclusions, the complaint alleged among other things, the following facts:

That on December 31, 1910, the bankrupt became indebted to one Hirsig in the sum of $45,000, evidenced by two promissory notes, payable on or before five years from date, with interest at 8 per cent. per annum; that to secure the payment of said indebtedness the bankrupt executed and delivered to Hirsig on the above date a mortgage on certain real estate situated in Cheyenne, Laramie county, Wyo.; that said mortgage was duly recorded on the day of its date; that it was assigned to Charles W. Hirsig, March 7, 1911, the assignment being recorded October 28, 1911; that for 15 years prior to September 24, 1913, the bankrupt had close business relations with the First National Bank of Cheyenne, through its president, Thomas A. Cosgriff, its vice president, George E. Abbott, and its cashier, Albert D. Johnson; that by reason of such business relations the bank had obtained and held the implicit confidence and trust of the bankrupt; that on the day last aforesaid the bankrupt, being indebted to said bank in the sum of $18,500, to secure the payment of the same, executed and delivered to the bank a mortgage running to one T. H. Williams covering the same property as the Hirsig mortgage, and in addition thereto lot 7, in block 287, the mortgage being recorded on the day of its date; that on February 21, 1914, the bankrupt was in default as to the Hirsig and Williams mortgages, and Hirsig notified the bank and the bankrupt that if payment of his mortgage was not made the same would be foreclosed; that on the day last aforesaid the bank decided to pay the amount due on the Hirsig mortgage and add the amount so paid to its own debt against the bankrupt; that at the same time the bank requested that the bankrupt execute and deliver to it a warranty deed conveying all the real estate mentioned and described in the two mortgages; that the bankrupt complied with this request, the deed running to Thomas A. Cosgriff, as nominee of the bank; that said warranty deed was dated February 21, 1914, and recorded March 5, 1914; that the consideration for said conveyance was the debt of the bankrupt to the bank and the payment by the bank of the amount due under the Hirsig mortgage, together with taxes due upon the land; that at the same time the warranty deed was executed and delivered there was an agreement in writing entered into between the bankrupt, party of the first part, Thomas A. Cosgriff, party of the second part, Charles W. Hirsig, party of the third part, and the First National Bank, party of the fourth part. This agreement, after reciting the indebtedness of the bankrupt to the bank, the indebtedness due upon the Hirsig mortgage, and the taxes due to the city of Cheyenne and the county of Laramie upon the real estate covered by the mortgages, proceeded as follows:

"Whereas, the party of the third part has notified first party that he intends to foreclose his mortgage upon the real estate belonging to first party, and it is the desire of first party to secure further time in the matter of negotiating money with which to pay its obligations, and avoid foreclosure of the mortgage as aforesaid; and

"Whereas, the party of the second part is willing to accept a transfer of the real and personal property, and assume and agree to pay the indebtedness represented by the above-described mortgages and the taxes accrued and owing against said property, and the insurance provided for by said Hirsig mortgage, the said conveyance of said party of the first part to the party of the second part to be made, executed and placed in escrow with the party of the fourth part, and to become absolute on the 5th day of March, A. D., 1914, unless on or before said date the party of the first part shall pay the taxes due and owing upon said property, and the interest due and owing to the party of the third part, and the indebtedness to the said T. H. Williams; and

"Whereas, the party of the fourth part has been agreed upon by the parties hereto as the escrow agent to receive and hold the conveyance aforesaid under the terms of this agreement:

"Now, therefore, in consideration of the mutual covenants herein expressed, and in further consideration of the payment of one dollar each to the other, the receipt whereof is hereby confessed and acknowledged, the parties hereto do agree as follows, to wit:

"I. The party of the first part hereby agrees to make, execute, and place with said escrow agent good and sufficient warranty deeds and bills of sale of all its property, both real and personal, excepting its outstanding book accounts, to the party of the second part, coincident with the execution and delivery of this agreement upon consideration of one dollar paid by second party to first party, and the assumption and agreement to pay by second party of the above-described indebtedness represented by mortgages, and the taxes accrued against said property to the city of Cheyenne and county of Laramie, Wyoming, and the insurance provided for by the said Hirsig mortgage, said deeds and bills of sale to be placed in escrow with the party of the fourth part, with instruction to said party, which is hereby given, to deliver said deeds and bills of sale to said second party on the 5th day of March, A. D. 1914, at 3 o'clock in the afternoon of said day: Provided that on or before said date and time mentioned the party of the first part has not paid the interest due and owing to Charles W. Hirsig upon the notes and mortgages herein described, and the taxes herein set forth, and said indebtedness represented by the note and mortgage of T. H. Williams, and that in the event the party of the first part shall pay said interest and said taxes and said indebtedness to T. H. Williams, on or before said date and time herein mentioned, then and in that event the party of the fourth part is hereby authorized and instructed to return said deeds and bills of sale to the party of the first part.

"II. The party of the second part agrees to accept said deeds and bills of sale from the party of the first part herein set forth, and to pay to the party of the first part the said sum of one dollar, and to assume and agree in said instruments of conveyance to pay the said indebtedness evidenced by notes and mortgages of said Charles W. Hirsig, and the said T. H. Williams, together with the said taxes to the city of Cheyenne and county of Laramie, Wyoming, all in manner and form as set forth in paragraph I of this agreement, and said party of the second part further agrees that in the event the party of the first part hereto does not pay the interest due and owing to the said Charles W. Hirsig, party of the third part, together with the taxes due and owing to the county of Laramie and city of Cheyenne, on or before 3 o'clock in the afternoon on the 5th day of March, A. D. 1914, that then and in that event the said party of the second part will forthwith pay to the said Charles W. Hirsig, party of the third part, all interest due and owing to him upon the said mortgage of first parties to third party, which amount is $3,600, with interest on said $3,600 at 8 per cent. from the 31st day of December, A. D. 1913, to the said 5th day of March, A. D. 1914, and also all taxes due and owing to the city of Cheyenne and county of Laramie aforesaid, and the insurance provided by said Hirsig mortgage.

"III. The party of the third part, in consideration of the aforesaid agreement of second party to pay all interest due and owing to the third party upon note and mortgage of first party on or before the 5th day of March, A. D. 1914, together with the taxes aforesaid and said insurance, hereby agrees to forego the foreclosure of his said mortgage against the property of the first party until the 5th day of March, A. D. 1914.

"IV. The party of the fourth part agrees to receive as escrow agent and safely keep the deeds of conveyance made, executed, and delivered by the party of the first part herein described, and to deliver same to the party of the second part or redeliver same to the party of the first part all and in accordance with the instructions and agreements contained herein."

That said party of the first part did not make the payments as stipulated in said agreement and thereupon the warranty deed was delivered to the grantee Cosgriff by the escrow holder; that the bankrupt, at the time the said warranty deed was executed and delivered, relied on the assurances then given by the bank, through its officers, that said Cosgriff would be a creditor of the bankrupt to the amount of all payments made under said warranty deed, and that said deed would be held by said Cosgriff by way of security only for the repayment of the money paid out in satisfaction of the mortgages; that notwithstanding the assurances given by the bank through its officers that the warranty deed would be held only as security, the bank with

premeditated and deliberate deceit, fraud, and cunning did insert or cause to be inserted in the above agreement certain provisions intending to show that the warranty deed was to be absolute in default of compliance by the bankrupt with its part of the above agreement; that said agreement and the contents thereof were unknown to the bankrupt prior to the time of signing the same, and said bankrupt was without legal advice as to the effect of the warranty deed and the agreement; that on March 5, 1914, the bankrupt took a lease of a certain portion of the land in question from said Cosgriff.

July 7, 1914, Hirsig assigned his mortgage to one Couzens. July 8, 1914, Williams also assigned to Couzens the mortgage dated September 24, 1913, for $18,500. Subsequently Couzens foreclosed the Hirsig mortgage, bought in the real estate described therein for $52,000, and received a sheriff's deed therefor, March 6, 1915. September 19, 1914, Cosgriff and wife conveyed the land described in the warranty deed to him from the bankrupt, except one-half of lot 4, block 356, to Hofman Bros., December 19, 1914; Cosgriff and wife conveyed said one-half of lot 4, block 356, to the Cheyenne Realty Company; that the realty company conveyed the land to Hofman Bros.; that the realty company is a subsidiary of the bank. March 9, 1915, Couzens and wife conveyed the land bid in by him to Cosgriff; that Cosgriff owned a majority of the stock of the bank and dictated all its affairs; that Williams and Couzens were at all times subject to the dictation and control of Cosgriff; that the conveyance made by the bankrupt to Cosgriff, dated February 21, 1914, divested the bankrupt of all its real estate to the prejudice of all its creditors; that on July 3, 1914, an involuntary petition in bankruptcy was filed against the bankrupt, alleging that the warranty deed given by the bankrupt to Cosgriff was so given with intent to prefer the bank, said bankrupt being then insolvent.

Henry E. Lutz, of Denver, Colo. (Wilfred O'Leary and Hilliard S. Ridgely, both of Cheyenne, Wyo., and George H. Karcher, of Denver, Colo., on the brief), for appellant.

John W. Lacey, of Cheyenne, Wyo. (Herbert V. Lacey, of Cheyenne, Wyo., on the brief), for appellees.

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

CARLAND, Circuit Judge (after stating the facts as above). Counsel for the trustee claim that the facts stated are sufficient to constitute a cause of action for the recovery of the real estate hereinbefore described upon either of three theories: (a) Neither the bank nor Cosgriff obtained title to the land by virtue of the foreclosure of the Hirsig mortgage, for the reason that the bank or Cosgriff was obligated to pay off the indebtedness, the nonpayment of which caused the mortgage foreclosure; (b) that the complaint alleges that the conveyance by the bankrupt to Cosgriff, although an absolute warranty deed in form, was in fact according to the agreement of the parties a mortgage; (c) that, if it be conceded that the conveyance by the bankrupt to Cosgriff for the benefit of the bank was absolute, still the complaint alleges facts which would constitute the conveyance a voidable preference.

[1-3] We are of the opinion that the question as to whether the bank or Cosgriff obtained title through the mortgage foreclosure may be put to one side, as we are of the opinion that the warranty deed by reason of the noncompliance of the bankrupt with the condition in the agreement agreed to be performed on its part became absolute.

The language of the agreement wherein it stated the condition upon which the warranty deed should become absolute was plain and unambiguous, and there is no allegation that the parties who executed the agreement in behalf of the bankrupt were not in the full possession of all their faculties. The agreement between the parties was put in writing for the very purpose of excluding oral testimony as to the terms of the contract, and it is elementary law that a contract completely reduced to writing cannot be contradicted, changed, or modified by parol evidence of what was said and done by the parties to it, prior to or at the time it was made. It is also elementary and the courts are unanimous in holding that a person, having the capacity and opportunity to read a contract, cannot avoid the contract on the ground of mistake, if he signs it without reading, where there are no special circumstances excusing his failure to read it. It is the duty of every contracting party to learn and know the contents of a contract before he signs and delivers it. To permit a party, when sued on a written contract, to admit that he signed it, but deny that it expresses the agreement he made, or to allow him to admit that he signed it, but did not read it or know its stipulations, would absolutely destroy the value of all contracts. The agreement is made an exhibit to the complaint, and the allegations of the complaint must be construed in connection with the exhibit. The complaint alleges that the bankrupt did not know the contents of the agreement prior to the time of signing the same. This allegation amounts to nothing, in view of the law above stated, and the further fact that the allegation above stated, properly interpreted, means that the bankrupt did know at the time of signing the contents of the agreement. We have no doubt but that the warranty deed became absolute according to the conditions of the memorandum agreement. The allegations in the complaint were insufficient to show that the execution and delivery of the warranty deed constituted a voidable preference. There was a total failure to allege that the bank or Cosgriff had reasonable cause to believe, at the time the warranty deed became absolute, that the enforcement thereof would effect a preference.

[4, 5] The allegation as to what the petition in involuntary bankruptcy alleged was not equivalent to a direct allegation of those facts, which would constitute the transfer evidenced by the warranty deed a voidable preference under section 60 of the Bankruptcy Law. It also appears that the warranty deed could not be attacked as a voidable preference, as it was executed more than four months prior to the filing of the involuntary petition. The deed was dated February 21, 1914, and recorded March 5, 1914. The involuntary petition was filed July 3, 1914. The law of Wyoming (sections 3653, 3654, Wyoming Compiled Statutes 1910) did not require the warranty deed to be recorded in order to be valid except as to subsequent purchasers in good faith, and no such person is before the court; therefore the four months mentioned in said section 60 ran from the date of the deed, and not from the date of recording the same. Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, L. R. A. 1917A, 295. So far as First National Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, and Mattley v. Geisler, 187 Fed. 970, 110 C. C. A. 90,

announce a contrary rule they have been overruled by Carey v. Donohue, supra.

This being our view of the law as applied to the facts, it results that the judgment below must be affirmed; and it is so ordered.

McCALLUM v. UNITED STATES.

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

No. 4854.

1. BANKS AND BANKING ⊜257(3)—OFFENSES—EVIDENCE—SUFFICIENCY.
   In a prosecution for misapplication of the funds, moneys, and credits of a national bank, in violation of Rev. St. § 5209 (Comp. St. 1916, § 9772), evidence *held* insufficient to sustain a conviction on a particular charge of abstraction of moneys.

2. BANKS AND BANKING ⊜257(4)—EMBEZZLEMENT—EVIDENCE—HYPOTHETICAL CHARGE.
   In a prosecution for misapplication of the funds of a national bank, in violation of Rev. St. § 5209, where the prosecution contended that defendant, the assistant cashier, failed to enter on the proper books $110.80 interest allowed the bank by a correspondent bank, and that, as the cash balance subsequently showed a shortage of $5.53, he must have abstracted the $110.80, the action of the court, interrogating the cashier, a witness for the prosecution, as to a hypothetical case of embezzlement of a deposit not entered on the books, was prejudicial, not being warranted by the evidence and tending to mislead the jury and prejudice them against defendant; this being particularly true as the cash showed a shortage, and, had defendant merely failed to enter the $110.80 interest on the proper book, the cash would not have balanced.

3. CRIMINAL LAW ⊜786(2)—INSTRUCTIONS—CREDIBILITY OF TESTIMONY OF ACCUSED.
   In a prosecution for misapplication of the moneys, funds and credits of a national bank, in violation of Rev. St. § 5209, declaring that any officer of a national banking association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association with intent to injure or defraud the association or any other company, body politic or corporate, or any individual person, shall be deemed guilty of a misdemeanor, the court denied requested charges that in order to justify a conviction of defendant, who was assistant cashier of the bank alleged to have been defrauded, the jury must be satisfied beyond a reasonable doubt that defendant intended by his acts to defraud the bank. The general charge instructed the jury on the presumption of defendant's innocence, the necessity of proof of guilt beyond a reasonable doubt, that there was an allegation in the indictment that the acts charged were done with intent to injure or defraud the bank, that the intent charged might be proven by the act done, that one may be presumed to have intended the natural and probable consequences of acts done, though such presumption is rebuttable, and that if a man knows the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily does the act, he is chargeable in law with the intention to injure or defraud. The court then summed up its charge in these words: "So the question for you to determine from all the evidence in this case is whether his intention in these different acts was to injure and defraud, by taking into consideration what the natural effect was and whether willful or lawful." *Held*, the charge minimized too much the testimony of the defendant as to

his intent, and restricted the jury in determining his intent too closely to the consideration of the rebuttable presumption of law that one may be presumed to have intended the natural and probable consequences of his acts intentionally done.

4. BANKS AND BANKING ⟸257(1)—OFFENSES—INDICTMENT.
An indictment charging a misapplication of the moneys, funds, and credits of a national bank, in violation of Rev. St. § 5209, which contained no averment that a credit which it alleged defendant unlawfully took with the bank ever injured the bank or caused it loss, is defective.

5. BANKS AND BANKING ⟸257(1)—OFFENSES—INDICTMENT.
Under Rev. St. § 5209, an indictment charging misapplication of the moneys, funds, and credits of a national bank is defective, where it did not charge that the moneys, funds, and credits were misapplied with intent to injure and defraud the banking association or any other company, body politic or corporate, or any individual person.

Carland, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Thomas D. McCallum was convicted of misapplication of the moneys, funds, and credits of the Arkansas National Bank, in violation of Rev. St. § 5209, and he brings error. Reversed and remanded, with directions.

Lewis Rhoton, Thomas E. Helm, Edward B. Buchanan, and Gardner K. Oliphint, all of Little Rock, Ark., for plaintiff in error.

W. H. Martin, U. S. Atty., of Hot Springs, Ark., and W. H. Rector, Ass't U. S. Atty., of Little Rock, Ark.

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

SANBORN, Circuit Judge. Thomas D. McCallum was indicted, tried, and convicted for misapplication of the moneys, funds, and credits of the Arkansas National Bank of Hot Springs, Ark., while he was assistant cashier, in violation of section 5209 of the Revised Statutes (section 9772, 9 U. S. Comp. Stat. Ann. 1916).

[1, 2] One of the charges of misapplication for which he was convicted was that on October 15, 1914, while he was assistant cashier and teller of the bank, he abstracted from its funds in his custody $110.80. Robert Neill, the cashier of the bank at the time of the trial, was called and examined by the United States to support this charge. On his direct examination he testified that the Arkansas bank kept an account with the National Bank of Commerce of St. Louis in August, September, and October, 1914, on which it allowed the Arkansas bank interest at the rate of 2 per cent. per annum on daily balances; that the St. Louis bank credited the Arkansas bank in its August account $110.80 on account of this interest for that month, that in the ordinary course of business the St. Louis bank sent a statement of its account between the banks to the Arkansas bank about 10 days after the close of each month, that when such a statement was received by the Arkansas bank it would be first properly entered on its reconcilement book, a book kept to reconcile the accounts of its correspondents

with those of the Arkansas bank, and then the proper entries would be made subsequently on the other books of the Arkansas bank; that this $110.80 was entered by McCallum on the reconcilement book, and that entry showed that the St. Louis bank had credited the Arkansas bank with this $110.80 interest, and that that interest was used as an exception in reconciling the account; that prior to this reconcilement the Arkansas bank had already charged the St. Louis bank on its ledger with this $110.80; that in the ordinary course of business this $110.80 would have been charged on the books of the Arkansas bank after the reconcilement to the St. Louis bank and credited to profit and loss; that it was charged in that way by direction of McCallum on October 15, 1914, but that it was not credited to profit and loss, or to interest account; and that at the close of business on October 15, 1914, the cash was short $5.53. In answer to questions of counsel for the government, the witness then testified in this way:

"Q. What would have been the result if the failure to credit that to profit and loss had been an inadvertence or mistake? What would have been the effect on the cash? A. The cash would have been over $110.80. * * * Q. How would it have been possible for his cash to have balanced there, unless he had abstracted $110.80 from the cash of the bank? A. It wouldn't occur, except, of course, there is a possibility of a corresponding error of some sort with somebody else."

On cross-examination this witness testified that, when the statement of the August account was received from the St. Louis bank in September, an entry was made on the reconcilement book of the Arkansas bank which—

"shows interest $110.80, as an exception on the credit side. That is in the handwriting of Mr. McCallum. Q. Does it show a credit or a debit? A. It is on the credit side. It shows that we were credited in St. Louis with that amount. We was to add that to the balance our books showed on the 31st. Q. You had already charged it on the Arkansas National Bank's books, had you not? A. On the ledger, yes; but not on the reconcilement book. Q. Was it charged on the books? A. It was not, until the 15th of October. Q. But it was later put in the regular form on the books, wasn't it? A. It was charged to the National Bank of Commerce; it wasn't credited to interest account. Q. How was it credited? A. I haven't any idea. The Court: I understood him to say it was not credited; it was charged. A. There was no corresponding credit. Q. It was simply, then, a failure to put the credit on the books, wasn't it? A. It is equal to that; yes, sir. Q. Well, that is what it was, wasn't it? A. Yes."

On redirect examination this colloquy was had:

"By District Attorney Martin: Q. You speak about that $110.80 being a mere matter of failure to credit it. Suppose it had been credited to profit and loss, that would have been a proper entry, would it not? A. Yes. Q. Then what would have been the result upon the cash? A. The cash would have balanced. Q. Failing to enter that there, what happened to the cash? A. In order for the cash to balance as close as it did, there must have been some money taken out. Q. You would (—) had to taken out a corresponding amount of money to (—) made the cash balance? A. Yes.

"By the Court: Q. Supposing I came in the bank and deposit $1,000, and I get it entered on my book, but on that evening there is no entry made on the books showing that I was credited with $1,000 and the cash balance, what became of that $1,000? A. It must have taken out of the cash. Q. In other words, it was embezzled or stolen; is that what it is? (Objected to by the defendant upon the ground of being incompetent, irrelevant, immaterial,

and upon the further ground that the same was prejudicial to the defendant, which objection was by the court overruled, and the defendant excepted.) A. Yes; in your hypothetical case it certainly would be."

This ruling of the trial court is assigned as error, and a careful consideration of all the evidence relative to this item of $110.80, and a comparison of it with the supposed case which the court presented, and by the testimony of the witness proved to constitute embezzlement, has convinced that it cannot be sustained. There was no evidence in this case that McCallum had deposited $110.80 in the bank, made no entry of it on the books of the bank, and that the cash balanced at the close of the day of the deposit, or of any facts at all similar to these. The sum of the evidence was that the St. Louis bank owed and had credited the Arkansas bank on August 31, 1914, $110.80 interest on deposit balances during August; that on receipt of the St. Louis bank's statement of account during the first half of September, McCallum entered that $110.80 on the reconcilement book of the Arkansas bank as an exception which showed a credit to the Arkansas bank of that amount with the St. Louis bank; that on October 15, 1914, he caused that $110.80 to be charged in the regular account books of the Arkansas bank against the St. Louis bank, but failed to credit it to profit and loss, or to interest account, as he should have done; that the effect of this failure to credit profit and loss necessarily was to make the cash balance on that night appear to be $110.80 over, but that balance was in fact $5.53 short; that this discrepancy might have resulted from the abstraction of the $110.80 from the bank by some one, or by a corresponding error in entries in the books regarding the accounts of others.

Upon this evidence and the fact that McCallum had access to the funds of the bank, and in the face of his testimony that he never abstracted this money, or any part of it, the United States convicted McCallum of the misapplication of this $110.80. But the indispensable basis of its case was that with the exception of the failure of McCallum to credit this $110.80 to profit and loss, or to interest account, the books of the bank were correct. The foundation of its case, without which it had no case, was that if that entry had been made, or if in its absence McCallum had not abstracted the $110.80, the books were correct and would have balanced. It rested its whole case on the proposition that the books were correct and would have balanced if the credit to profit and loss had been made, and its entire case was that as that entry was not made, and the books did not show the cash $110.80 over, McCallum must have taken it. But it introduced no evidence that the books of the bank were correct and would have balanced if the credit had been given to profit and loss, or if McCallum had not taken the money, and it demonstrated the fact that they were not correct and would not have balanced by the fact that at the close of the day the cash was $5.53 short. Neither the failure to credit the $110.80 to profit and loss nor the abstraction of the $110.80 could by any possibility have produced that shortage, if the books were otherwise correct and would have balanced. That shortage may have resulted from one or many errors in the bookkeeping, it could not have resulted from correct bookkeeping and the $110.80 transaction, and

the entire foundation of the government's case dropped from it, and at the close of the trial there was no substantial evidence to sustain the charge that McCallum abstracted this money.

Returning, now, to the introduction into this case of the supposed case of a culprit who deposited $1,000 with a bank, which was not entered on its books and the books still balanced, and the proof that some one was a thief and embezzler, the introduction of this case and proof was an error, because it tended to withdraw the attention of the jury from the facts in evidence in McCallum's case, and to fix them on another case and other facts, essentially unlike those in the case on trial, and to invite the danger that they might be misled to decide McCallum's case on the facts in the supposed case, because the supposed case and its facts were irrelevant and immaterial to the issues presented by the evidence of the facts in the case on trial, and far more baleful to the culprit than were those before the court, and because the introduction of the supposed case and its facts tended to prejudice the minds of the jurors against McCallum, and to lead them to think that the court was of the opinion that he was in a plight similar to that of the culprit in the supposed case. And as there was no substantial evidence to sustain the claim of abstracting this $110.80 the court also fell into an error in its refusal to instruct the jury as requested by counsel for McCallum to return a verdict of acquittal of the charge of misapplying this money.

[3] The statute under which this defendant was convicted expressly declares that his "intent * * * to injure and defraud the association or any other company, body politic or corporate, or any individual person," is an indispensable element of the offense of a misapplication of the funds of the bank. United States v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; United States v. Northway, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664; Dow v. United States, 82 Fed. 904, 906, 27 C. C. A. 140, 142. It is a universal rule that where the intent of a defendant is material his testimony to that effect is competent and relevant. In the case at bar the intent of McCallum was the crucial issue. At the times of the alleged misapplications he was the assistant cashier of the bank authorized to act for it, a customer of the bank with a deposit and checking account in his name as agent, in which he kept his individual deposits and credits, and at the same time he was the agent of an insurance company. One of the charges of misapplication was that he drew his draft on the insurance company for $227, took credit for the amount in his deposit account, and destroyed the draft. The evidence for the United States was that such a draft was drawn, that credit for it was taken by McCallum, that a letter of transmittal of the draft to a St. Louis bank was written, but the draft was never presented to the insurance company or paid. The defendant testified that he drew the draft on the insurance company to pay a claim of Dr. Barrie against it, took credit for the money in his deposit account, checked it out in the regular course of business, listed the draft out to the exchange clerk, who entered it up in the books in the regular way, that the draft had then passed out of the defendant's hands, and he knew nothing about its destruction.

Another charge was that the defendant caused the Exchange National Bank of Little Rock to pay $829 he owed to the insurance company and to charge it to the Arkansas National Bank at a time when McCallum's deposit account showed a credit balance of $1,179.48. There were other charges of a like character. The defendant testified that he never had any intention to defraud the bank, or any other party, and that the discrepancies in the books were the results of his neglect to make the proper entries therein. From this brief reference to the evidence it will be seen how important the question of intent was in the trial of this case. Counsel for the defendant requested the court to instruct the jury that, in order to justify a conviction on any of the charges against him, they must be satisfied from the evidence beyond a reasonable doubt that the defendant intended, by his acts in reference to that charge, to defraud the bank. The court denied these requests, and gave a general charge in which it instructed the jury of the presumptive innocence of the defendant, of the necessity of proof of his guilt beyond a reasonable doubt, that there was an allegation in the indictment that the acts charged were done with intent to injure or defraud the bank, that the intent here charged may be proven by the act done, that one may be presumed to have intended the natural and probable consequences of acts intentionally done, that this presumption is rebuttable by a showing that the person acted in good faith without any wrong intention to injure or defraud the bank, that—

"if a man knows the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily does the act, he is chargeable in law with the intention to injure or defraud. It is not necessary that his object was primarily to injure or defraud. It might have been to benefit himself or another. These terms are used in the statute, and mean nothing more than that general intent to injure and defraud, which always arises in contemplation of law when one willfully and intentionally does that which is illegal and fraudulent, and which in its necessary and natural consequences must injure and defraud another."

After some farther remarks upon this subject the court closed its charge with these words:

"So the question for you to determine from all the evidence in this case is whether his intention in these different acts was to injure and defraud by taking into consideration what the natural effect was and whether willful and wrongful. So far as the defendant is concerned, he says that he never intended to do anything wrong; that he intended to pay that $1,275.67 note and had the money—had securities; but, as the district attorney says, he did not offer any of the securities when he borrowed the money; he did not ask any of the officers, who were authorized to make loans to authorize it, and did not obtain the consent of the president or the discount committee."

To this portion of the charge the defendant excepted, and he also excepted to the refusal of his request upon this subject. If the court had instructed the jury that the defendant's intent to defraud the bank was an indispensable element of each offense with which he was charged, that there is a presumption of law that one intends the natural and probable effect of the acts he intentionally does, that this presumption may be overcome by evidence, that a defendant's testimony as to his intent and his explanations of his acts and omissions

are competent and material evidence upon the subject of his intent, that acts are sometimes more persuasive evidence of intent than words, and that it was their duty to consider all the evidence of the acts and omissions of the defendant, the rebuttable presumption that one intends the natural and probable effect of his acts intentionally done, the testimony of the defendant as to his intent and his explanations of his transactions, and from them all to determine whether or not they were satisfied beyond a reasonable doubt that the acts with which he was charged were done with intent to defraud the bank, the charge would have been more satisfactory. As given it minimized, it almost ignored, the testimony of the defendant regarding his intent, and it in effect instructed the jury that they must determine his intent, not from his testimony on that subject, his acts, his explanations, and the rebuttable presumption of law, but that they must determine it by the natural and probable effect of his acts in view of the legal presumption without regard to his explanations and testimony. It deprived the defendant of the just and proper consideration by the jury of his explanations and testimony, and for that reason was erroneous. Cummins v. United States, 232 Fed. 844, 846, 147 C. C. A. 38.

[4] After the verdict and judgment, a motion in arrest of judgment was made which challenged the sufficiency of the counts of the indictment. A consideration of the various counts has convinced that the first count charging the misapplication of the $227 cannot be sustained because it contains no averment that the credit of $227 which it avers that McCallum took with the bank ever injured the bank or caused it any loss. There is no allegation in the count that he ever checked this money out of the bank, or that the bank in any way was deprived of it. "Merely giving credit to Miller on the books of the bank for the amount of the checks did not lessen the funds held by the bank, nor in fact defraud the association in any form. To complete a misapplication of the funds of the bank it was necessary that some portion thereof should be withdrawn from the possession or control of the bank, or a conversion in some form should be made thereof so that the bank would be deprived thereof." Dow v. United States, 82 Fed. 904, 906, 27 C. C. A. 140, 142; United States v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; United States v. Northway, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664.

[5] The second count of the indictment is bad, because it nowhere charges that the misapplication there specified was made by the defendant "with intent to injure and defraud the association, or any other company, body politic or corporate, or any individual person."

The judgment below must be reversed, and the case must be remanded to the court below, with instructions to grant a new trial; and it is so ordered.

CARLAND, Circuit Judge (concurring in part and dissenting in part). The jury returned a general verdict of guilty on all five counts of the indictment, and the defendant was sentenced on each of these counts. The judgment below, therefore, must stand so far as the indictment is concerned, even if counts 1 and 2 are bad, as argued in

the majority opinion. I do not think the court erred in its charge on the question of intent. I concur in the holding of the majority opinion that a verdict ought to have been directed as to count 3, and I also concur in the holding that it was prejudicial error for the trial court to make the statement which it did with reference to the charge in the third count. I am not satisfied that the evidence introduced under the third count of the indictment, taken in connection with the remarks of the trial court, did not prejudice the defendant as to the charges contained in the other counts.

I therefore concur in reversing the judgment below and granting a new trial, for the reasons stated in the majority opinion in discussing the evidence under the third count, and referred to in the opinion as the charge with reference to the abstraction of the sum of $110.80.

CHESAPEAKE & O. RY. CO. v. CHARLTON.*

(Circuit Court of Appeals, Fourth Circuit. November 9, 1917.)

No. 1554.

MASTER AND SERVANT ⊂=111(1½)—SAFETY APPLIANCE ACT—COUPLING DEVICE.

It is a compliance with Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (Comp. St. 1916, § 8606), providing that on and after the 1st day of January, 1898, it shall be unlawful for common carriers to haul or permit to be hauled or used on their lines any cars used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, for a railroad company to provide appliances that would automatically couple by impact when the knuckles were open and provided with levers extending outside of the car by means of which the knuckles could be opened, so that a coupling could be made or cars uncoupled, and where a railroad brakeman went between cars to open the knuckle of a coupling although the lever was in good condition, there could be no recovery on the theory that the railroad company should have provided automatic couplers, the knuckles of which would at all times be open and ready for coupling.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by Evalyn Charlton, administratrix of the estate of James H. Charlton, deceased, against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

William Leigh Williams, of Norfolk, Va., for plaintiff in error.

John Winston Read, of Newport News, Va., for defendant in error.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. This action was instituted in the District Court of the United States for the Eastern District of Virginia by the administratrix of James H. Charlton, deceased, against the Chesapeake & Ohio Railway Company under the act of Congress known

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

*Rehearing denied February 8, 1918.

as the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]) to recover damages on account of the death of James H. Charlton. There was a verdict and judgment for $12,000 in favor of the defendant in error in the court below. The plaintiff in error excepted to the refusal of the court below to grant certain instructions and to direct a verdict in its favor. The case comes here on writ of error.

In the course of this opinion defendant in error will be referred to as plaintiff, and the plaintiff in error as defendant; such being the relative positions of the parties in the court below.

On the night of the 5th of September, 1915, plaintiff's intestate was engaged as a brakeman by the defendant on its yards at Newport News, Va., and while thus employed he was crushed between two cars, and as a result of his injuries he died soon thereafter. It is conceded that at the time of the accident both the defendant and deceased were engaged in interstate commerce.

It appears that just prior to the accident an engine to which four cars were attached left the main track and moved to track No. 9, going in the direction of a single car standing still upon that track for the purpose of coupling the head car of the four cars to the standing car. It was the duty of Charlton to give the proper signals and to assist in making this coupling. As the moving cars approached the standing car it appears that he was riding upon the ladder step of the car next to the standing car.

C. M. Cox, a witness for the plaintiff, testified that he was the engineer in charge of the train at the time the injury occurred; that after leaving the lead track he moved on until he received the stop signal, that the cars struck at the first impact, and that he received this signal from some one riding on the sill step of the head car. It was shown by another witness that Charlton was riding on the sill step or ladder step. It further appears that the engine and the cars attached to the engine did not move after this signal was given until after Charlton was hurt. When the cars attached to the engine came into contact with the single car they failed to couple by the impact, and the standing car was pushed a distance of four or five feet away from the cars to which the engine was attached.

Witness Albright when asked what they were endeavoring to do said:

"We are going to back up to car No. 5. When the car upon which Charlton and I were struck, it knocked the car a distance of about four or five feet. They did not couple. Then he (Charlton) comes down to open the knuckle, and the car rolled back and caught him."

A little later on in his testimony this witness said:

"I don't know whether he went to open this knuckle or to fix it."

It appears that there was a very slight grade at this point, and, while Charlton was engaged in attempting to adjust the knuckle, the solitary car rolled back and caught him, causing the injuries from which he died the following day.

It further appears that at the point where Charlton received his injuries the track was straight. It is not shown why the deceased went

in between the cars. The witness Albright further testified that he was riding on the same car with the deceased, and that immediately after the cars came together he went to see what had happend, and found that deceased had been hurt. He also stated that he found the knuckle closed at that time; that if the knuckle had been open the cars would have coupled automatically. This witness also testified as follows:

"Q. State whether or not, Albright, these cars coupled automatically when they came together. A. Does it do it? Q. Do they? A. Yes, they couple all right if the knuckle is open. Q. If the coupler is in proper condition it couples automatically without the brakeman doing anything? A. Well, if it is on a straight track, you do not have to regulate it provided one of the knuckles is open."

John Morgan Hazelwood, a witness for defendant, among other things, testified that he was a car inspector for the defendant company. He further testified as follows:

"I remember hearing of Mr. Charlton being killed, and soon thereafter, somewhere about 12:30 o'clock, four cars were brought to the lower yard and Conductor Massie pointed out two cars he said Charlton was mashed between. The conductor took the cars loose, separating them, and I inspected them, examined the drawheads, lock pins, the lift levers and all the parts, and made a memorandum at the time of my inspection, which I have with me. Examining that memorandum, I state that I found all the parts of these cars in perfect condition at the time I inspected them. * * * You can cut cars loose or you can throw open the knuckles by using the lever without going in between the cars. The couplers on these two cars are standard construction, ordinarily used in railroading, known as M. C. B. Standard—Master Car Builders' Standard."

It further appears that the accident occurred between 9 and 10 o'clock in the evening, and, as we have stated, an examination of the appliances was made about 12:30 that night. Furthermore, it appears from the evidence that on a straight track there is no coupler known that will couple from impact where both of the knuckles are closed.

It is earnestly contended by counsel for plaintiff that section 2 of what is known as the "Safety Appliance Act" of March 2, 1893, requires the railroad to equip all cars with couplers which will automatically couple by impact; that this duty is positive; that any failure on the part of a railroad to properly equip its cars with automatic couplers renders it liable to the penalty prescribed by law, and that whenever one is injured on account of a failure of the railroads to equip their cars with automatic couplers, the question should be submitted to a jury with the view of having it determine as to whether such cars had been equipped in compliance with the statute; and that where the Safety Appliance Act is violated the questions of assumption of risk and contributory negligence are immaterial under section 2 of the act, and also that the failure of an appliance to act is in itself sufficient to sustain a verdict in favor of the plaintiff. The section to which we have just referred is as follows:

"Sec. 2. *(Automatic Couplers)*—That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automat-

ically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The defendant insists that the plaintiff's interpretation of the statute is erroneous; that, while it was the purpose of Congress to require railroads to furnish an appliance to couple cars together which would couple automatically by impact, Congress did not thereby intend to provide that, where the knuckles of a coupler by the motion of the train or otherwise should be closed, this of itself would be sufficient to render the railroad liable for a failure to comply with the statute, provided the appliance furnished was in perfect working order, which, of course, would include, among other things, the lever on the side of the car by which a closed knuckle could be opened without requiring an employé to jeopardize his life by going between the cars to adjust the knuckle.

Among other things the defendant requested the court to give the jury the following instruction:

"The court instructs the jury if they believe from the evidence that the cars between which the decedent, Charlton, was caught were each provided with standard automatic couplers which would couple by impact when the knuckles were open, and were provided with levers by which the knuckle could be thrown open without going in between the cars, and that these couplers were in good working order, and that there is no coupler known that will couple by impact while the knuckles are closed, then the jury should find their verdict for the defendant."

This instruction fairly presents the question as to whether the couplers were in working order, and the refusal by the court below to grant the same was tantamount to holding that it was the duty of the railroads, under the statute, not only to equip their cars with appliances that would automatically couple by impact, but that a coupler should be so constructed that the knuckles would be open at all times so as to permit a coupling to be made without operating the lever which extends outside the car, and that this lever was intended only to be used in uncoupling cars.

It is admitted that plaintiff's intestate's injury was due to an attempt on his part to effect a coupling of the cars by going between them to open the knuckle which had been closed. In this connection we must bear in mind that appliances like the one in use on this particular car are so constructed that the knuckle of the coupler could be easily opened and closed by a lever without going between the cars. It is apparent that the purpose of the act in question is to avoid the necessity of a brakeman or other employé engaged in making a coupling going between the cars for that purpose, and in obedience to the act the railroads of the country soon after its passage equipped their cars with couplers capable of being operated as we have stated. It clearly appears that the knuckle of the coupler, swinging as it does on hinges, is liable, in case of jar or other sudden movement, to swing inward and thus close the open space intended to receive the knuckle of the car sought to be connected with the train.

This court, in the case of Atlantic Coast Line R. Co. v. United States, 168 Fed. 175, 94 C. C. A. 35, in the first syllabus, in referring to the duty of the railroads, said:

"It was the manifest intention of Congress, in the enactment of the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) to require all common carriers engaged in interstate commerce to keep their cars and engines at all times equipped with proper safety appliances. The degree of diligence required by the statute is of the highest order, and the duty thus imposed is absolute and unconditional. Therefore any failure on the part of the railroad company to comply with its requirements must necessarily subject the railroad company to the penalty imposed."

The foregoing relates to the duty of the railroad to keep its cars properly equipped, at all times, with automatic couplers, but there is nothing contained therein to justify the contention that, where it appears, as in this instance, that the railroad has equipped its cars with couplers in perfect order and capable of being coupled automatically by impact, when properly adjusted, one who goes between the cars for the purpose of effecting a coupling and undertakes to open the knuckle without employing the lever which projects beyond the side of the car, and is injured, is entitled to recover either upon the theory that the railroad has failed to perform its duty or that it was negligent in not having a coupler the knuckle of which would at all times remain open. The deceased undoubtedly knew that all he had to do was to operate the lever and thus open the knuckle so as to effect the coupling, but for some reason he failed to make use of this appliance. If in this instance the coupler had been out of order or the lever had failed to operate so as to open the knuckle, then, under such circumstances, it would have been the duty of the court below to have submitted the question to the jury for its determination as to whether there had been a failure, in the first instance, to properly equip the car, and (2) as to whether the company had failed to keep the safety appliance in proper working condition.

However, plaintiff insists that the cases of Overstreet v. Norfolk & Western Railroad Co., 238 Fed. 565, 151 C. C. A. 501, Chicago, Burlington & Quincy Railroad Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, Chicago, Rock Island & Pacific Railway Company v. Brown, 229 U. S. 317, 33 Sup. Ct. 840, 57 L. Ed. 1204, and other cases referred to in the brief, sustain its contention.

In the case of Overstreet v. Norfolk & Western Railroad Co., supra, it was alleged that a coupler on one of the locomotives, or some part of it, was out of order, which plaintiff alleged was the proximate cause of the death of deceased. The court below directed a verdict in favor of the defendant. This court in that case held that the court below was in error in directing a verdict, inasmuch as there was a conflict of evidence as to whether the coupler was in good order, and that under such circumstances the court should have submitted that question to the jury. While in the present case there is no evidence tending to show that the coupler was in a defective condition, we think it is established beyond peradventure that the coupler was in good condition and the knuckles of the same could have been easily manipulated by the lever if the deceased had chosen to adopt that method rather than going between the cars.

The case of Chicago, Burlington & Quincy Railroad Co. v. United States, supra, was a suit brought to recover a penalty for a violation of

the Safety Appliance Act. There was evidence tending to show the defective condition of all of the four cars, but the defendant sought to relieve itself from liability upon the ground that it was ignorant of the condition of the cars and had exercised reasonable care in inspecting and had endeavored to keep the cars in repair. The court in that case announced, what is conceded to be the universal rule, that it was immaterial as to whether the defendant knew that its cars were out of order; that the statute imposed upon it the positive duty of knowing that they were in order and kept in order at all times.

In this case, however, plaintiff insists that the question as to whether the cars were properly equipped is not to be considered; that the only question to be considered is as to whether they failed to couple by impact. It will be observed at a glance that the above case is not in point, and that the doctrine announced is inconsistent with the contention made as to the rule which should govern in the case at bar.

In the case of Chicago, Rock Island & Pacific Railroad Co. v. Brown, supra, the court, among other things, said:

"The railway company starts its contentions with a concession of its own culpability in sending Brown to his duty to encounter defective appliances and then seeks to relieve itself from liability by a charge against him of a careless judgment in its execution."

The foregoing statement clearly distinguishes that case from the case at bar, in that in this instance it is clearly shown, as we have stated, that the appliances were not defective. The Supreme Court in the case from which we have just quoted also said:

"The cars were in motion on a car track at the time. The uncoupling was to be done by means of shoving the cars in motion. Had the safety appliance been in order, this could have been accomplished by defendant in error while walking at the side of the train. But the safety appliance on the side of the car on which he was working at the time would not operate."

In that case the injured party, owing to the defective condition of the safety appliance on the side of the car, under the stress of circumstances, felt impelled to go between the cars for the purpose of adjusting the pin, which could have been easily adjusted from the side of the car if the appliance had been in working order. While the first headnote in the case tends to support the contention of plaintiff as to the duty of the defendant, nevertheless, a reading of the opinion clearly shows, as we have stated, that the case turned on an entirely different point from the one involved in the case at bar.

Our attention was called in the argument to the case of San Antonio & Aransas Pass Railway Company v. Wagner, 241 U. S. 476, 36 Sup. Ct. 626, 60 L. Ed. 1110. As we interpret the language of the court this question was not passed upon. The point decided in that case was that the Safety Appliance Act applied to locomotives as well as cars.

We have carefully considered the other cases cited by plaintiff to support her contention, but are of opinion that none of them are analogous to the case at bar. Indeed, we have been unable to find any case where the facts are similar to those of this case.

To construe this statute in accordance with the contention of counsel for plaintiff would be to require the railroads to perform a duty which

appears, at this time, to be wholly impractical. The framers of the act only intended to require the railroads to furnish some kind of an appliance that would automatically couple cars and uncouple the same without exposing employés to the risks that were incident to coupling and uncoupling cars before the date of the passage of the act. The railroads, we think, have fully met this requirement by equipping their cars with an appliance that couples automatically by impact, and so arranged that if the knuckles should, for any reason, become closed that the same could be opened by using the lever at the side of the car, and thereby accomplished the obvious purpose of the statute, viz. to have the railroads so construct their couplers that it would be possible to couple and uncouple cars without going between them.

Therefore, in this instance, inasmuch as it appears that the cars were properly equipped with the safety appliances, in good working order, which could have been operated from the side of the car, thus avoiding the injury sustained by the deceased, the court below should have granted the instruction tendered by the defendant.

We thoroughly appreciate the financial loss that the widow has sustained in this instance, and regret that the facts are such as not to entitle her to recover. We, therefore, with reluctance, conclude that the judgment of the lower court should be reversed.

Reversed.

PARISH v. UNITED STATES.*

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

No. 1557.

1. CRIMINAL LAW ⊜829(1)—TRIAL—INSTRUCTIONS.
The refusal of requests covered in substance by the charge given, is not error.

2. POST-OFFICE ⊜50—OFFENSES—UNMAILABLE MATTER.
A letter written by defendant to a school-teacher, reciting that he saw her and a man in a compromising position; that she knew what the school trustees would do if told; that defendant had a proposition to make before exposing the whole thing; that if she decided to see him she could arrange the meeting place; that if he did not receive an answer before a day fixed, he would see the school trustees; and that she should not be afraid to write, as no one, not even his wife, would know—cannot as a matter of law be held not to be obscene, lewd, or lascivious within Pen. Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129 (Comp. St. 1916, § 10381), denouncing the offense of transmitting such matter through the mail, but in view of its obvious import, the question whether the letter violated the statute should be submitted to the jury.

3. CRIMINAL LAW ⊜1129(1)—APPEAL—ASSIGNMENTS OF ERROR.
The question whether the trial judge erred in stating that in his opinion a letter made the basis of a prosecution for violating the statute against mailing obscene matter was a solicitation for an immoral purpose, mailed in contravention of the act, cannot be reviewed where not assigned.

4. CRIMINAL LAW ⊜656(9)—TRIAL—WEIGHT OF EVIDENCE.
In a prosecution in the federal court, the trial judge has the right to express an opinion as to the weight of the evidence, provided the question of fact is ultimately submitted to the jury.

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

*Rehearing denied February 8, 1918.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

B. P. Parish was convicted under Penal Code, § 211, of sending through the mails obscene, lewd, and lascivious matter, and brings error. Affirmed.

Arthur R. Young, of Charleston, S. C., and Jennings K. Owens, of Bennettsville, S. C. (Hagood, Rivers & Young, of Charleston, S. C., on the brief), for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty. of Columbia, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error, hereinafter referred to as defendant, was indicted and tried under section 211 of the Penal Code of 1909, in the District Court of the United States for the Eastern District of South Carolina.

The indictment charges the defendant with mailing a letter which it is alleged was obscene, lewd, and lascivious, the letter in question being in the following language:

"B. P. Parish. J. B. Parish, E. E.

"Pee Dee Light & Power Company.

"Clio, S. C., May 10/17.

"Miss A. B. Vann, Clio, S. C.—Dear Mdm.: Doubtless you will be surprised to get a letter from me but I feel it my duty to write. About two or three months ago I saw you and Dave R. in a very funny position down at my mill and last Sunday me and my wife and some other parties saw you at the same thing again. Now Miss Vann there is no good in you trying to deny this charge as we saw you and Dave on the raincoat together and thought we would stop you when you came back across the milldam and tell you what we were going to do but both of you looked too sheepish to bother with. You know what the school trustees will do about this if I tell them as well as I do. Now I have a proposition to make you before I expose the whole thing and if I can see you and have a private talk with you I think I can keep the whole thing quiet. Will leave this part with you and if you decide to see me in regard to the matter you can write me to-day and let me know where I can see you at. You can come down to the mill or I will go most any place that will suit you. Now if you want to keep this quiet don't let Dave know anything about it as he will try to raise sand and only make the matter worse for you.

"Will wait for my answer till to-morrow noon and if I don't hear from you by that time I will see Mr. Roberts and the school trustees about it.

"Don't be afraid to write as no one not even my wife will know the least thing about it, will call for my mail to-morrow noon.

"Yours truly, B. P. Parish."

The defendant in the court below moved to quash the indictment on the ground that the letter was not obscene, lewd, or lascivious, nor of indecent character or in violation of the statute. This motion was overruled. Certain requests to charge were presented which were refused and exceptions were taken. Exceptions were also taken to certain portions of the charge. The jury returned a verdict of guilty against the defendant, and sentence was imposed in pursuance there-

of. Defendant excepted, and the case now comes here on writ of error.

[1] It is insisted by the second and third assignments that the court erred in refusing certain requests to charge. While these requests were denied, we think that the substance contained therein was substantially given to the jury by the court.

[2] The main point presented for our consideration is as to the character of the letter in question. Counsel for defendant insists that the court erred in refusing to hold as a matter of law that the language of this letter was not such as to subject the defendant to indictment under the statute.

In the case of United States v. Hanover (C. C.) 17 Fed. 444, the court held that in a case like the one at bar the whole letter should be considered in determining its character.

In the case of Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799, the court, in charging the jury inter alia, said:

"Now, what is [are] obscene, lascivious, lewd, or indecent publications is largely a question of your own conscience and your own opinion; but it must come—before it can be said of such literature or publication—it must come up to this point: That it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes."

Mr. Justice Brown, in passing upon this instruction, said:

"The alleged obscene and indecent matter consisted of advertisements by women, soliciting or offering inducements for the visits of men, usually 'refined gentlemen,' to their rooms, sometimes under the disguise of 'Baths' and 'Massage,' and often for the mere purpose of acquaintance. It was in this connection that the court charged the jury that, if the publications were such as were calculated to deprave the morals, they were within the statute. There could have been no possible misapprehension on their part as to what was meant. There was no question as to depraving the morals in any other direction than that of impure, sexual relations. The words were used by the court in their ordinary signification, and were made more definite by the context, and by the character of the publications which had been put in evidence. The court left to the jury to say whether it was within the statute, and whether persons of ordinary intelligence would have any difficulty in divining the intention of the advertiser. We have no doubt that the finding of the jury was correct upon this point."

In the case of United States v. Moore (D. C.) 129 Fed. 159, after discussing the merits of the case, the court employed the following language at the conclusion of the opinion:

"In short, it was a seductive letter—as much so as if the writer had employed broader and balder indecent expressions for bringing about adulterous intercourse with this woman. At all events, it certainly is a question for the jury to pass upon, under proper instructions from the court."

The case of United States v. Wroblenski (D. C.) 118 Fed. 495, we think, is very much in point. In that case the court said:

"* * * In either case the question of violation of the statute rests upon the import and presumed motive, and not upon the mere terms of the communication. Thus its tendency depends upon circumstances, and unexceptionable language may convey vicious information within the statute. * * * In the case of a private letter (sealed) there is no publication, * * * and no presumption arises of intention to give publicity, or that it will be read by others than the addressee. The language or communication may be free from the condemnation of the statute in one instance, while it would clearly

fall within it when addressed to other persons. So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee. * * *"

It is insisted by the government that the purpose of the letter in question, under the circumstances, is easily divined; that if the defendant had had an intimate acquaintance with the young lady to whom the letter was addressed and the letter had contained a definite proposition on his part to relieve her from embarrassment in a substantial way, telling her that he proposed to see the school trustees and set matters right with them, then, in that event, it would have been the duty of the court below to say as a matter of law that the letter did not come within the purview of the statute.

Nothing appears in the evidence to show that he had more than a passing acquaintance with this young lady, nor is there anything to indicate that he knew any of her people or had any special reason to induce him to act as her protector. Under these circumstances, for what purpose was this letter written? Can it be reasonably insisted that defendant's purpose was to protect the good name of this young woman? If such had been the purpose of defendant, would he not have invited her to call at his home, where he and his wife could have conferred with her as to the best means to be employed in extricating her from what appeared to be an unfortunate situation? Undoubtedly this would have been the course naturally adopted by one actuated by honorable intentions. However, instead of approaching the young lady in a friendly and disinterested spirit, he opens the second sentence in his letter by breathing a threat as to what would happen in the event she should fail to comply with his request for an interview. On this point he says:

"About two or three months ago I saw you and Dave R. in a very funny position down at my mill and last Sunday me and my wife and some other parties saw you at the same thing again. Now Miss Vann there is no good in you trying to deny this charge as we saw you and Dave on the raincoat together and thought we would stop you when you came back across the milldam and tell you what we were going to do but both of you looked too sheepish to bother with. You know what the school trustees will do about this if I tell them as well as I do. Now I have a proposition to make you before I expose the whole thing and if I can see you and have a private talk with you I think I can keep the whole thing quiet."

He then admonishes Miss Vann to say nothing to the young man who was with her about the matter "as he will try to raise sand and only make matters worse for you," and also assures her that no one, not even his wife, will know about the matter.

Can it be reasonably insisted that it was the purpose of defendant by seeking this interview to tell her that he was going to intercede with the school trustees in her behalf, inasmuch as he warns her that if she does not grant him an interview that he will expose the whole thing? This sentence immediately follows the sentence in which he says "you know what the school trustees will do about the matter if I tell them as well as I do." This clearly indicates that unless she complied with his request, he would call the matter to the attention of the school trustees. The tone of his letter also indicates that his primary object was to convince this young lady that her conduct was highly improper,

and that the only way she could avoid exposure would be to have a private conference with him at his mill or any place that might suit her.

We are of opinion that the question as to whether this letter was susceptible of the interpretation that the defendant had conceived a scheme to have a private interview with the young lady, for the purpose of using the knowledge which he claimed to possess to coerce her to accede to his immoral demands, was properly submitted to the jury. Such being the case, the action of the lower court in permitting the jury to determine the character of the letter was eminently proper, and in expressing this view we are not in conflict with the law as announced in the cases of United States v. Journal Co., Inc. (D. C.) 197 Fed. 415, and Knowles v. United States, 170 Fed. 409, 95 C. C. A. 579.

By the fifth assignment it is insisted that the court below erred in telling the jury that they might consider the surrounding circumstances as an aid in construing the letter. We think that this assignment is without merit. The defendant introduced testimony to show the surrounding circumstances as bearing upon the question of motive and intention. In this respect we think the court was very generous in its treatment of the defendant. It would have been manifestly unfair to permit the defendant to go into this matter and not accord the government the same privilege.

[3, 4] Counsel for defendant, in their brief, say that:

"In refusing to quash the indictment the trial judge stated that in his opinion the letter was a solicitation for an immoral purpose, coupled with a contravention of the act, but would submit the question to the jury. This statement was made in the presence of the venire of jurors, who were in the court, and at once created such an atmosphere that it was practically a foregone conclusion that any jury impaneled would convict."

However, there is no assignment of error upon which to base this contention. If this point were properly before us, we would be inclined to hold that, inasmuch as the court below submitted the question to the jury as to character of the letter, thus permitting them to pass upon this question, the court was not in error. It is not necessary to cite authorities in support of the proposition that the court had the right to express an opinion as to the weight of evidence, provided it ultimately submitted the facts to the jury to be passed upon by them, as in this instance. A careful consideration of the cases relied upon by defendant show that they do not tend in the slightest to vary the rule which we have announced.

In view of all the facts and circumstances surrounding this transaction we think that the defendant received a fair and impartial trial, and that he justly merits the punishment meted out to him by the court below.

For the reasons stated the judgment of the court below is affirmed.

COOPER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. October 16, 1917.)

No. 1536.

1. INDICTMENT AND INFORMATION ⟸10—SUFFICIENCY—TRUE BILL.
   An indictment, which under the Constitution is a prerequisite to the prosecution of an infamous crime, is not effective until it is found a true bill by a properly constituted grand jury.
2. INDICTMENT AND INFORMATION ⟸10—SUFFICIENCY—TESTIMONY.
   An indictment can only be found upon the testimony of a competent and material witness or witnesses, who must be sworn and examined before the grand jury.
3. INDICTMENT AND INFORMATION ⟸139—MOTION TO QUASH—TIME FOR FILING.
   A motion to quash relates to defects appearing on the face of the indictment, and should be made at or before the beginning of trial.
4. CRIMINAL LAW ⟸1023(13)—APPEAL—REVIEW.
   A motion for new trial is, as a general rule, not reviewable.
5. CRIMINAL LAW ⟸970(1)—MOTION IN ARREST—PURPOSE.
   A motion in arrest of judgment may be used for the purpose of taking advantage of any defect in the indictment, based upon knowledge obtained during or after the conclusion of the trial.
6. CRIMINAL LAW ⟸974(1)—MOTION IN ARREST—INDICTMENT—SUFFICIENCY OF EVIDENCE.
   Defendant was convicted of receiving a sum of money to influence his decision as a juror, and after conviction he filed an affidavit reciting that one L., whose name was indorsed on the indictment found against him as one of the witnesses, while testifying on the prosecution of another based on the same transaction, stated that he did not appear before the grand jury at the term at which the indictment was found and did not testify before the same. The defendant's affidavit further recited, on information and belief, that no material and competent evidence was introduced before the grand jury, and that no witness except L. existed who could testify of his own knowledge to the facts set forth in the indictment. The affidavit, which alleged the indictment was found on an ex parte affidavit by L., did not allege that one D., whose name appeared on the indictment as having been sworn and examined by the grand jury, did not give competent testimony on which the indictment could have been based. *Held* that, though it was contended that the testimony of D. in the subsequent prosecution arising out of the same transaction showed that his evidence was insufficient to have sustained the indictment, the affidavit was an insufficient showing to warrant the sustaining of the motion in arrest, on the ground that the indictment was not based on material and competent testimony, for, as it was necessary to contradict the record to sustain the motion, the showing should be clear and convincing, and defendant by other means might have made such showing.

In error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller and Chas. A. Woods, Judges.

B. E. Cooper was convicted of receiving a sum of money to influence his decision as a juror, and he brings error. Affirmed.

M. F. Stiles, of Charleston, W. Va., for plaintiff in error.

F. W. McCullough, U. S. Atty., of Huntington, W. Va., and Wm. E. Ross, Asst. U. S. Atty., of Bluefield, W. Va.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. This is a criminal action instituted and tried in the District Court of the United States for the Southern District of West Virginia, and now comes here on writ of error. Plaintiff in error was defendant in the court below, and will be hereinafter referred to as such.

Defendant was indicted at the November term, 1915. The indictment contains two counts. In the first it is alleged that defendant agreed with Bigley to receive the sum of $10 to influence his decision as a juror in the case of Jones & Bigley against the Hardwood Package Company. The second count was withdrawn. Defendant was tried on the first count at the November term, 1916, and found guilty. The sentence was held in abeyance until the 13th day of January, 1917. In the meantime Ramage was tried and acquitted, and the indictment against Bigley was nol. pros'd. The indictment against Cooper purported have been found upon the testimony of one J. H. Long and James Duling.

However, it is insisted that at the trial of Ramage it became known for the first time to the defendant and his counsel that Long had never appeared in person before the grand jury, but that the district attorney had presented an affidavit made by Long upon which the indictment was found, and, further, that there was no witness or person upon whose testimony an indictment could be found, except Long, and that, therefore, the indictment was not based upon any competent evidence; that it appeared in the trial of Ramage that the facts testified to by Duling were not competent nor sufficient to sustain the finding of the indictment. At the trial of Cooper, Long testified that upon a certain Friday morning during the trial of Jones & Bigley against the Hardwood Package Company he overheard a conversation between Cooper and Ramage at the Fleetwood Hotel, at which time Ramage offered Cooper $10 if he would hang the jury, or prevent a verdict in favor of the defendant, and that Cooper agreed and accepted the same.

The defendant insists that he proved by sundry reputable and unimpeachable witnesses that, at the time fixed by Long for the conversation between Cooper and Ramage, Ramage was not, nor had not been, at the Fleetwood Hotel, but that he was confined to his room at a different hotel by illness, and therefore could not and did not have the alleged conversation. However, notwithstanding this fact, the jury returned a verdict of guilty against the defendant.

Upon the trial of Ramage the same testimony in substance was given against Cooper, except that Long fixed the day of the conversation as being on Saturday, instead of Friday, that being the last day of the trial, and it was shown that at that time the judge had already directed a verdict in the case, or had intimated that he would do so, and whatever conversation Long heard between Cooper and Ramage related to an entirely different matter, and had no relation to the case on trial, whereupon, after the acquittal of Ramage and the discontinuance of the case against Bigley, the defendant presented to the

court his affidavit, setting out the foregoing facts more particularly than we have stated them, and moved the court to arrest judgment, quash the indictment, and grant a new trial. It is insisted by counsel that, owing to the poverty of Cooper, the case was not reported and no record of the proceedings preserved, further than that shown in the transcript, and therefore defendant is not able to bring up any errors other than those herein indicated.

[1, 2] The point involved in this case, owing to the incomplete state of the record, is difficult of solution. The question which we are called upon to determine is as to whether the court below erred in refusing to arrest the judgment on the ground that the indictment was invalid. The Constitution (Const. Amend. 5) provides that one charged with certain offenses shall not be placed upon trial until the grand jury shall have investigated the subject-matter of the offense alleged in the indictment, and returned a true bill thereon. To this end certain formalities must be complied with in the preparation and presentation of the bill to the grand jury. Technically speaking, such paper cannot be called a bill of indictment until it is found "a true bill" by a properly constituted grand jury. An indictment can only be found upon the testimony of a competent and material witness or witnesses, who must be sworn and examined before the grand jury. In the case of State v. Ivey, 100 N. C. 541, 5 S. E. 407, the Supreme Court of that state, in referring to the importance of complying with the rules and formalities relating to the finding of indictments, said:

"The action of the grand jury, upon bills of indictment, is very important to individuals and the public. On the one hand, the safety, good order, and well-being of society are to be affected for good or evil by it; and, on the other, a person should not be carelessly accused of crime. This should be done upon solemn accusation, and for reasonably apparent cause; it may be of great consequence to the accused, whether the accusation be well or ill founded. Such bills are not to be treated lightly, but seriously; the action of the grand jury must be based, not merely upon conjecture, suspicion, mere information, what they or a member or members of their body may know, but upon the testimony of witnesses duly sworn, or other evidence that comes before them duly authenticated. If a grand juror has knowledge of facts material, he should be sworn as a witness, and examined as such. State v. Cain [8 N. C.] 1 Hawks. 352."

[3-5] It appears from the record that three motions were made in the court below, to wit, motion to quash, motion for a new trial, and motion in arrest of judgment. A motion to quash relates to defects appearing on the face of the indictment, and should be made at or before the beginning of the trial. A motion for new trial is, as a general rule, not reviewable. A motion in arrest of judgment must, from the very nature of things, be made after the trial has been concluded, and may be used for the purpose of taking advantage of any defect in the indictment based upon knowledge obtained during or after the conclusion of the trial.

[6] In this instance, as we have already stated, it appears from the affidavit of the defendant that the principal and only material witness marked on the indictment did not appear in person and was not sworn and examined by the grand jury; that the indictment in this instance was based solely upon an affidavit which the witness Long had made.

That portion of the defendant's affidavit referring to this point is in the following language:

"That the said J. H. Long, while testifying as a witness on the trial of the said Ramage, stated that he did not appear before the grand jury at the term at which said indictment was found and returned, and was not sworn for the purpose of going before said grand jury, and did not testify before the same, and affiant, upon information and belief, charges that no material and competent evidence was introduced before said grand jury, and that no witness except the said Long exists or existed who could testify, of his own alleged knowledge, to the facts set forth in said indictment as a sufficient basis for said indictment; and as affiant is informed and believes, and upon such information and belief charges, said indictment was based upon an ex parte affidavit of said Long, not made by him before the grand jury, or in the presence of the grand jury, or in the presence of any member thereof, and which affidavit is now in the possession of the United States attorney for the district aforesaid."

As we have said, another witness by the name of James Duling appears upon the indictment as having been sworn and examined before the grand jury. While the defendant insists that the evidence of Duling was immaterial, and therefore not sufficient to have justified the grand jury in finding a true bill, there is no substantive evidence contained in the defendant's affidavit, nor does it appear by the affidavit or testimony of any other competent witness, that the testimony of Duling was not sufficient upon which to base the indictment. In order to sustain a motion in arrest of judgment where, as in this instance, it is sought to contradict the record, it must be shown by direct and positive evidence (a) that Long did not appear before the grand jury as a witness, and (b) that the evidence of Duling was immaterial and incompetent, and therefore not sufficient to warrant the grand jury in its finding. In other words, the evidence in support of a motion of this kind, where it is sought to impeach the record, should be clear and convincing.

The defendant failed to offer evidence of this kind, and now contents himself by offering an affidavit which, in the main, relates to matters that are purely hearsay, stating that he bases the same on information and belief. He could easily have obtained the affidavit of some member of the jury under appropriate process of the court and also the affidavit of the witness Duling, which would have enabled the court in the usual manner to determine as to what really transpired before the grand jury, and, having failed to do so, we are of opinion that the action of the court below in refusing to arrest the judgment was eminently proper.

While we regret that the facts bearing upon this motion were not fully developed in the court below, nevertheless, in view of the state of the record, we are impelled to the conclusion that the judgment of the lower court should be affirmed.

UNITED STATES v. CHESAPEAKE & O. RY. CO.

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

No. 1530.

RAILROADS ⟸229—SAFETY APPLIANCE ACT—CONSTRUCTION.

Safety Appliance Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (Comp. St. 1916, § 8614), requires railroads engaged in interstate commerce to have not less than 50 per cent. of the cars in each train equipped with power brakes operated by the engineer, and further provides that "all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated." By order of June 6, 1910, the Interstate Commerce Commission, as authorized by the act, increased the number of cars required to be so equipped and operated in each train to 85 per cent. *Held* that, if the required 85 per cent. of the cars in a train were so equipped and operated, it was not a violation of the act to haul other cars in such train, which, although power-braked, had their air brakes cut out, because defective and not in condition for use.

Knapp, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Action by the United States against the Chesapeake & Ohio Railway Company. Judgment for defendant, and the United States brings error. Affirmed.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (R. E. Byrd, U. S. Atty., of Richmond, Va., and Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C., on the brief), for the United States.

Randolph Harrison, of Lynchburg, Va. (Harrison & Long, of Lynchburg, Va., on the brief), for defendant in error.

Before PRITCHARD and KNAPP, Circuit Judges, and DAYTON, District Judge.

PRITCHARD, Circuit Judge. This is an action instituted in the District Court of the United States for the Western District of Virginia to recover penalties for alleged violations of the "Safety Appliance Act." The plaintiff alleges 12 causes of action and demands $1,200 aggregate penalties. Eleven of these causes are alike, alleging the violation of section 2 of the federal Safety Appliance Act approved March 2, 1903, demanding judgment for $1,100 aggregate penalties. The eighth cause of action is in a class by itself (involving defective coupler, finally disposed of by the lower court).

Section 2 of the Safety Appliance Act, upon which plaintiff relies, is in the following language:

"Sec. 2. That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be

operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

By an order entered November 15, 1905, the Interstate Commerce Commission increased the minimum percentage of power-braked cars as specified in the above section from 50 to 75 per cent., and on June 6, 1910, the percentage was further increased by the Commission from 75 to 85 per cent., the increase to take effect September 1, 1910. The order requiring the last increase is in the following language:

"That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power, or train brakes, not less than 85 per cent. of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power brake cars in every such train which are associated together with the 85 per cent. shall have their brakes so used and operated."

It is insisted by the government:

"That the cars admitted to have possessed the air brake equipment but which equipment was not operated or so connected up as to be operated were power brake cars within the meaning of that term as used in section 2 of the act of 1903, and that the use of such cars in the condition described and in the manner alleged and admitted by the defendant was unlawful and in violation of the order of the Interstate Commerce Commission."

In order to decide the point thus presented we must determine as to whether a railroad company, after having placed in its train 85 per cent. of cars equipped with workable air brakes, is then precluded from using any cars that have been cut out for defects in the remaining 15 per cent. The history of the safety appliance legislation shows that it was the purpose of Congress to secure the highest possible protection for employés and passengers. To accomplish this end railroad companies were required on and after the passage of this act to have at least 50 per cent. of the cars of any train equipped with proper air brakes, and later, as we have stated, this per cent. was increased to 75 by the Interstate Commerce Commission, and now the amount is fixed at 85 per cent., and it may be that at some future date the railroads will be enjoined with the duty of having 100 per cent. of the cars that may be operated in any train equipped with workable air brakes. However, such is not the case at this time, which leaves us to decide as to whether the use of cars with cut out brakes, but capable of being used for the purpose of transmitting air to cars properly equipped with brakes, is in violation of the act. Was it the intention of Congress that where a car had once been equipped with a workable air brake, but which became defective, should never be used again in a train made up of cars properly equipped with the required percentage of air brakes?

It is conceded by counsel for the government that the cars equipped with old-fashioned hand brakes may be used as the 15 per cent. allowed by the requirements of the Interstate Commerce Commission. Inasmuch as 85 per cent. of the train in question was composed of cars equipped with workable air brakes, which is deemed by the Interstate Commerce Commission to be sufficient to insure the safety of em-

ployés and passengers, it became immaterial as to whether the remaining cars were equipped with air brakes or the ordinary hand brakes, and we cannot think of any possible reason why there should be any distinction made between the cars equipped with ordinary hand brakes and those with air brakes that had been cut out. It would be unreasonable, we think, for the government to make any such demand, and we do not believe that a fair interpretation of the statute warrants a ruling to that effect. The statute which requires a railroad to equip its cars with proper air brakes was enacted for the sole purpose of having a sufficient number of cars thus equipped in every train so as to insure safety, and we think this, and this only, is the extent to which Congress intended that the law should be applied.

Among other things, the order of the Interstate Commerce Commission quoted above provides that:

"* * * Whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power, or train brakes, not less than 85 per cent. of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train."

From the foregoing it is manifest that it was not the purpose of Congress to require every car in a train equipped with power or train brakes to be used and operated by air. If such had been the original purpose of Congress, the duty would have been enjoined upon the railroads to keep 100 per cent. of its cars at all times equipped with air brakes that were in first-class condition and capable of being used.

The Interstate Commerce Commission, in pursuance of the authority conferred upon it by Congress, undoubtedly has the right to require railroads to equip 100 per cent. of their cars with air brakes, but up to the present time they have not seen fit to adopt this policy. This is a function that rests solely with the Commission, and so long as the percentage remains as now fixed by it the courts have no authority to change the same.

The act further provides that:

"All power-braked cars in such train, which are associated together in said 50 per cent., shall have their brakes so used and operated."

This provision clearly indicates that it was the purpose of the Congress that the railroad companies might use power brake cars not associated with the 50 per cent. that the railroad was not required to have operated as "power brake cars" in a workable condition.

In the case of United States v. Baltimore & Ohio Railroad Co. (D. C.) 176 Fed. 114, District Judge Orr said:

"* * * It is averred in plaintiff's statement of claim that, while the train had 75 per cent. of its cars used and operated by the engineer, there were associated together in said train with said 75 per cent. four additional train brake cars which did not have their brakes operated by the engineer. This charges a breach of the provisions of section 2 of the act of March 2, 1903, above quoted. It was admitted at the trial that said four cars were defective and out of repair. It did not appear how long their brakes had been unused. The testimony showed that they had their air 'cut out'—that is, cut off in the pipes extending from the main air line of the train to the brakes. The air was not interfered with in passing through said cars to other cars. It seems plain that with brakes cut out for defects they ceased to be power-braked cars and became part of the allowed percentage of hand-braked cars.

The act nowhere imposes a penalty for using an air-braked car with a cut out brake, as it does for using one with a defective coupler, or one without grabirons or handholds. Again, the act does not say all power-braked cars in a train shall have their brakes used and operated. There is a qualification which must mean that only such power-braked cars 'which are associated together with said' 75 per cent. shall have their brakes used. That clearly contemplated that there might be some power-braked cars not associated with the 75 per cent., which need not have their air brakes used and operated. All the cars in the train, except the four cut-out cars, and the caboose, not complained of, were associated together in the air brake operations by the engineer of the locomotive. When the Interstate Commerce Commission shall, in the exercise of its powers, fix a minimum percentage of cars in any train required to be operated with power or train brakes, which must have their brakes used and operated as required by the act, at a minimum much greater than that which now is the standard, there may be some right to recover upon a cause of action in which the allegations and proofs are similar to those in the case at bar."

The Interstate Commerce Commission under authority conferred upon it by Congress has provided that in the making up of a train the railroad company must equip 85 per cent. of its cars with workable air brakes, and where the railroad, as in this instance, has fully complied with this requirement it is immaterial as to whether the remainder of the train is made up of cars equipped with cut out air brakes or the ordinary train brakes. We think it is contrary to common sense and justice to hold otherwise.

Therefore the judgment of the court below is affirmed.

KNAPP, Circuit Judge (dissenting). I cannot concur in holding it lawful to haul a car which has been equipped with power brakes, when such brakes are unused and unusable, because not in good order. Such a construction of the law seems to me unwarranted by its terms and clearly opposed to its spirit and purpose. It is a matter of common knowledge that the power brake requirement has not been extended to all cars, because a considerable number of them, too good and too much needed to be withdrawn from service, cannot be equipped without prohibitive expense. The initial act of 1893 required a "sufficient number" of power-braked cars to enable the engineer to control a train without the use of hand brakes. In 1896 a minimum of 50 per cent. was imposed, and this minimum has been increased by the Commission, under grant of authority, first, in 1906, to 75 per cent., and later, in 1910, to 85 per cent. But nowhere in the language or legislative history of these enactments and orders do I find any indication of an intent to allow the commercial movement of cars provided with power brakes, when such brakes are not used because out of order or for other reasons. Every reasonable inference appears to me to the contrary. The hauling in each train of a certain percentage, reduced gradually from 50 to 15, of cars not so equipped and used has been permitted, not to cover power-braked cars whose brakes are defective and unworkable, but to keep in needed use a class of cars that cannot as a practical matter be provided with the power-brake appliance. In other words, the percentage exemption includes, in my judgment, and was intended to include, only the older type of hand-braked cars which for one cause and another are not convertible

into power-braked cars, but which in the public interest ought not to be taken out of service.

A car equipped with power brakes, whether originally or by alteration, is in the class of power-braked cars to which the statute applies; and I cannot believe that such a car ceases to belong to that class when and because its power brakes are out of order. Surely the defective condition of its power brakes does not make it in any sense a hand-braked car, and why, then, should that condition entitle it to claim exemption? To hold that it does is, as seems to me, to limit unduly and beyond the legislative intent the aim and scope of the safety appliance laws, and particularly the train brake provision in section 2 of the 1903 enactment, which says:

"That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty [now eighty-five] per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty [now eighty-five] per centum shall have their brakes so used and operated."

This means, in my judgment, not merely that 85 per cent. at least of the cars in any train must have power brakes "used and operated," but that all power-braked cars in a given train, however many there may be, must be associated together and used by the engineer, and this necessarily implies that all of them must have their power brakes in an operable condition. So the Commission held in its annual report to the Congress in 1908 (page 43), saying:

"As a result of the requirement of the Master Car Builders' Association that all cars offered in interchange shall be equipped with power brakes, practically all cars are now so equipped. It necessarily follows, therefore, that all such brakes must be in operative condition in order that the law may be complied with. The importance of maintaining all brakes in operative condition is thus clearly apparent; that this has not been done may be due to misapprehension by railway officials concerning the actual requirements of the law."

It is familiar doctrine that the construction given to a statute by those charged with the duty of executing it is entitled to great respect, and ought not to be overruled without cogent reasons. Edwards v. Darby, 12 Wheat. 206, 6 L. Ed. 603; United States v. Moore, 95 U. S. 760, 763, 24 L. Ed. 588; Brown v. United States, 113 U. S. 568, 571, 5 Sup. Ct. 648, 28 L. Ed. 1079; Heath v. Wallace, 138 U. S. 582, 11 Sup. Ct. 380, 34 L. Ed. 1063; Delano v. United States, 220 Fed. 635, 136 C. C. A. 243.

The construction put upon this law by the Commission, which I believe to be correct, seems fully supported by two recent decisions of the Sixth Circuit Court of Appeals, Pennsylvania Co. v. United States, 241 Fed. 824, 154 C. C. A. 526 and B. & O. S. W. Ry. Co. v. United States, 242 Fed. 420, —— C. C. A. —— and by numerous cases therein cited. I am of opinion that the commercial hauling of cars equipped with power brakes, when such brakes are out of order and unused, is a violation of the Safety Appliance Acts, and I must therefore vote to reverse the judgment.

KINSTON MFG. CO. et al. v. FREEMAN.

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

No. 1520.

1. WORK AND LABOR ⟸30(3)—ACTION BY AGENT FOR COMPENSATION—INSTRUCTIONS.

By a written contract defendants authorized plaintiff to sell timber lands owned by them at a net price to them, plaintiff to receive any excess obtained above such price. Through plaintiff's efforts a person was secured, who took an option on the land at an advanced price; but the option was not exercised, and the contract between the parties expired. Defendants then requested plaintiff's aid in further negotiations with the same person, and through his efforts a sale was made at a lower price. *Held*, in an action to recover for his services on a quantum meruit, that defendants, having availed themselves of the labor done by plaintiff in his prior negotiations with the purchaser, were not entitled to an instruction that anything done by him under the contract should not be considered by the jury.

2. INTEREST ⟸7—RIGHT TO INTEREST—MONEY DUE ON IMPLIED CONTRACTS.

In such case a contract to pay plaintiff reasonable compensation for his services was implied, when they were requested, and on recovery plaintiff was entitled to interest from the time the sale was effected, both by the general law and under Revisal N. C. 1908, § 1954, which provides that money due by contract shall bear interest, which shall be distinguished from the principal in the verdict; and the fact that the jury did not make any finding as to interest, but only the value of plaintiff's services, was a technical omission, which did not deprive him of the right to interest, or the court of the power to include it in the judgment.

Dayton, District Judge, dissenting in part.

In Error to the District Court of the United States for the Eastern District of North Carolina, at New Bern; Henry G. Connor, Judge.

Action by E. B. Freeman against the Kinston Manufacturing Company and the Ellington-Bryant Timber Company. Judgment for plaintiff, and defendants bring error. Affirmed.

For prior opinion, see 233 Fed. 58, 147 C. C. A. 128.

G. V. Cowper, of Kingston, N. C., and O. H. Guion, of New Bern, N. C., for plaintiffs in error.

Walter H. Taylor, of Norfolk, Va., and A. D. Ward, of New Bern, N. C. (E. F. Aydlett, of Elizabeth, N. C., and M. T. Dickinson, of Goldsboro, N. C., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. The facts appearing in the record and principles of law applicable thereto, on which this court reversed the judgment rendered in favor of defendants on the first trial, are clearly stated in the opinion rendered by Judge Knapp, filed May 13, 1916. 233 Fed. 58, 147 C. C. A. 128. On the second trial the District Judge submitted issues to the jury in accordance with the North Carolina practice, and on the answers made by the jury entered judgment in favor of the plaintiff for $7,500 and interest from the date of the

accrual of the plaintiff's alleged cause of action. The points now made in this court by defendants are: First, that there was an erroneous instruction to the jury; second, that the jury's findings of fact required a judgment for the defendants; and, third, that, even if the plaintiff was entitled to judgment, it should have been for $7,500 with interest only from the first day of the term of the court.

[1] The action was to recover compensation for the alleged procurement by the plaintiff for the defendants of the sale of a large body of timber and a sawmill and lumber and logs in North Carolina. As his first cause of action the plaintiff set up an express written contract with the defendants which allowed him to sell the standing timber and sawmill plant for $350,000 net to the defendants, the plaintiff to receive any excess or overage in the price; negotiation by plaintiff with J. T. Deal, which resulted in the defendants, at plaintiff's instance, giving Deal an option for 60 days at the price of $390,000, of which the plaintiff was to receive $40,000, on the faith of a representation by the defendants that there were 130,000,000 feet of standing timber; a subsequent agreement that if a sale should be made to Deal for a less price, on account of shortage in the timber, the plaintiff's compensation should be $25,000; the failure of Deal to buy at $390,000 because the tract contained only 70,000,000 feet of timber; the subsequent sale to Deal in pursuance of plaintiff's efforts under his contract with the defendants. As a second cause of action, the plaintiff set up as a quantum meruit procurement of the sale by him of the property to Deal for the defendants, for which his services were reasonably worth $40,000. The answer made issues as to these allegations which were thus submitted to the jury and answered:

"1. Did defendants represent to plaintiff at or before the contract set out in Exhibits B and C that there was 130,000,000 feet of timber standing on the lands referred to in said exhibits? Answer. Yes.

"2. Was there 130,000,000 feet of timber standing on said lands? Answer. No.

"3. Did defendants on April 4, 1912, at the time the option to J. T. Deal was signed in Goldsboro, N. C., agree to pay to the plaintiff the sum of $25,000 if, because of shortage in the quantity of the timber on the land, there should be a reduction in the price of the timber? Answer. No.

"4. Did plaintiff, relying on defendants' representation in regard to the number of feet of timber on the land, comply with his part of the contract by securing a purchaser who was able, ready and willing to purchase the properties for $390,000 under the option, provided there was 130,000,000 feet, or approximately that quantity, of standing timber? Answer. No.

"5. Did defendants sell the timber to J. T. Deal for a smaller price than that named in the option solely by reason of the shortage of the timber? Answer. No.

"6. When was the sale of the timber to J. T. Deal made? Answer. June 24, 1912.

"7. Did plaintiff, by his effort, procure the sale of the timber by defendants to J. T. Deal at the price of $307,000? Answer. Yes.

"8. If so, what were plaintiff's services reasonable worth to defendants? Answer. Seven thousand and five hundred dollars."

The defendants first insist that they were entitled to the instruction, asked and refused, that the jury, in considering the seventh issue submitted as to the alleged cause of action on quantum meruit, should dis-

regard all services rendered under the alleged contracts for compensation of $40,000 and $25,000. The argument is this: The option given to Deal at the instance of the plaintiff, under which plaintiff was to receive $40,000, had expired. All the work done by the plaintiff under that option was at his risk that the option would be closed by Deal; and, when Deal refused to exercise the option, the plaintiff could not require defendants to compensate him for labor performed at his own risk in the effort to sell under the option. This labor undertaken by the plaintiff under an express contract at his own risk, and lost by the failure to make the sale under the option, could not be brought over and added to services afterwards performed, even if the plaintiff afterwards procured the sale. This argument might be convincing, but for the fact that, after the option to Deal and the express contract between plaintiff and defendants had expired, the defendants asked the aid of the plaintiff. About a week before the sale was made to Deal by defendants, a meeting was arranged between Deal and the defendants in Richmond. Freeman testified, and Bryant practically admitted; that Freeman was present at this meeting at the request of Bryant, representing the defendants, to aid in the negotiation with Deal. This could only have meant that the defendants to forward the sale to Deal availed themselves of the labor performed and information obtained by Freeman in his former negotiation with Deal. Having thus availed themselves of Freeman's former labor, the defendants were not entitled to the instruction denying plaintiff reasonable compensation for it. Nor does it matter that defendants sold against the protest of the plaintiff, made on the ground that, in his opinion, the land could be sold for a greater price. All this was involved in the question whether the plaintiff procured a purchaser who bought at a price the defendants were willing to take; and this question was answered in the affirmative.

This reasoning and conclusion go far towards disposing of the next position taken by defendants. The jury found in effect that the defendants did incorrectly represent that there was 130,000,000 feet of timber; that Freeman lost nothing by this misrepresentation under his contract with the defendants for $40,000 over their net price of $350,000, because he did not find a purchaser ready, willing, and able to take the property for $390,000 on the basis of the representation. They also found that the defendants did not contract to pay Freeman $25,000 on a sale for less than $350,000 net. The defendants contend that, under the former opinion of this court, the legal sequence from these findings on the alleged express contracts is that Freeman could not recover under the quantum meruit count. True, it was held in the former opinion of this court that if, because of defendants' untrue representation, Freeman was unable to realize the net price of $350,000, and an overage for himself, he could nevertheless recover if he brought about the sale at a less price. But it was not held that, as a condition precedent to recovery on the quantum meruit, the plaintiff would have to show that he could have realized $350,000 net, but for the untrue representation of the defendants upon which the original contract was based. On the contrary, the court said:

"The second count, it is true, is lacking in clearness of statement and cannot be regarded as a model pleading, but it purports to set forth a cause of action upon quantum meruit, it states the facts with sufficient particularity and its allegations are ample in our judgment to apprise the defendants of the grounds upon which plaintiff claims the right to recover independent of the original agreement."

There was evidence supporting the jury's findings that the sale was procured by Freeman's efforts, and that the plaintiff conferred on the defendants at their request the benefit of all the work he had done in forwarding the sale.

[2] The judgment of the District Court was for $7,500, the amount which the jury found Freeman's services were reasonably worth to the defendants and interest from June 24, 1912, the date of the sale to Deal. The defendants contend that in North Carolina interest is recoverable on an unliquidated demand only from the date of the judgment, and not from the date when the service was rendered. Section 1954, Pell's Revisal 1908, provides:

"All sums of money due by contract of any kind whatsoever, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it be paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section."

The service rendered by Freeman, which the jury found brought about the sale, having been rendered at the instance of the defendants and accepted by them, there was a contract implied in fact on the part of the defendants to pay for them, as distinguished from express contract, and also from quasi contract, or an obligation imposed by law to pay for benefits received, when no promise could be implied in fact. 9 Cyc. 242; 6 Rul. C. L. 587, 588. The case, therefore, presents an implied contract falling under the statute.

Even where the matter is not regulated by statute, the tendency of modern decisions is to allow interest on all money owing on contracts, either express or implied, from the date it was due, whether the amount be liquidated or unliquidated. 15 Rul. C. L. 8. It is no objection to the application of the rule that the amount due under the contract is unascertained until the trial. The interest is not charged to the debtor as a penalty, but on the principle that, since he has had the use of the money which was justly due to his creditor under the contract, he should pay for the use he is presumed to have made of it from that time. This gives the creditor nothing more than his right, and imposes no hardship on the debtor. The debtor may always escape payment of interest to the creditor by tendering the sum justly due and keeping the tender good. Charlotte Nat. Bank v. Davidson, 70 N. C. 118. The statute of North Carolina was intended to express this modern rule that interest should be allowed on money owing on all contracts from the date when the creditor was entitled to receive it. This, we think, is clearly held in Bond v. Pickett Cotton Mills, 166 N. C. 22, 81 S. E. 936. It is true that interest was not allowed in that

case on a balance which was unascertained until an accounting had been taken. But the refusal to allow interest on a balance which could only be ascertained by an accounting was placed on the express ground that the amount in defendant's hands was not a debt in the sense intended by the statute, but a trust fund which the defendant had been always ready and willing to pay as soon as the amount should be ascertained, and that therefore no default could be attributed to it. Indeed, the defendant was a mere stakeholder, having no duty of ascertaining the share of the fund in his hands due to each claimant. In the case before us the defendant denied all liability, and the jury found in effect that it owed the plaintiff on an implied contract $7,500 on June 24, 1912. Interest was therefore chargeable under the statute from that date.

The argument that interest cannot be allowed from the time when the money was due, because the jury failed to comply with the requirement that "they shall distinguish the principal from the sum allowed as interest," is rather technical than substantial. The finding that the plaintiff's services were reasonably worth $7,500, without doubt, meant that they were worth that when they were rendered, and that that sum was due to the plaintiff under the implied contract to pay him when his services were completed by the sale. Interest followed from that date as a matter of law; and it was a mere omission of the jury in failing to set it down. Surely, it cannot be necessary to try the whole case over to correct this omission. No more reasonable would it be to impanel another jury and instruct them to do the mechanical act of finding the interest. Looking through and beyond mere technicality, the case is one for emphasis to be placed on the last line of the section of the statute quoted, which requires that "the judgment and decree of the court shall be rendered according to this section"; that is, that the judgment shall be rendered so as to include interest when the statute clearly requires its allowance.

Affirmed.

DAYTON, District Judge (concurring in part and dissenting in part). I concur in the ruling of this opinion that the pleadings and evidence warranted a judgment by the court below, upon the findings of the jury, in favor of Freeman for $7,500; but I cannot agree that it was authorized to add interest thereto from a date prior to that of the judgment. The North Carolina statute cited, as I understand it, clearly requires, if interest is to be awarded, the amount thereof to be definitely determined and found by the jury, as of the date of verdict, so that the same in the court's judgment may not become part of the principal and interest be thereby compounded. It is not for the court, upon a jury trial, to determine the amount of this interest; the statute expressly requires the jury to find specifically as to it. The right of the court to instruct the jury as to its duty to ascertain and determine specifically the interest, if any, due the plaintiff, was clear, as was also its power to set aside, on motion of the plaintiff, the verdict because the jury erred in not finding interest. Under some circumstances and conditions, where no controversy exists as to the items and dates from which interest is to be calculated, before accepting the

verdict tendered by a jury for the principal sums found, the court might go so far as to send the jury back to determine the interest due; but beyond this, it seems to me, it could not go. In other words, it could not, under this statute, either add to or take away, by its judgment, from the jury finding without substituting a verdict of its own for that of the jury.

It is clear, it seems to me, that in the final analysis of this case it resolves itself into what, under common-law pleading, would be a simple action of assumpsit based alone upon the common count "for work and labor performed at defendant's instance and request." Under the clear and logical rules of that system of pleading, plaintiff would have been required, before trial, to file a specific bill of particulars of these services rendered. The pleadings in this case would seem to indicate that the code practice of the state does not require such bill of particulars, yet the evidence discloses that Freeman's services did not consist of a single act at one specific time, but embraced a number of negotiations and interviews at different times, each involving his time, labor, and probable outlay in the nature of expenses incurred. Such diversity of amounts and dates, universally arising in claims for services rendered, makes clear the obligation of the jury to ascertain the interest sum to be allowed upon the items, and illustrates how impracticable it is for the court to do so by addition to the verdict in its judgment.

It seems to be true that, under the anomalous practice of North Carolina, juries are not required to render formal verdicts, but, in lieu thereof, are subjected to answer numerous interrogatories (liable, it may be suggested in passing, to confuse them in their conclusions so as to render their findings contradictory, as most earnestly has been contended to be so in this case), and upon the answers returned the court renders judgment. For this reason, it may be contended that, because the jury in this case, in answer to one question, said the sale of the timber was made June 24, 1912, and, to another, that Freeman's services were reasonably worth $7,500, the court was justified in assuming that the jury meant the value of the services to relate to the date of sale. In my judgment such conclusion is not justified for these reasons:

First. Because the services were rendered largely at dates prior to the date of sale, and no ascertainment of the interest due therefor is intimated to have been made by the jury as of the date of sale; therefore the isolated finding of the date of sale furnishes no criterion, in the absence of a specific finding to that effect, that the jury intended interest to run from that date. Second. Because the strong presumption naturally arises that, when the question was submitted of what Freeman's services were reasonably worth, in other words, what compensation he was to be allowed by the jury, it assumed the amount to be found to relate to the time of trial and in consequence found a gross sum, including everything due him, as of that date. Third. Under such a practice, with a plain statute before him governing this matter of interest, and setting forth how it should be ascertained by the jury and not by the court, it seems to me very clear that it was the duty of the plaintiff, at the trial, to have such an issue presented

to the jury, among the others, as would have required the jury to determine what interest, if any, he was entitled to, and the specific and separate amount thereof, as the statute required, and, having failed to do this, he could not ask the court, contrary to the statute, to supply the loss, if any, sustained by reason of his own neglect in not asking for such finding on the part of the jury which could alone, under the terms of the statute, make it.

I cannot concur in the view that the objection to the court's action in this regard is technical, inasmuch as the substantial result was that the court, by assuming the sole prerogative of the jury, gave Freeman a judgment for over $9,500, notwithstanding the jury found him entitled to only $7,500. I would therefore modify and reverse the judgment of the court below, so far as it awarded the plaintiff interest on the $7,500 from June 24, 1912, awarding such interest only from the date of the rendition of the verdict, and, as so modified, would affirm it.

BOTHWELL CO. v. BICE.
BICE v. BOTHWELL CO.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1917.)

Nos. 4868, 4898.

1. EMINENT DOMAIN ⟸158—SUIT FOR ACCOUNTING—CONSTRUCTION OF CONTRACT.

Complainant and defendant were owners in common of a tract of land, which with a much larger tract adjoining, owned by defendant, was about to be condemned by the United States for use in an irrigation project. Complainant conveyed his interest in the land to defendant, pursuant to a written contract "for the sole purpose of uniting all of said interests in one general action of condemnation," defendant agreeing to pay complainant one-half the award received for the land jointly owned, deducting his pro rata share of expenses computed per acre in all the land involved. In the condemnation proceeding defendant did not have the land jointly owned valued separately, but the jury found the value of the entire tract which was paid to defendant. *Held* that, in a suit in equity by complainant for an accounting, the court was justified as against defendant in dividing the award in proportion to the number of acres in each tract.

2. EMINENT DOMAIN ⟸158—EVIDENCE—RELEVANCY.

In such suit, the court properly excluded evidence as to the comparative value per acre of the two tracts of land as not relevant to the issue being tried, which was as to complainant's proportionate share of the award.

3. ACCOUNT ⟸20(1)—REFERENCE TO MASTER—DISCRETION OF COURT.

In a suit involving an accounting, it is within the discretion of the court to refer the case to a master for that purpose.

4. INTEREST ⟸18(1)—ACCOUNTING ON CROSS-DEMANDS.

Questions of interest recoverable by each party on an accounting considered.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit in equity by Charles M. Bice against the Bothwell Company. From the decree, both parties appeal. Modified and affirmed.

Marion A. Kline, of Cheyenne, Wyo., for plaintiff.

H. B. Durham, of Denver, Colo. (Hilliard S. Ridgely, of Cheyenne, Wyo., on the brief), for defendant.

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

CARLAND, Circuit Judge. Bice, as plaintiff, commenced this action against the Bothwell Company, as defendant, for an accounting, the recovery of the amount which should be found due from defendant to plaintiff, and a reconveyance of certain land theretofore conveyed by plaintiff to defendant. There was a decree for the plaintiff, from which defendant appeals. The plaintiff also appealed on the question of the disallowance of interest prior to the decree.

[1] Counsel for defendant filed a motion to dismiss the complaint for the reason that it did not state facts sufficient to constitute a cause of action in equity. The motion was overruled, and this ruling is assigned as error. The contentions made in support of the motion may be stated as follows: (a) The contract pleaded is based upon a future contingency, viz., that the value of the land would be determined in the condemnation suit, and it never was so determined, therefore there can be no recovery; (b) the failure to determine the value of the lands in the condemnation suit was not the fault of either party, therefore the defendant is discharged; (c) the failure to determine the value of the lands in the condemnation suit was due to an act of government.

These contentions are all based upon a false premise, and therefore must fail. The value of the lands jointly owned and "a large tract of adjacent land, which is also to be condemned in the same manner," was determined by the jury, and the plaintiff conveyed to defendant his interest in the lands jointly owned "for the sole purpose of uniting all of said interest in one general action of condemnation." The value of the jointly owned lands was not determined separately by the jury, but under the facts in this case the failure to have the value of the jointly owned lands determined separately was the fault of the defendant, and of course the mere form of the verdict cannot be said to be an act of government in the sense in which counsel uses that term. The motion to dismiss was properly denied. Laying aside for the moment the accounting feature of the action, the facts are as follows: October 11, 1906, plaintiff and defendant entered into the following contract:

"It is hereby stipulated and agreed that whereas, the undersigned each own an undivided one-half interest in and to the following described lands in Natrona county, Wyoming, to wit: Lot 1 of section 1, township 29 north, of range 85 west, and lots 1, 2, 3, and 4, and the east half of the southwest quarter, and the west half of the southeast quarter of section 31, in township 30 north, of range 84 west, and lots 2, 3, and 4 of section 6, township 29 north, of range 84 west of the sixth principal meridian, containing 617.17 acres—said land being within the basin of the Pathfinder reservoir of the north Platte project of the United States Reclamation Service, and condemnation proceedings are to be instituted by the United States government to secure said lands for said reservoir purpose; and whereas, the Bothwell Company owns a large tract of adjacent land which is also to be condemned in the

same manner and for the same purpose by the said government: It is hereby agreed, for the sole purpose of uniting all of said interests in one general action of condemnation, that Charles M. Bice shall deed and convey to the Bothwell Company his one-half interest in said land above described, and the said the Bothwell Company hereby agrees to pay to said Bice one-half of the award received as compensation for his interest in said land, after deducting the pro rata shares of expenses of said suit per acre on all lands involved in said proceedings, including all attorneys' fees, witness fees, and all expenses of every kind incurred on account of said condemnation suit until said award shall be actually paid by said United States government. Should said government abandon the said project, or fail to appropriate or condemn said land, the said Bothwell Company hereby agrees to reconvey said land to said Bice free and clear of all incumbrances upon demand."

In pursuance of the contract plaintiff conveyed his undivided one-half interest in the lands described therein to defendant. In 1909 the United States began proceedings against the Bothwell Company to condemn 497.74 acres of the land mentioned in the contract, together with other lands of defendant, amounting in all to 2,893.66 acres. November 26, 1909, a jury in the condemnation proceedings awarded to defendant the sum of $108,250 for the taking of said lands. January 10, 1910, the United States paid to defendant the amount awarded, except the sum of $5,000, retained in the registry of the court to satisfy an attorney's fee for services rendered in behalf of the defendant in the condemnation proceedings; a lien having been duly filed. January 27, 1910, defendant paid to plaintiff $4,000 out of the condemnation award. November 17, 1915, the amount retained to pay attorney's fees was paid out in satisfaction of a judgment obtained by the attorney for the defendant in the condemnation proceedings. The trial court found that the value of the tract of 497.74 acres, as determined by the jury, was $18,625.50, of which plaintiff was entitled to the sum of $9,312.75, less the $4,000 already paid as above stated, and less plaintiff's pro rata share of the expenses of the condemnation proceedings.

It does not appear from the record how the trial court reached its conclusion that the value of the 497.74 acres, as found by the jury, was $18,625.50. It is insisted, however, by counsel for plaintiff, that in view of the fact that the trial court, in approving the statement of the evidence, stated that there was other evidence introduced, we must presume that there was evidence upon which the court based its finding. A court ought never to knowingly deceive itself. The verdict of the jury established the value of the lands taken. That verdict could not be altered or changed by evidence. The memorandum opinion of the trial court, which may be looked to for information, appears in the transcript, and it appears from the memorandum that the trial court divided the amount of the award by the number of acres condemned and thus found the average price per acre. This average price for 497.74 acres produced the value found by the trial court.

This is an action in equity, having for its object the recovery of plaintiff's share of the condemnation award. It is not an action for damages, or for the value of the land, but for plaintiff's portion of the award, as fixed by the jury. We are of the opinion, therefore, that it is entirely proper for a court of equity, in order to accomplish sub-

stantial justice, to proceed as the trial court did to ascertain the proportion of the award to which plaintiff was entitled, having in view the language of the contract, which provided that the sole purpose of the conveyance of the undivided interest of plaintiff to defendant was in order that all the land to be condemned could be proceeded against in one action, and also having in view the fact that the defendant, having charge of the proceedings as the owner of the land, might have had the land jointly owned valued separately, as was done in regard to what is called in the record the Kelly tract. The contract provided that the plaintiff should pay his pro rata share of the expenses of the condemnation suit per acre. If the defendant was to obtain more per acre for his individual land than plaintiff for his interest, why was the plaintiff to pay an equal share of the expense? To reach any other conclusion than as here indicated would turn the plaintiff out of a court of equity without any relief, because he is entitled to what the contract provided for or he is not entitled to anything. We therefore find no error in the method by which the trial court ascertained plaintiff's proportion of the condemnation awarded.

It is further contended that the trial court erred in not construing the contract to mean that the plaintiff was to receive one-fourth of the award received for the 497.74 acres, as compensation for his interest in the lands jointly owned. This contention is based upon the language of the contract, which reads, "one-half of the award received as compensation for his interest in said land." In other words, it is claimed that this language means that plaintiff was to receive only one-half of what the jury should award as compensation for plaintiff's interest, and not one-half of the total amount awarded for the 497.74 acres. Such reasoning would result in holding that the plaintiff conveyed his undivided one-half interest in the land to defendant without any consideration, other than a one-fourth share of the award received for the 497.74 acres, and from that share should also be deducted plaintiff's pro rata share of the expense of the condemnation suit. Such a contention as this would tend to cast a doubt upon the good faith of counsel. It is not only unjust, but technically wrong.

[2] At the trial counsel for defendant sought to show by the witness Albert J. Bothwell the character of the land in question at the time the condemnation suit was brought, and as to whether there was any improvements upon the land, and, if so, by whom they were constructed; also as to the value of the land taken in the condemnation suit which the Bothwell Company owned, as compared with the 497.74 acres in which the plaintiff was interested. The questions which sought to elicit this testimony were objected to as incompetent, irrelevant, and immaterial, and not within the issues being tried. This objection was sustained. We do not think the trial court erred in so ruling. The action was brought for plaintiff's proportion of the condemnation award to which under the contract between the parties he was entitled. To again litigate the value of the land in controversy would be to substitute the finding of a jury in this case for that of the jury in the condemnation suit, with no probability of reaching a more just result than that adopted by the trial court. As we have said before, the

action was not for damages, nor for the value of the land, but for plaintiff's proportionate share of the award.

[3] The court, by the method which it adopted for ascertaining plaintiff's proportionate share of the award, did not amend or modify the contract, nor amend or modify the verdict of the jury. Of the land conveyed by plaintiff to defendant pursuant to the contract, there was 119.43 acres which were not condemned, and a reconveyance of plaintiff's interest therein in said tract is asked. Defendant does not dispute plaintiff's right to a reconveyance, and by his answer made tender of such reconveyance, conditioned upon the plaintiff paying into the court for the use of defendant the sum of $65 as plaintiff's proportion of the taxes paid by the defendant from time to time upon said land. The plaintiff in his complaint prayed for an accounting against the defendant for the rents and profits which defendant had received from the tract not condemned. Therefore, on the face of the pleadings, the only matter for an accounting was the expenses of the condemnation proceedings and the rents and profits, if any, received by the defendant from the 119.43 acres.

Counsel for defendant contend that the trial court erred in sending the case to a master on these questions. The trial court could have made the accounting itself, or in the exercise of a sound discretion could have referred the same to a master. There was no error in the court's action. The accounting before the master took a much wider range than any issue made by the pleadings. Counsel for defendant assigns as error the refusal of the court to allow defendant to set off against plaintiff's claim one-half of the sum of $1,750 spent for improvements upon the land jointly owned, consisting of cultivation and fencing. The master ruled, and his ruling was affirmed by the trial court, that the defendant had had the use of the land for 20 years, had harvested alfalfa therefrom, and that such use of the land and profits received would offset the amount expended by the defendant in improving the land.

If the inquiry could be made as broad as to cover a period of 20 years and all the lands, we see no error in the action of the trial court. But this was a suit for an accounting upon a specific contract. The improvements were all on the lands many years prior to the date of the contract. They were made by the defendant for its own benefit, without the knowledge or consent of plaintiff as shown by the testimony. They are not mentioned in the contract, nor in the pleadings. The ruling of the master and trial court were correct for this reason.

[4] The defendant should not be allowed interest upon the expenses paid in the condemnation suit, nor for amounts expended in the improvement of the Bice-Bothwell tract. As to the items of $250 and $300, paid John W. Lacy on October 9, 1906, and December 13, 1907, respectively, we think the defendant was entitled to receive from plaintiff interest at 8 per cent. on plaintiff's proportionate share of these items to January 7, 1910, the date when the defendant received the condemnation award. On the appeal of the plaintiff, we are of the opinion that the plaintiff should receive interest on the amount due at 8 per cent. from November 17, 1915, the date when the question of the

attorney's fee due John W. Lacy was settled. There was no excuse for the defendant to retain the money after that date.

As thus modified as to the question of interest, the decree below is affirmed.

METROPOLITAN CASUALTY INS. CO. OF NEW YORK v. JOHNSTON.

(Circuit Court of Appeals, Third Circuit. November 30, 1917. Rehearing Denied January 8, 1918.)

No. 2252.

1. INSURANCE ⊜612(2)—ACCIDENT INSURANCE—NOTICE.
   Provisions in accident policies requiring notice to the insurer within a fixed time or reasonable time are valid, being employed by the insurer to protect itself from fraudulent claims, and must be complied with as a condition precedent to recovery.
2. INSURANCE ⊜539(1)—ACCIDENT INSURANCE—NOTICE—PROVISION.
   Where an accident policy requires notice of the accident to be given in a reasonable time, the question of what is a reasonable time depends on the circumstances of the case and the opportunity for giving notice which the circumstances afford to one on whom devolves the duty of giving it.
3. INSURANCE ⊜646(9)—ACCIDENT INSURANCE—NOTICE—PROVISIONS.
   Where an accident policy required notice of accident to be given within 21 days, unless not reasonably possible, in which case notice should be given as soon as reasonably possible, the insured or beneficiary of the policy has the burden of proving compliance with the provision, or showing an excuse for failure to give notice within the time limited, and that it was given as soon as reasonably possible.
4. INSURANCE ⊜668(14)—ACCIDENT INSURANCE—JURY QUESTION.
   Where the facts are undisputed, and no contradictory inference can be drawn, the question whether one insured under an accident policy which required giving of notice of accident within 21 days, if reasonably possible, complied with the provision, is for the court.
5. INSURANCE ⊜668(14)—ACCIDENT INSURANCE—NOTICE—JURY QUESTION.
   In an action on an accident policy, where it appeared that the accident which finally resulted in insured's death deranged his mind, the question whether it was reasonably possible for the insured, or his wife, the beneficiary, or another member of his family, to sooner give notice of the accident, *held* for the jury.
6. APPEAL AND ERROR ⊜1002—REVIEW—VERDICT.
   A verdict on evidence from which conflicting issues can be drawn is conclusive.

McPherson, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Action by Emma E. Johnston, individually and as executrix of the last will and testament of Henry Johnston, deceased, against the Metropolitan Casualty Insurance Company of New York. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wicoff & Lanning, of Trenton, N. J. (Heyn & Covington and George B. Covington, all of New York City, of counsel), for plaintiff in error.

J. Raymond Tiffany, of Hoboken, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action on a policy of accident insurance. While the errors assigned cover the whole range of the trial, the single question urged on review is—Whether notice of the accident was given the insurance company within the time stipulated in the contract of insurance, and whether, accordingly, the trial court erred in refusing a motion for binding instructions in favor of the defendant.

A policy of accident insurance, issued by the defendant company to Henry Johnston, was in force on Feb. 28, 1914, when Johnston fell upon a sidewalk and sustained injuries to his head. On Aug. 30, 1915, he died, and on Sept. 4, following, Emma E. Johnston, his widow and executrix, notified the insurance company of the accident and made claims for indemnities under the policy. The insurance company, considering notification of an accident 18 months after its occurrence to be flagrantly violative of the provision of the policy respecting notice, refused payment, whereupon, the plaintiff brought this suit.

The indemnities which the insurance company had stipulated to pay in the event of accident to the insured were two kinds, namely, weekly indemnities for disabilities payable to the insured, and death indemnity payable to his wife. Action was therefore brought on the double undertaking of the insurance company by the wife of the insured in her dual capacity of executrix and beneficiary.

As the proceedings at the trial followed the double aspect of the cause of action, the court instructed the jury that if they found for the plaintiff they should render two verdicts in her favor, one in her capacity of executrix and the other in her individual capacity. The evidence, so far as we can discern, was of a character that would support one verdict as well as the other, yet the jury, curiously enough, made a discrimination and rendered a verdict against the plaintiff as beneficiary and for the plaintiff as executrix of the insured.

The plaintiff was apparently content with the opposing verdicts. The defendant insurance company was not. It sued out this writ of error, but directed it solely to that part of the judgment which holds it liable to the executrix for weekly indemnities covering the period from the date of the accident to the date of the death of the insured.

The merits of the controversy were embraced in the issues—Whether there was an accident, and if so, whether the disabilities and subsequent death of the insured were solely and directly due to the accident independently of all other causes. With these issues, the defendant concedes, we have nothing to do, as they were resolved by the verdict of the jury in favor of the plaintiff. We are concerned only with the question—Whether the plaintiff was precluded from maintaining this action in either of her capacities, because of the failure (astonishing as it at first appears) to give the insurance company notice of the accident until 18 months after its occurrence.

[1] The rights involved in this litigation are contractual, and arise from an agreement between the parties. This agreement is embodied in the policy of insurance. There the insurer undertook to indemnify

the insured for the consequences of accidents, and the insured undertook to notify the insurer of any accident upon which he would make claim for indemnity. The time within which such notice should be given was indicated in the policy and was agreed to by the insured. The giving of notice within the time stipulated therefor became an undertaking on the part of the insured, the performance of which is regarded by the law as an absolute condition precedent to the enforcement of the insurer's liability.

The provision of the policy is as follows:

"Written notice must be given the company * * * of any accident or injury for which a claim is to be made, * * * within twenty-one days from the date of the accident or injury, *unless* the giving of such notice within such time *shall not be reasonably* possible, *in which event* such notice must be so given *as soon as reasonably possible.*"

In inserting this provision in the policy of insurance, it is evident the insurer considered it a substantial feature of the contract and intended that its liability for indemnities should be conditioned upon compliance with it. The law views such provisions as reasonable means to be employed by insurance companies in protecting themselves against fraudulent claims, and requires that they be complied with in the manner and within the time agreed upon as a condition precedent to an action on the policy. But under this rule there frequently arise questions as to what constitutes compliance with such provisions, and courts are called upon to interpret their meaning. So, in this case, it becomes necessary to construe the provision in order to determine whether notice was given in compliance with its terms. The plaintiff urges that the insured, though he gave no notice of the accident, was excused for not complying with the provision because of a mental condition occasioned by the accident, which made compliance impossible. On the other hand, the defendant contends that the insured was not so excused, or, if he was, then the duty of complying with the provision devolved upon his wife, or if not upon her, then upon her niece, who were persons next to the insured and in a measure conversant with the contract of insurance and of the insured's undertaking to give notice.

These contentions, considered with reference to the evidence, raise no new questions of law. The novel feature of the case is in the application of the law to a notice of the unusual character of the one here given 18 months after the accident.

The manifest object of providing in a contract of accident insurance for notice to be given within a time, either precisely prescribed or generally defined, is to afford the insurer an opportunity promptly to inquire into the accident and to take such steps for its protection as can only be taken shortly after its occurrence. To attain this end different insurance companies write different provisions in their policies according to their varying notions of what is necessary for their protection. Some require that the notice shall be given within a specified number of days after the accident, others that "immediate notice" be given, and still others that notice be given "as soon as possible," or "as soon as reasonably possible."

Notice within a given number of days is held by some courts, though harsh, to be unconditionally binding upon the insured, even though the

giving of such notice be made impossible by the very accident insured against. Whiteside v. North American Accident Ins. Co., 200 N. Y. 320, 93 N. E. 948, 35 L. R. A. (N. S.) 696; Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160, 164; Heywood v. Maine Mutual Accident Ass'n, 85 Me. 289, 27 Atl. 154. Other courts interpret like provisions as made by the parties in full contemplation of the possibility of the insured being rendered incapable of giving the prescribed notice by the accident insured against, and follow what now appears to be the rule, that, where, because of circumstances surrounding the accident, including the mental condition of the insured as a consequence of the accident, the giving of notice within the time specified becomes impossible, it will be excused, and notice given within a reasonable time after the removal of the obstacle, will be sufficient.

[2] A discussion of these cases appears in a note to Jennings v. Brotherhood Accident Co. (44 Colo. 68, 96 Pac. 982) as reported in 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109, and in a note to Hilmer v. Western Travelers' Accident Ass'n (86 Neb. 285, 125 N. W. 535) as reported in 27 L. R. A. (N. S.) 319. As the provision in controversy does not unconditionally limit the giving of notice to a given number of days, some of the cases cited bear upon the question under discussion only as they show the drift of judicial decision from the harsh rule requiring compliance with the provision without regard to the ability of the insured to comply with it, to the more liberal rule that such provisions are made and agreed to in contemplation of the impossibility of literal compliance. Other cases cited bear directly upon the matter under discussion, in that they contain judicial interpretations of the expressions, "immediate notice," and "notice as soon as possible," found in many policies. "Immediate notice" is not construed to mean notice to be instantly given, but is construed to mean "reasonable notice," or notice to be given within a reasonable time. In this regard the defendant concedes that a provision for "immediate notice" is identical in point of law with the provision of the policy in this case requiring (in the last event) that notice "be given as soon as reasonably possible." Foster v. Fidelity, etc., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833. The legal meaning of both is that notice shall be given within a reasonable time. What is a reasonable time depends upon the circumstances of the case and upon the reasonable opportunity for giving notice which the circumstances afford the one upon whom devolves the duty of giving it.

See Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 346, 347, 22 Sup. Ct. 833, 46 L. Ed. 1193; Travelers' Ins. Co. v. Nax, 142 Fed. 653, 73 C. C. A. 649; National Surety Co. v. Western Pacific Ry. Co., 200 Fed. 675, 119 C. C. A. 91; People's Mutual Accident Ass'n v. Smith, 126 Pa. 317, 17 Atl. 605, 12 Am. St. Rep. 870; Lyon v. Assur. Co., 46 Iowa, 631; Roseberry v. American Ben. Ass'n, 142 Mo. App. 552, 121 S. W. 785.

[3] The provision in dispute contains two binding clauses and one saving clause. As we construe it, the first requires written notice of an accident within twenty-one days from the date of its occurrence. By this clause the insured is bound to give notice within the time specified, unless, as provided by the saving clause that follows, the

giving of notice within that time shall not be reasonably possible. In that event, the concluding clause binds the insured to give notice as soon thereafter as is reasonably possible. In suing on a policy containing such a provision, an insured, or his legal representative, has the burden of showing performance of this condition precedent. He must show that notice was given within twenty-one days, or, failing in this, he must excuse his failure by showing that it was not reasonably possible for him to give notice within that time, and that he has complied with the remaining clause by giving notice as soon thereafter as was reasonably possible. Whether notice was not given within the initial limit of twenty-one days because it was not reasonably possible, and whether it was given as soon thereafter as was reasonably possible, this being the ultimate limit of the provision, are clearly questions of fact and ordinarily are questions for the jury. Whether such questions are for the jury or the court is determined by familiar rules. Travelers' Ins. Co. v. Nax, 142 Fed. 653, 660, 73 C. C. A. 649.

[4] If the facts are not controverted, or, if from proven facts no doubtful inferences can be drawn as to the reasonable impossibility of the insured giving notice within twenty-one days, or as to whether he gave notice as soon thereafter as was reasonably possible, then, of course, there is nothing to submit to the jury and the court may hold as a matter of law that the condition precedent has or has not been performed. But, if the facts and circumstances are controverted, and are such as to sustain an inference that it was not reasonably possible for the insured to give notice within twenty-one days, and that the notice thereafter was given as soon as was reasonably possible, the question whether the insured has performed the condition precedent to the enforcement of the insurer's liability for indemnity is for the jury. The language of Mr. Justice Paxson, in speaking for the Supreme Court of Pennsylvania, in People's Mutual Accident Ass'n v. Smith, 126 Pa. 317, 17 Atl. 605, 12 Am. St. Rep. 870, is peculiarly appropriate to this discussion. He said:

"A person might be so injured as to be physically unable to give the notice for weeks. Hence it is that such questions are referred to the jury, to say whether, under all the circumstances, there has been an unreasonable delay in giving notice."

See National Surety Co. v. Western Pacific Ry. Co., 200 Fed. 675, 681, 119 C. C. A. 91; Travelers' Ins. Co. v. Nax, 143 Fed. 653, 73 C. C. A. 649; Hughes v. Central, etc., 222 Pa. 462, 71 Atl. 923; Everson v. General, etc., 202 Mass. 169, 88 N. E. 658. ("* * * as soon as possible").

[5, 6] Applying these observations to the facts of this case, startling as these facts are, we shall first inquire whether a right of action on the policy by the personal representative of the insured was lost by the failure of the insured to give notice at any time. This inquiry can readily be disposed of. The evidence upon which the jury found that injury to the insured and his death were due solely to the accident was sufficient to sustain a finding that the accident created a mental condition in the insured which made compliance with the pro-

vision of the policy impossible. The trial court squarely charged the jury, that if they found it was reasonably possible for the insured to give notice at any time, the plaintiff could not recover. The verdict was for the plaintiff, hence the verdict was a finding that it was not reasonably possible for the insured, in view of his mental condition, to give notice at any time after the accident. By this finding, the insured was excused.

The next questions are—Whether the undertaking of the insured to give notice of the accident devolved upon his wife when he became incapable of performing it, and whether the court should have decided that question as a matter of law.

The defendant contends, upon authority of a stray dictum in Travelers' Ins. Co. v. Nax, 142 Fed. 653, 657, 73 C. C. A. 649, that the provision of the policy required notice to be given by someone on behalf of the insured within the time prescribed, if the insured himself was not able to give the notice. The controlling fact of the Nax case was that the insured was in full possession of his faculties for a long period after the accident and could have given the notice, and the point of decision was that being able to give notice, he was bound to give it, and that his failure barred recovery on the policy by his personal representative. Manifestly the Nax case does not rule this case.

The evidence upon which the defendant bases its contention that the wife of the insured was bound to give the notice required of him is meagre and unsatisfactory. The evidence tends to prove that Johnston never spoke of his accident insurance after the accident; that Mrs. Johnston knew that her husband carried a policy of accident insurance and that he kept it in a safe deposit box, the key to which was accessible; that she did not know the name of the company which issued the policy; that in September, 1914, about 7 months after the accident, there was received in her husband's mail a renewal certificate in the form of a receipt for a renewal premium of $40.00, then due on the policy; that, accepting this certificate as a notice as well as a receipt, Mrs. Johnston sent her check for $40.00 to the insurance company, enclosed in a letter showing that the check was in payment of a premium on the policy in suit; that the letter and check had been written by her niece and that she signed them at her request; and that she was wholly ignorant of the terms and conditions of the policy until after her husband's death, when she found the policy and promptly gave notice of the accident.

From this testimony, it was possible for the jury to find two facts, first, that Mrs. Johnston knew of the existence of the policy, and second, that she was ignorant of its terms. The trial court refused to find as a matter of law that Mrs. Johnston knew the terms of the policy, and refused to hold, therefore, that she was bound by the undertaking of her husband to give notice of the accident, as a condition precedent to her action on the policy. What the court did was to leave the question of Mrs. Johnston's knowledge of the terms of the policy to the jury, under instructions that if they found that she knew the terms of the policy in the life time of her husband, it was her duty to give the notice, and failing so to do, she could not recover.

The jury rendered a verdict for Mrs. Johnston as executrix of her husband's will, which was a finding that she did not know the terms of the policy. Clearly no duty devolved upon the wife to perform an undertaking of her husband to which she was not a party and of which she was ignorant. Assuming without deciding, that such a duty devolved upon her had she knowledge of her husband's undertaking, the finding by the jury that she had no such knowledge, disposed of any question of her duty and left her free to maintain this action.

The contention that the action was barred because the niece failed to give the notice which the policy required of the insured, is no stronger than the case made against the wife; for, while the evidence showed that the niece had a wider knowledge of the business affairs of the insured, it was sufficient for the jury to find that she also was ignorant of the terms of the policy.

In showing knowledge of the terms of the policy on the part of the wife and the niece, the defendant laid stress, with no little force, upon a phrase appearing in the renewal certificate received after the accident. In this certificate were printed in conspicuous type the words —"Notify the Company at Once in Event of Accident." This direction to the insured, coming it is assumed within the observation of the wife and niece, is persuasive of the defendant's contention that they were thereby substantially informed of the terms of the policy, yet, opposed to this evidence, there was the testimony of the wife and niece that they were ignorant of its terms, and the jury, by accepting, reconciling or disregarding the testimony as they chose, found that the wife and niece did not know the terms of the policy.

The finding of the jury was in effect, that it was not reasonably possible for the insured to give notice of the accident because of his mental incapacity occasioned by the accident; and that it was not reasonably possible for the wife and niece to give notice for him, because of their ignorance of the requirement until after his death, when, the obstacle of their ignorance being removed, notice was given as soon as reasonably possible. This finding was upon a question which the court could not avoid submitting and was sustained by one view of the evidence. It is not within our province to say that the finding was wrong. It, therefore, concluded the defendant.

The judgment below is affirmed.

McPHERSON, Circuit Judge (dissenting). I agree with nearly all that has been so well said by Judge WOOLLEY, but I regret to find myself obliged to disagree at a vital point. In my opinion the company was entitled to binding instructions, for the reason that the wife and the niece should be conclusively charged with knowledge of the company's provision for notice, and should bear the consequence of their failure to comply until nearly a year thereafter. The insured was injured in February, 1914; in September his wife and his niece received and read the company's letter concerning the renewal of the policy, the letter bearing the words in large type "Notify the Company at Once in Event of Accident," and they acted on the letter by paying the premium and thus extending the policy for another year. The insured did not die until August 30, 1915, but no notice of the

accident was given until September 4, a year and a half after the fall, and almost a year after the wife and the niece had learned that prompt notice of the injury was required. I do not see how a court could permit a jury to find that they did not know the contents of the letter, when concededly they opened it and read it and sent a check to the company in compliance with its contents, even referring to the policy by its number and the name of the insured. Those who receive and act upon a writing must be held to know its terms, just as a man cannot be allowed to say that he looked, but did not see a train, although he stepped directly in front of a moving car.

Moreover, no one can doubt that the wife and the niece had a right to make the payment, although they were assuming to act for the insured without his express authority, and no one can doubt that they would have been justified also in giving notice of the accident on his behalf. The closeness of the family relation is a sufficient reason, coupled with his inability to act for himself. But if the wife and the niece had these implied rights, I think they were impliedly bound to discharge the corresponding duties. If they stood in the shoes of the insured, and were protecting the interest that he could not protect for himself, why were they not bound by the same duty that would have bound him—of course so far only as their actual or presumed knowledge extended? In a word, the evidence seems to me conclusive that they knew what was conspicuously before their eyes, and since they knew it I think they were bound to act thereon. No doubt they had a reasonable time to act after the knowledge reached them, but under the facts of this case a year is not reasonable, and I think the court should have said so as a matter of law.

NOYES v. WOOD et al.*

(Circuit Court of Appeals, Ninth Circuit. November 19, 1917.)

No. 2593.

1. BANKS AND BANKING ⊂⊃91—REPAYMENT OF LOANS—ACCEPTANCE OF BANK'S STOCK.

   A bank, although without power to purchase its own stock, may lawfully accept such stock in repayment of a loan which the directors deem precarious.

2. BANKS AND BANKING ⊂⊃54(2)—ILLEGAL PURCHASE OF STOCK—LIABILITY OF DIRECTORS.

   Evidence *held* insufficient to establish the good faith of the directors of a bank and exonerate them from personal liability for misappropriating the bank's funds, where, although it was without power under its charter to purchase its own stock, its funds were in fact used, although indirectly, to pay for the stock of a stockholder.

3. BANKS AND BANKING ⊂⊃54(2)—MISAPPROPRIATION OF FUNDS—PURCHASE OF STOCK FROM CAPITAL.

   A writing by which a member of a partnership, whose business was taken over by a newly organized bank, agreed to take stock in the bank for his share of the firm's assets, *held* to bind him as a stockholder, and a transaction by which he was paid cash in lieu of the stock, after he had served as cashier of the bank and knew that he was carried on the

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

*Rehearing denied February 11, 1918.

books as a stockholder, *held* an illegal diversion of the funds of the bank, which a subsequent receiver was entitled to have set aside.

4. BANKS AND BANKING ⊂=77(4)—LIABILITY OF DIRECTORS—ADVERSE INTEREST IN TRANSACTION.

The receiver of an insolvent bank *held* entitled to recover from the directors damages sustained by the bank by reason of the purchase from a partnership, of which two of the directors were members, at face value, of assets which proved to be worthless, and which were known by the directors at the time to be of doubtful value.

5. BANKS AND BANKING ⊂=54(2)—LIABILITY OF DIRECTORS—MISAPPROPRIATION OF FUNDS.

The payment by a bank of accrued interest on notes purchased from a partnership, not provided for by the written contract between the parties, *held* an illegal diversion of the funds of the bank, for which the directors participating were liable.

6. BANKS AND BANKNG ⊂=54(2)—LIABILITY OF DIRECTORS—MISAPPROPRIATION OF FUNDS.

A bank bought stock of another bank, and at the same time gave an option to another to purchase the stock within a year at the same price. At the end of the year the option was exercised by the holder and another, both of whom were then directors, and with the concurrence of the other directors the stock was transferred to them without the payment of any interest to the bank, which in the meantime had received no dividends on the stock. *Held*, that all the directors participating were liable to the receiver of the bank for legal interest on the investment so carried by it for the sole benefit of the purchasing directors.

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

Suit in equity by F. G. Noyes, as receiver of the Washington-Alaska Bank, against R. C. Wood, John L. McGinn, Roy Brumbaugh, J. A. Jesson, James W. Hill, E. R. Peoples, J. A. Healey, John A. Clark, and George Preston. Heard on cross-appeal by the receiver. Decree modified.

For prior opinion on defendants' appeal, see 245 Fed. 46, — C. C. A. —.

Fernand De Journel, of San Francisco, Cal., and O. L. Rider, of Vinita, Okl., for appellant.

John L. McGinn and A. R. Heilig, both of Fairbanks, Alaska (Metson, Drew & Mackenzie, Curtis Hillyer, Chas. J. Heggerty, and E. H. Ryan, all of San Francisco, Cal., of counsel), for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a cross-appeal; the original appeal being No. 2528, Jesson et al. v. Noyes, as Receiver of the Washington-Alaska Bank, reported in 245 Fed. 46, — C. C. A. —, to which reference may be had for the general nature of the suit. By this appeal the receiver asks review of certain findings and conclusions made by the lower court in respect to the purchase of certain shares of bank stock, referred to as the Strandberg, Johnson, and McGinn stock, respectively, and also challenges the accuracy of certain conclusions of law and of the decree made upon the facts as found.

The substance of the finding of the court with relation to the purchases of the stock referred to is as follows:

The board of directors of the bank required monthly statements showing the condition of the bank, and on July 13, 1908, considered refunding to those who wished to give up their stock, and thereafter numerous surrenders were made by stockholders. Stock taken back by the bank was charged to treasury stock. On November 18, 1908, the stock of Strandberg Bros., 100 shares, Emma Strandberg, 10 shares, and Johnson, 10 shares, of an aggregate par value of $12,000, was taken up by the bank in part payment of a loan of $15,000 that the bank had previously made to the firm of Strandberg & Johnson. The bank was also paid at that time $4,000 in cash on account of the loan. The court regarded this transaction as the taking of stock for a pre-existing debt rather than as a purchase of stock by the directors, and held that when the transaction was had the directors acted in good faith and in the belief that the loan to Strandberg was precarious.

McGinn owned 100 shares of stock, of the par value of $10,000, and on October 13, 1910, demanded the right to inspect the books of the bank, and threatened that, unless he was given such right immediately, he would apply for an order permitting the examination and for the appointment of a receiver. The court found that the directors, fearing that the information obtained by an investigation would be used by McGinn in promoting the interests of a rival bank, and that if litigation were started it would impair confidence, authorized the cashier to lend a purchaser enough money to pay for McGinn's stock; that one of the directors said that he had a purchaser who would buy the stock for $6,000, but that the money would have to be borrowed; that, the matter being urgent, the cashier bought the stock in his own name, and gave his note to the bank for the purchase price thereof, and paid to McGinn $6,000, the proceeds of the note, for 100 shares of stock; that thereafter, about October 25, 1910, the cashier, without the knowledge of the directors, canceled the note, charging the amount thereof to the bank, and surrendered it to the bank; and that thereafter the bank held the stock as treasury stock.

The court found generally that, when stock was taken back by the bank, the amount paid was either turned over in cash or notes held by the bank or canceled and surrendered by the stockholders, that there was no surplus or undivided profit against which the account could be charged, and that the directors acquiesced in the stock surrenders, and in some instances expressly approved the same. The court exonerated Jesson, Hill, and Peoples of all liability connected with the purchase of the Strandberg and Johnson stock, and dismissed the appellant's action with relation thereto, and also appellant's action for recovery against the appellees Jesson, Brumbaugh, Clark, Healey, and Preston, directors at the time of the purchase of the McGinn stock.

The evidence upon which the findings rest shows that on November 5, 1908, the executive committee of the bank agreed to lend Strandberg Bros. $15,000 on the security of 110 shares in the Fairbanks Banking Company and notes aggregating $2,500. The directors approved this resolve on November 12, 1908. Strandberg and Strandberg Bros. and Johnson made a note to the bank for $17,050, dated November 5, 1908, due May 31, 1909, and $15,000 as the proceeds of

the note were credited to Strandberg Bros. and Johnson, and the stock placed as collateral. It does not appear definitely what day the note was executed, but it would seem to have been about November 12th, or about six days before the executive committee discussed the matter of taking over the Strandberg stock, with a view of applying the proceeds to take up the loan of Strandberg Bros. On November 19th the stock was taken up, $4,000 was paid, and the note canceled and surrendered, and the stock was charged to the treasury stock account, and the deposit account of Strandberg Bros. and Johnson was credited with $15,000, which the court finds "subsequently was withdrawn by them." Afterwards, November 25th, the deposit account of Emma Strandberg was credited with $1,000, par value of her stock, and her 10 shares were canceled, charged to treasury stock, and the amount so credited to her account was by her subsequently withdrawn.

The history of the surrender of the McGinn stock is as follows:

Prior to October 12, 1910, McGinn, who had been a director of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, and an attorney for the bank, notified the vice president and manager that he intended to examine the affairs of the bank and would sell his stock for $6,000. The court found that McGinn, who was at that time an owner in the First National Bank, a rival of the Washington-Alaska Bank, threatened the officers of the Washington-Alaska Bank by telling them that an examination would disclose matters which would be of advantage to the First National Bank and harmful to the Washington-Alaska Bank, and that this threat alarmed the directors of the Washington-Alaska Bank, and that thereupon the transaction referred to was entered upon. The court finds that these matters were told to the directors and at a meeting of October 12, 1910, the directors authorized a loan "to the party to whom McGinn would sell and retain the stock in the bank as collateral," and that, if necessary to prevent action by McGinn, the cashier, Hawkins, should be loaned the money to pay for the McGinn stock, and the stock should be held as collateral for the loan; that when the prospective purchaser could be communicated with a new loan could be made to him and the stock issued to such purchaser and be held by the bank as collateral security for such new loan. The cashier borrowed $6,000, bought the stock, made his note to the bank, and thereafter canceled his note and returned the stock to the bank without any knowledge on the part of any of the directors until after the bank was closed. It is found that the directors acted in good faith in this matter and believed, when they bought the stock, that it was worth more than $6,000, and that if McGinn had been permitted the right claimed by him as a stockholder, and examination of the bank had followed, irreparable damage would have ensued.

The Strandberg stock transaction is not clear to us, and the briefs of counsel on the respective sides tell us that the evidence of the bookkeeping of the matter is indefinite. If the lower court was right in finding that the deposit of $15,000 to the credit of Strandberg Bros. and Johnson was subsequently withdrawn by them, it would seem that they received that sum from the funds of the bank and also their can-

celed note for $15,000, without consideration other than the stock which they turned over of the value of $11,000 and $4,000, which they paid in cash, the question then occurs: Why, if, as appellee contends, the object of the purchase by the bank was to cancel the debt due by Strandberg Bros. and Johnson, was the $15,000 put to their credit, and why were they allowed to draw it out? If the stock was charged, as it was apparently, to treasury stock, the cash ought to have been charged to cash. The cancellation of the note would require that the loan account should be balanced by a credit thereto; but, again, if the stock sale and the cash took up the loan, yet the $15,000 was withdrawn, it is hard to see what benefit accrued to the bank. Appellee argues that the statement just referred to which appears in the record is evidently a mistake, and argues that when the amount of $15,000 was credited to the Strandberg account the deposit account must have been charged with the amount in payment of the outstanding note, and that on the surrender of the stock the bills receivable account must have been credited with $11,000 and the treasury stock account charged with $11,000, and the bills receivable account credited with $4,000 cash and the cash account charged with $4,000.

[1] If the position of appellant is correct, the transaction discloses glaring wrongdoing, while if appellees' solution is right the court was justified in concluding that the directors acted in good faith and in the belief that it was a proper way to protect the bank as against what they looked upon as a precarious loan. But in the absence of definite evidence to demonstrate clearly that the appellant's inferences are sound, we must hold that the proof fails to overthrow the conclusion of fact which accords with the presumption of integrity, and not chicanery, on the part of those in charge of the affairs of the bank. Good faith and honesty being therefore presumed, the transaction became one where the bank received its own stock in payment of a secured debt owing to it, the directors believing the taking to be reasonably necessary to prevent loss. To this we believe there was no legal objection, notwithstanding the fact that the corporation had no power to purchase its own shares. 7 R. C. L. 533; Barto v. Nix, 15 Wash. 563, 46 Pac. 1033.

[2] But we find ourselves unable to sustain the view of the District Court upholding the validity of the McGinn stock transaction. It would seem that the statement of the director to his codirector that he had in mind a prospective purchaser for the stock, whose name was not disclosed, and who would have to make a loan at the bank in order to enable him to purchase the stock, should have aroused enough interest to call for the name of the person who would buy. But, however that may be, the cashier was authorized to borrow enough of the bank's funds to pay for the stock and to hold the same as collateral until the prospective purchaser could be reached. It may be that the transaction finds sufficient explanation in the apprehension then felt that, unless action of the character had was taken, ruin would face the bank. But that does not dispose of the unexplained omission of the directors after the stock was acquired to inquire whether the trans-

action ever was carried out by a sale through the cashier and the bank relieved of the consequences of having purchased its own stock in the market. We decline to say that directors of a bank, who had been purchasing stock from time to time, can put their corporation in such a position, and after refraining from making any inquiry of the cashier, whom they had elected to hold the stock, as to whether he had carried out their directions, and delivered the stock to the expected buyer and canceled the loan made to himself, can escape liability for their negligence, upon the ground that no information was given to them that the cashier had not transferred the stock to, and taken the note of, the undisclosed unknown purchaser. As we look at the transaction, the only consideration moving to McGinn was the money of the bank, and when the cashier turned the stock over to the bank and canceled his own note he was but completing the transaction authorized by the directors and for which they must be held liable. Jesson et al. v. Noyes, 245 Fed. 46, — C. C. A. —; In re S. P. Smith Lumber Co. (D. C.) 132 Fed. 618; Devlin v. Moore (Or.) 130 Pac. 46; Thompson v. Reno Savings Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797; Tolman v. N. M. & D. Mica Co., 4 Dak. 4, 22 N. W. 505.

[3] The next question involves the purchase of stock from appellee Wood. The substance of the pertinent findings is as follows: Before January 21, 1908, subscriptions for capital stock in the Washington-Alaska Bank were circulated. E. T. Barnette, who was then a partner, subscribed for 220 shares for Wood. At a meeting of the stockholders of the Fairbanks Banking Company in March, 1908, the matter of taking over the property of the Fairbanks Company, a partnership, was discussed, and on March 12th, at a meeting of the subscribers to the capital stock, Wood and others were treated as stockholders. Wood was not present, but was notified of the result of the meeting. On March 16, 1908, an agreement was made by the corporation and the partnership fixing values of resources to be turned over to, and amounts of liabilities to be assumed by, the corporation, and the shares to be issued to Wood. In the agreement, Wood, Barnette, and Hill agreed to accept the stock of the corporation at its par value for the amount of assets in excess of said liabilities. Wood, though not present, was advised of these matters, and before he returned to Fairbanks offered to sell his corporation stock and take in payment therefor part cash and a note to be secured by the stock as collateral. Wood returned to Fairbanks in April, 1908, and signed the agreement heretofore referred to, whereby he agreed to take stock for his share of the assets of the partnership transferred to the corporation in excess of the liabilities thereof. Wood was elected cashier of the corporation, and acted as cashier from March 16 until June 30, 1908. He then demanded $13,000 as the amount of his interest in the partnership assets, and a certificate for 130 shares of the capital stock of the bank, of the par value of $13,000, was written up in the name of Wood, but was never detached from the stockbook, and was carried as outstanding stock from March 16 to June 30, 1908. On June 30th Wood accepted a certificate of deposit for $13,000 in lieu of the stock, and on

that day the shares of capital stock standing in Wood's name were charged to treasury stock on the books of the bank, and Wood afterwards drew out in cash from the funds of the bank the $13,000.

Upon these facts the court held that the appellees Jesson, Hill, and Wood were not liable to the receiver for the purchase of the $13,000 of stock. In summing up the testimony upon which the court made the findings stated above, the judge emphasized the testimony of Wood to the effect that it was distinctly understood between him and the directors, at the time he signed the agreement with the corporation, that he should have the right to take cash, instead of the par value of the shares subscribed for, on July 1st, and the court was of opinion that, whatever the liability of Wood may have been under the written agreement of March 16th, the agreement having been fully executed in accordance with what was then the understanding of all the parties thereto, and cash in lieu of stock having been delivered to Wood, the receiver could not set aside the executed contract and enforce the terms of the written contract, although the written contract is found to be at variance in some respects with that exactly carried out by the parties. But we find that such a conclusion does not properly follow from the facts. In our opinion, Wood was a subscriber for the capital stock of the bank; he elected to take stock for his share of partnership assets, and acted as a stockholder, well knowing that stock was issued to him and carried on the books of the bank as outstanding shares. The directors also knew of these things, and the transaction of taking back the stock was separate from the transfer under the written contract, and was a division of the capital of the bank among the stockholders on a payment therefor out of the money of the depositors of the bank.

[4] Appellant also asks judgment against the appellees Jesson, Hill, and Wood jointly and severally for the purchase from the partnership of $69,909.94 of past-due and worthless notes, and particularly specifies certain notes by the Tanana Electric Company, aggregating $27,997.38, and also certain notes, aggregating $12,860.61, which the partnership had carried as "doubtful accounts." In the written agreement entered into between the partnership and the corporation at the time of the transfer, the bank assumed the liabilities of the partnership, including an obligation of $252,000 to the partners individually, in consideration of the transfer to the bank of the partnership assets. Part of these assets were specified loans and discounts, together with notes past due and accepted at face value, but which were found by the court to be "unpaid and uncollectible." Hill and Wood, appellees, together with Barnette, composed the partnership, and when the bank was organized Barnette became president, Hill vice president, and Wood cashier, and these three were officers when the written agreement of transfer was made, and Jesson was a member of the board of directors. The court found that two past-due notes, made by the Tanana Electric Company in the sum of $27,997.38, depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same, but that in fact there was no guaranty, and the claim therefor had been repudiated by

the Scandinavian-American Bank before the note was accepted by the board of directors of the bank, and that the "repudiation" was known to the members of the board of directors. It was found that, of the notes accepted from the partnership and paid for by the corporation, there were charged by the partnership on its books on December 31, 1907, "doubtful accounts" for $22,979.99, and that the "doubtful accounts" were then depreciated on the books to the extent of 33⅓ per cent. thereof, and the notes were accepted by the corporation at $22,979.99, but that of this sum $12,869.61 was unpaid and uncollectible, and that when these past-due notes were accepted and paid for, including the notes of the Tanana Electric Company, certain of the directors, including Hill, Jesson, and Wood, cashier, gave their consent with full knowledge of all the facts, and that Hill and Wood were also members of the partnership with which the corporation contracted respecting the matters, and were personally interested adversely to the corporation.

Upon these facts Jesson, Hill, and Wood were held not liable to the receiver for the purchase of these notes, because the contract for taking over had been fully executed, and also because under the statutes of Nevada the corporation was authorized to issue stock for labor done, or personal property, or real estate, and in the absence of fraud in the transaction the judgment of the directors as to the value of such labor, property, and real estate necessarily should be conclusive. But in our judgment the question which called for decision was whether the receiver of the bank could recover damages which the bank had sustained on account of the negligence and mismanagement of its officers and agents. And upon the real point involved the law is established that, wherever there is a personal interest in a director which is adverse to that of the bank, the situation calls for the utmost fairness and good faith in guarding the interest of the bank. Stearns v. Lawrence, 83 Fed. 738, 28 C. C. A. 66; Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567. In the light of the findings of fact of knowledge, we can find no sound principle upon which the conclusion of the court can be upheld.

[5] Appellant asks judgment against the appellees Jesson, Hill, and Wood for $39,642.81, paid to the partnership as accrued interest on notes purchased from it by the corporation, Fairbanks Banking Company. This transaction appears to have been as follows: Under a written agreement between the partnership and the bank there was transferred to the corporation loans and discounts aggregating $353,842.54. In the loans and discounts is a list of notes with a schedule attached to the contract referred to. In the agreement the partners, as parties of the first part, assigned these scheduled outstanding loans and discounts, together with mortgages to secure the same, and agreed to transfer all to the corporation. The partnership failed in December, 1907, and trustees for it were appointed. In January, 1908, certain proposed incorporators had a meeting with a view to organizing a corporation to take over the business of the partnership, and in due time a plan was adopted by the proposed organizers. The scheme recommended by the committee was the acceptance of the partnership prop-

erty on a basis of $288,000 in excess of its liabilities, and that all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, to be payable before December 31, 1908. This was agreed to, and afterwards, on January 21, 1908, the Fairbanks Banking Company, a corporation, was organized, and on February 8th thereafter the subscribers to the capital stock met and elected a board of directors, to serve until the articles of incorporation could be received from Nevada. After the articles had come, in March, 1908, the board resolved that the taking over of the property of the partnership, Fairbanks Banking Company, be left to the board of directors. On March 12th the board adopted certain resolutions, except that the resolutions providing for the payment of accrued interest up to February 15, 1908, was amended so as to read "March 15, 1908." On March 16th the written agreement referring to the liabilities was entered into, in which the value of the assets of the partnership in excess of its liabilities was reduced from $288,000 to $252,000, but no provision was made therein for the payment of accrued interest. Afterwards papers were prepared and agreements signed by Barnette and Hill, two members of the partnership, and by the corporation, through its president and secretary. In April, 1908, Wood, the remaining partner, signed the agreement, "knowing that it did not provide for the payment of said accrued interest." On March 23, 1908, accrued interest was computed to March 15th of that year, amounting to $39,642.81, which was placed to the credit of the partners and subsequently paid to them in cash. At this time Hill, appellee, was vice president of the corporation and a member of the executive committee, Wood was cashier, and Jesson was a member of the board of directors. The court also finds that all consented to what was done, and that Hill and Wood, as members of the partnership, were personally interested adversely to the corporation. Upon substantially these facts the court held that Jesson, Hill, and Wood were not liable to appellant for the allowance of the accrued interest, and dismissed appellant's action therefor.

We believe the payment to the partners of the $39,642.81 as accrued interest was wholly without right as against the rights of those represented by the receiver. In the proposed reorganization interest was to be computed on existing loans to February 15, 1908, as was the proposal for acceptance of notes and properties at a value of $288,000 in excess of liabilities; but when incorporation was had the shareholders turned the matter of taking over the property of the partnership to the board of directors, and the board approved the resolution of the stockholders with the change that accrued interest should be paid up to March 15, 1908. Thereafter, when the written agreement was prepared by the executive committee, no reference was made therein to allowance of any accrued interest, but the excess of assets over liabilities was reduced from $288,000 to $252,000. The written agreement of March 16, 1908, between the partnership and the corporation, expressly transferred all loans and discounts as appearing in the schedule to the corporation, and contained this language:

"The intention of this agreement being to place the party of the second part in the shoes of the parties of the first part * * * as to all properties hereinbefore mentioned and specified."

By the sale of the notes all right to accruing and accrued interest passed to the corporation, and the action of the directors in paying the item of interest was against the written agreement with the partnership and in effect became a diversion not to be countenanced. Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; Michie on Banks and Banking, 296, 297. It appears that $7,500, included as paid for accrued interest was never collected by the bank from borrowers. This payment constituted a deliberate depletion of the funds of the bank.

[6] Appellant asks for a reversal of the action of the lower court in denying him a recovery against appellees Jesson, Wood, McGinn, and Brumbaugh jointly and severally for one year's interest upon the amount of funds of the bank which were invested in the capital stock of the First National Bank. The substance of the findings in the matter was as follows:

In May, 1909, the Fairbanks Banking Company and the Washington-Alaska Bank of Washington each bought one-half of the capital stock of the First National Bank of Fairbanks, Alaska, for which each paid $62,500. The stock was owned until May 4, 1910, when the Fairbanks Banking Company sold and delivered all such stock to the appellees herein, Wood and McGinn, for $125,000. When the banks bought the stock, they gave to Wood an option to purchase the same on or before June 1, 1910, for $125,000, and the sale to Wood and McGinn was made in pursuance of such option. Neither of the banks received any dividend on the stock while it was owned and held by them; nor did Wood and McGinn pay any interest upon the money invested in the stock. When the sale to McGinn was made, the appellees, Jesson, Wood, McGinn, and Brumbaugh, were officers and directors of the Fairbanks Banking Company, and each agreed to the sale on the terms above stated. The Fairbanks Banking Company was the successor of the partnership of Barnette, Hill and Wood, which had done business under the partnership name of Fairbanks Banking Company. On September 14, 1909, the Fairbanks Banking Company, a corporation, bought the entire capital stock of the Washington-Alaska Bank of Washington, and thereafter, on October 1, 1910, the Fairbanks Banking Company took over the assets of the Washington-Alaska Bank and agreed to pay its liabilities, and thereupon the Washington-Alaska Bank ceased to do business and the Fairbanks Banking Company changed its name to the Washington-Alaska Bank of Nevada, now in the hands of the receiver, who is the appellant herein.

It appears, then, that the Fairbanks Banking Company invested in the stock of the First National Bank out of its own funds $62,500, and thereafter invested $250,000 in buying the entire capital stock of its co-owners, the Washington-Alaska Bank of Washington. Naturally, the Fairbanks Banking Company should have received some interest on its investment by way of profits of the First National

Bank during the year of such investment; and it would also seem that, as the sole stockholder of its co-owner, the Washington-Alaska Bank of Washington, it should also have received some dividend upon the $62,500 invested by that bank. But no profit appears to have come from the investment unless it should be held that, when the Fairbanks Banking Company took over the Washington-Alaska Bank, it acquired as a part of the assets of the last-named bank a right to interest on the $62,500, which had been invested by the Washington-Alaska Bank of Washington in the stock. It is admitted that the purchase of the stock and the option were not the acts of the same officers who later on concluded the sale of the shares to Wood and McGinn, but it is found that Wood and McGinn, defendants here, as officers, ratified the entire transaction when they agreed, as they did, that the sale should be made in pursuance of the option. The option gave to Wood the right at any time within a year to take up the stock at the same price paid for it by the bank. Inasmuch as the bank carried the investment until just before the option expired, without having received a dividend on the stock or any interest on the investment, the most reasonable inference is that the bank in its purchase acted for the benefit of those who had the right to avail themselves of the option, and that the defendants, appellees, Jesson, Wood, McGinn, and Brumbaugh, by consent to the sale on the terms specified in the option, ratified the action of the bank in carrying the investment for the benefit of the optionees without cost to them. Thus the transaction became one where the directors and officers of the bank knowingly failed to guard the interests of the corporation and preferred to serve the personal interests of certain directors. The legal consequences must be that all directly involved became liable for the loss of interest on the money invested at the legal rate prevailing in Alaska. Wardell v. Railroad Co., 103 U. S. 651, 26 L. Ed. 509; Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667.

The decree of the lower court is ordered corrected in the particulars hereinafter referred to, to conform with the views which we have expressed, so that, in addition to the relief therein granted to the receiver, he may have a decree in his favor: (1) Against the appellees John A. Jesson, John A. Clark, and J. A. Healey, jointly and severally, on the purchase of the stock of John L. McGinn, with interest from October 13, 1910, $6,000. (2) Against appellees John A. Jesson, James W. Hill, and R. C. Wood, jointly and severally, on the purchase of the stock of R. C. Wood, with interest from June 30, 1908, $13,000. (3) Against the appellees John A. Jesson, James W. Hill, and R. C. Wood, jointly and severally, for the purchase of the worthless Tanana Electric Company notes from Fairbanks Banking Company, a partnership, with interest thereon from March 16, 1908, $27,997.38. (4) Against the appellees John A. Jesson, James W. Hill, and R. C. Wood, jointly and severally, for the purchase of other worthless notes from the Fairbanks Banking Company, a partnership, with interest thereon from March 16, 1908, $41.911.56. (5) Against appellees John A. Jesson, James W. Hill, and R. C. Wood, jointly and severally, for paying to Fairbanks Banking Company, a partnership, accrued interest on notes purchased from

it, with interest thereon from March 16, 1908, $39,642.81. (6) Against appellees John A. Jesson, R. C. Wood, John L. McGinn, and Ray Brumbaugh, jointly and severally, for one year's interest upon the amount invested in the capital stock of the First National Bank, on account of the sale of said stock to John L. McGinn and R. C. Wood, with interest thereon from May 4, 1910, $10,000.

NOYES v. WOOD.*

(Circuit Court of Appeals, Ninth Circuit. November 19, 1917.)

No. 2594.

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

Suit in equity by F. G. Noyes, as receiver of the Washington-Alaska Bank, against R. C. Wood. Decree for defendant, and complainant appeals. Reversed.

O. L. Rider, of Vinita, Okl., and Fernand De Journel, of San Francisco, Cal., for appellant.

John L. McGinn and A. R. Heilig, both of Fairbanks, Alaska (Metson, Drew & Mackenzie and Curtis Hillyer, all of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a suit by the receiver of the Washington-Alaska Bank to recover $13,000, alleged to have been wrongfully obtained by appellee Wood. The District Court made findings of fact and drew certain conclusions of law, which resulted in a decree against recovery by the receiver. The receiver appeals.

No question of the accuracy of the facts as found arises, but the receiver contends that the conclusions of law are erroneous. Inasmuch as the issues in the suit involve the same transaction stated and considered as one of the matters decided in Noyes, as Receiver, v. Wood et al. (No. 2593) 247 Fed. 72, — C. C. A. —, reference to that case is here made, and no extended statement herein is necessary. Inasmuch as the opinion and conclusion reached in that case disposed of the direct essential issue in this, it follows that, for the reasons given in our opinion in that case, the decree of the lower court herein must be reversed, and the cause sent back, with directions to enter a decree in favor of the receiver and against appellee, Wood, for $13,000, with interest and costs.

The lower court is directed to make the necessary provision that, upon payment of the joint and several judgment entered in the case No. 2593 above referred to against this defendant, Wood, and others, the judgment herein also becomes satisfied.

Reversed.

*Rehearing denied February 11, 1918.

THE SOUTH COAST.*

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

No. 2865.

1. MARITIME LIENS ⟸28—REPAIRS AND SUPPLIES—FEDERAL STATUTE.
Under the general maritime law the necessity for credit for repairs or supplies furnished to a vessel is presumed, when it appears that they were necessary and they were ordered by the master, and under Act June 23, 1910, c. 373, §§ 2, 3, 36 Stat. 604, 605 (Comp. St. 1916, §§ 7784, 7785), which are not intended to change this rule, the authority of the master to represent the owner in procuring repairs or supplies is also presumed, and these presumptions must prevail, unless it is shown that the master did not represent the owner, or was not authorized to use the credit of the vessel, and that the furnisher knew or ought to have known that fact.

2. MARITIME LIENS ⟸21—SUPPLIES—AUTHORITY OF CHARTERER.
A charterer of the hull of a ship, with an option to purchase, the owner reserving the right only to appoint the master, who was to be paid by and to be under the orders of the charterer, provided that the owner might retake the vessel on failure of the charterer to pay the charter hire, or to discharge any liens within 30 days, and that the charterer should hold the owner harmless from all liens or demands against the vessel created during the charter term. *Held*, that such provisions did not negative the authority of the charterer to procure supplies on the credit of the vessel, but rather implied such authority, and that one who in good faith furnished necessary supplies on the order of the master and expressly on the credit of the vessel, although notified by the owner not to do so, was entitled to a lien therefor.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty by J. C. Rudbach against the steamer South Coast, the South Coast Steamship Company, Claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 233 Fed. 327.

On June 19, 1915, the South Coast Steamship Company chartered to Howard R. Levick, Jr., with the right of purchase, the steam schooner South Coast, on terms and conditions set forth in the charter party, which contains, among others, the following provisions:

"Fifth. It is understood that this charter is a charter of the bare vessel, and that said party of the second part shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores and supplies of every kind and nature, pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines, or government fines, pilotages, overtime of crew, agencies, commissions, consular charges, dry-docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all other charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter."

By the sixth paragraph the owner is accorded the right to appoint the master, who is to be under the orders of the charterer as to the management of the ship, and whose wages are to be paid by the charterer.

By the eighth paragraph, in default of any payment, or upon failure on the part of the charterer, within 30 days after incurring the same, to discharge any debts or liabilities which are liens on the vessel, the owner is given the right to withdraw the vessel from the service of the charterer.

By the tenth paragraph it is provided that, if the payments (charter hire)

*Rehearing denied January 7, 1918.

are not made, then, at the option of the owner, the vessel shall be delivered to it, "free from all liens and claims of every kind or description whatsoever during the term of this charter party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second part, will hold and save harmless the said party of the first part from all liens, claims, or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter party, except any claim for salvage services that may be rendered to said vessel, and further will save said party of the first part harmless from all liens, losses, damages, costs, or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims, or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith."

As to the further facts, we adopt the statement of the trial court, as follows:

"Libelant furnished supplies at various times to the steamer South Coast in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant, before furnishing any of the supplies in question, was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners, and if they did not want it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy, one of the owners, not to deliver any goods on the credit of the ship. So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship; such warning was clearly and definitely given."

Marcel E. Cerf and C. H. Sooy, both of San Francisco, Cal., for appellant.

Ira S. Lillick, of San Francisco, Cal., for appellee.

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

WOLVERTON, District Judge (after stating the facts as above). [1] Prior to the adoption of the act of Congress of June 23, 1910 (36 Stat. 604), relating to liens upon vessels for repairs, supplies, or other necessaries, there was much confusion respecting the law, as to whether a lien would attach where the necessaries and supplies, etc., were ordered by the master when the owner was personally present, or whether such a lien was susceptible of being impressed orally by the owner in case the supplies, etc., were furnished through his personal order on the credit of the ship. In the first instance, it was thought that it would not attach because, the owner being present, the presumption seemed to prevail that there was want of authority in the master to bind the vessel. But, if the ship were in a foreign port and the owner were not present, the authority of the master to bind the ship would exist through necessity, that the ship might be repaired and provisioned in order to go forward upon its voyage. Thomas et al. v. Osborn,

19 How. 22, 15 L. Ed. 534; The Kalorama, 10 Wall. 204, 212, 213, 19 L. Ed. 941; The Underwriter (D. C.) 119 Fed. 713, 755.

In the second instance, according to many authorities, the personal order of the owner gave rise to the presumption that the supplies were furnished on his personal credit. The St. Jago de Cuba, 9 Wheat. 409, 6 L. Ed. 122. And it was not even clear that the owner could impose a lien upon the vessel by oral agreement. The Iris, 100 Fed. 104, 40 C. C. A. 301; Cuddy v. Clement, 113 Fed. 454, 51 C. C. A. 288. But all this controversy has been put at rest, or rather obviated, by the statute, which imposes a lien in favor of the person furnishing repairs, supplies, etc., "upon the order of the owner or owners, * * * or of a person by him or them authorized." Section 1 (Comp. St. 1916, § 7783). The lien follows, therefore, in any event, where the repairs or supplies are furnished by direction of the owner, though by the fourth section of the act (section 7786) it may be waived on the part of the furnisher of such repairs, supplies, etc., by agreement or otherwise. By the second section (section 7784) the master, among others, is presumed to have authority from the owner to procure repairs, etc., and by the third (section 7785), the presumption is declared to extend to such officers and agents "when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel." So that one who disputes the validity of a supposed lien claimed for repairs, etc., furnished on the order of the master, is required to overcome the presumption which the law imposes of the master's authority to represent the owner respecting the particular involved. In other words, the presumption imposed by the statute is disputable in character, and it has been held that it is but declaratory of a principle previously recognized in maritime jurisprudence. The Yankee, 233 Fed. 919, 147 C. C. A. 593.

There is a divergence of opinion among the cases as to whether a charter party of the nature and character of the one here involved withdraws the authority of the master to act for the owner in the ordering of repairs, supplies, etc. Judge Lowell has held, in a most learned and searching opinion, that it does. The Underwriter, supra. But this decision is disapproved by the Circuit Court of Appeals of his circuit in the case of The Surprise, 129 Fed. 873, 64 C. C. A. 309, which impresses us as being based upon the stronger reasoning. The court there says:

"We should also observe that much has been made of the fact that, in The Kate and The Valencia, there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance, and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the same as those specially provided in The Kate and The Valencia. The charterer is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because, if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that

the usual obligations pro and con exist, and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact, because all the decisions we will hereafter cite, relating to vessels where the hull was chartered, bear on The Kate and The Valencia, regardless of the fact whether there was a formal charter, or only an oral one without any express statement of the terms thereof" (citing thereafter numerous cases).

In Thomas et al. v. Osborn, supra, Mr. Justice Curtis has this to say:

"Nor do we think the fact that the master was charterer and owner pro hac vice necessarily deprived him of this power [the power to borrow money on the credit of the vessel for repairs and supplies]. It is true it does not exist in a place where the owner is present. The St. Jago de Cuba, 9 Wheat. 409 [6 L. Ed. 122]. But this doctrine cannot be safely extended to the case of an owner pro hac vice in command of the vessel. Practically this special ownership leaves the enterprise subject to the same necessities as if the master were master merely, and not charterer, and the maritime law gives him the same power to borrow to meet that necessity as if he were not charterer."

A little later the eminent jurist reaches this conclusion:

"And so in this case, we think, the general owners must be taken to have consented that, if a case of necessity should arise in the course of any voyages which the master was carrying on for the joint benefit of themselves and himself, he might obtain, on the credit of the vessel, such supplies and repairs as should be needful to enable him to continue the joint adventure. This presumption of consent by the general owner is entertained by the law from the actual circumstances of the case, and from considerations of the convenience and necessities of the commercial world."

It seems to be settled law that, unless repairs and supplies are necessary to render the vessel seaworthy to enable her to proceed on her voyage, the master is not authorized, as between himself and the owners, to procure them on the credit either of the owners or of the vessel. But the necessity for credit will be presumed where it appears that the repairs and supplies were ordered by the master, and that they were then necessary for the ship when lying in port, or to fit her for an intended voyage, unless it be shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts, or one of them, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry, and to show that if he had used due diligence he would have ascertained that the master was not authorized to obtain any such relief upon the credit of the vessel. The Lulu, 10 Wall. 192, 203, 19 L. Ed. 906; The Kalorama, supra. This latter case added the element of good faith, on the part of the parties concerned, in the procuring and furnishing of such repairs and supplies.

In the case of The Kate, 164 U. S. 458, 469, 17 Sup. Ct. 135, 140 (41 L. Ed. 512), the court says:

"The principle would seem to be firmly established that, when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libelant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required that he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master

upon the owner, or in some breach of the master's duty to the owner, of which the libelant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts."

Based upon the principle, the following deduction was made:

"If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less is one recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them."

See, also, The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

It would appear, in view of these authorities, that the clause in the act of Congress (section 3 [Comp. St. 1916, § 7785]) declaring that nothing contained therein "shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor," was intended as declarative of maritime law respecting the subject, as it existed prior to the enactment. It was not designed to ordain any new or different principle of law. So that, under the law, the necessity for credit is presumed when it appears that the repairs, supplies, etc., were necessary and were ordered by the master; and, under the act, the authority of the master to represent the owner in procuring such repairs, etc., is also presumed. And these presumptions must prevail, unless it be shown that the master did not represent the owner, or was not authorized to obtain any such relief on the credit of the vessel, and the furnisher knew or ought to have known the fact. This we take to be the rule, in view of the statute, read in the light of the law applicable as it existed previous to its enactment.

[2] Now, coming to the instant controversy: The repairs and supplies in question were furnished on the order of the master. The master, who was appointed by the owner, was obliged, under the charter party, to take his directions from the charterer. The libelant was apprised of the existence of the charter party, and was warned by the owner not to furnish supplies on the ship's credit. The libelant, nevertheless, furnished the supplies, with the declaration to the owner's representative that he would not furnish them in any other way, or under any other conditions, than upon the credit of the ship.

It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case, as otherwise credit would not be extended, upon the account of the owner or master alone, to

enable the ship to discharge its peculiar function, and great inconvenience would follow, to the detriment and disadvantage, if not the ultimate disaster in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, we cannot believe that it was the intendment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the ship to engage in her accustomed traffic. Nor do we believe that it was the intendment of the statute or of the law thus to impose so vital a hindrance upon maritime shipping, and unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, be so subverted.

The terms of the present charter party as respects the furnishing of repairs, supplies, etc., are only those usual to most charter parties, and by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel. True it is that the owner attempted to prevent the libelant from advancing the supplies on the credit of the vessel; but this was an invasion of the charterer's rights under the charter party, and was unavailing to subvert the master's authority in the premises. As bearing upon the proposition, in addition to The Surprise, supra, see The Philadelphia, 75 Fed. 684, 21 C. C. A. 501.

Stress is laid upon The Kate and The Valencia, supra, as determinative of the present controversy. In The Kate, the coal, for the price of which the lien was filed, was furnished to the charterer under circumstances indicating, as was said in The Surprise, "that there never was any expectation of holding the vessel," and, as explained by the Supreme Court:

"None of the coal furnished to the chartered vessels was ordered by the master of the vessel, nor were any of the bills therefor submitted to him for approval. They were submitted only to the steamship company. Nor did the agents of the chartered vessels know that coal was supplied by the libelant on the credit of the vessel, or that any specifications of lien were filed under the local statute."

In other words, the dealing respecting the coal was always directly between the libelant and the steamship company, the charterer; the vessel at the same time having an agent within easy communication of the parties. The case practically hinged upon the condition that there was an element of fraud in the transaction of claiming the lien, to which the libelant was a party. The Valencia is an analogous case. The present controversy is without any such element of fraud attributable to the libelant. These cases of The Kate and The Valencia

are therefore without application, further than they purport to state general maritime law.

The decree of the District Court will be affirmed.

W. A. LILLER BLDG. CO. et al. v. REYNOLDS et al.

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

No. 1550.

1. BANKRUPTCY ⊂⊃288(1)—RECOVERY OF ASSETS—SUMMARY PROCEEDINGS—"ADVERSE CLAIMANT."

Where an insolvent forms a corporation, with near relatives as incorporators and nominal stockholders, to which he conveys his property for the purpose of placing it beyond the reach of his creditors, such corporation is a colorable holder only for the insolvent, and not an "adverse claimant," as against his trustee in bankruptcy, within the meaning of Bankr. Act July 1, 1898, c. 541, § 23a, 30 Stat. 552 (Comp. St. 1916, § 9607), requiring a plenary suit to determine the right to the property; but the bankruptcy court has jurisdiction by a summary order to direct its seizure and sale.

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

2. BANKRUPTCY ⊂⊃120—TRUSTEES—COMPETENCY OF ATTORNEYS FOR CREDITORS.

Attorneys for petitioning creditors may properly be appointed trustees for a bankrupt.

3. BANKRUPTCY ⊂⊃206—SALE OF PROPERTY—PROPERTY SUBJECT TO SALE.

That a family corporation, formed by an insolvent to take over his property to protect it from creditors, paid off valid judgments of a state court which were a lien on the property, does not render such property exempt from sale by the bankruptcy court.

4. BANKRUPTCY ⊂⊃407(3)—DISCHARGE—GROUNDS FOR REFUSAL—FRAUDULENT TRANSFER OF PROPERTY.

To justify the denial of a discharge to a bankrupt on the ground that he transferred property with intent to hinder, delay, or defraud his creditors, the transfer must have been effective to place the property beyond the jurisdiction of the bankruptcy court to seize it by summary proceedings.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Martinsburg, in Bankruptcy; Alston G. Dayton, Judge.

In the matter of W. A. Liller, bankrupt; Frank C. Reynolds, Taylor Morrison, and Andrew Woolf, trustees. The W. A. Liller Building Company and Z. T. Kalbaugh appeal from an order for the sale of property. Affirmed.

The following is the opinion of Dayton, District Judge, in the court below, upon petitions to revise.

[1] I have carefully examined the questions involved in this bitterly contested controversy, and am satisfied that the crucial one is whether the referee had power, by summary order, to direct the seizure of the personal property claimed by the W. A. Liller Building Company, a corporation, as the property of the bankrupt, or, in other words, whether the claim thereto by this cor-

poration was adverse and required a plenary suit to determine its validity. Collier (10th Ed.) at page 477, discussing section 23b of the Bankruptcy Act, very pertinently says: "It is impossible to declare a general rule which will determine in every case whether a person claiming a right or interest as against the trustee is an adverse claimant."

Generally possession of the property is a controlling element, and, where such possession is in a claimant, it is not a right of the bankruptcy court by summary proceeding to determine the nature of the possessor's right and title to it. Such summary proceeding should always be resorted to with caution. However, the cases of York Mfg. Co. v. Brewster, 174 Fed. 566, 98 C. C. A. 348, In re Rieger et al. (D. C.) 157 Fed. 609, In re Berkowitz (D. C.) 173 Fed. 1013, and In re Holbrook Shoe & Leather Co. (D. C.) 165 Fed. 973, seem to well establish the doctrine that, where an individual is insolvent and undertakes to form a corporation, with near relatives as incorporators, to which he conveys his property with a view to withdraw such property from the reach of creditors, such corporation should not be held to be an adverse claimant, its holding to the contrary is only colorable and should be held to be that of the insolvent himself. It seems to me the logic of such conclusion is clear. A corporation is only a creature of law, and the law never creates means to defraud. By the admission of the bankrupt himself in this case the building corporation was formed for no other purpose than to withdraw his property from the reach of his creditors and enable him to secure for himself a salary and possibly some gain for the incorporators, who were himself, his wife, his son under age, his brother-in-law, and his attorney securing the corporation charter for him. The shares of stock subscribed by others than himself were nominal, two shares of the par value of $25 a share, those of the son and attorney being paid for in services.

The case here, it seems to me, falls clearly within the legal principles established by the cases cited, and therefore I must hold that the referee was justified, by summary order, in directing the seizure of the property.

[2] Having so determined this question, the other rulings of the referee can be easily disposed of. One is to the allowance made to the attorneys for the petitioning creditors, two of whom were also trustees. The impression indicating that it was improper to appoint such attorneys trustees is erroneous. "A general creditor of a bankrupt or his attorney is competent." Loveland (4th Ed.) vol. 1, p. 730, § 353; In re Lewensohn (D. C.) 98 Fed. 576; In re Lazoris (D. C.) 120 Fed. 716; In re Blue Ridge Packing Co. (D. C.) 125 Fed. 619. The fee allowed here was paid out of funds payable to a secured bank creditor who has not complained of it. I think it could have done so under the ruling in Re Gillespie (D. C.) 190 Fed. 88, but not having done so, and months having elapsed since the allowance was made, I am inclined to hold it now estopped by its acquiescence from doing so. I do not think others can complain.

[3] The contention made, that in order to take over this property the corporation went into bank and borrowed $2,500 and paid off outstanding executions issued upon judgments rendered more than four months before bankruptcy proceedings, whereby this property became exempt, does not strike me as sound under the rulings of New River Coal Land Co. v. Ruffner Bros. (two cases) 165 Fed. 881, 91 C. C. A. 559 (C. C. A. 4th Ct.), and Graham Mfg. Co. v. Davy-Pocahontas Coal Co., 238 Fed. 488, 151 C. C. A. 424 (C. C. A. 4th Ct.), to the effect that the bankrupt court's jurisdiction is exclusive; and I think they exclude the idea that the bankrupt and a corporation formed by him to purchase the property, as this one was, shall be permitted to determine whether such sale shall stand or not. It is for the bankrupt court to determine that question, and, where creditors demand a sale of it, I cannot see how it can be well refused. The question as to whether the bank making this loan, or a surety paying it, is entitled to subrogation to the liens of the executions, and entitled to payment out of the proceeds of sale, as I understand, by the referee's decree, is not determined, but reserved, and therefore I make no expression as to that, only determining that, if he should sustain such subrogation, the common creditors are entitled to have the property sold in order that it may be determined whether it will bring a surplus for their

benefit, and in order that the property itself will not suffer dissipation, deterioration, and loss pending the determination of their contest against the right to subrogation in case they determine to contest it.

Finally as to the planing mill: I do not understand that the referee's order contemplates a sale of the wife's real estate, but does contemplate a sale of the machinery located in the mill. This property is clearly subject to sale, unless this machinery is so attached to the realty as to make it part thereof. There is nothing to show it to be so attached. Under recent rulings of the Supreme Court it seems to be a rather difficult proposition to establish such machinery to be so attached. See Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, and Detroit Steel Cooperage Co. v. Sistersville Brewing Co., 233 U. S. 712, 34 Sup. Ct. 753, 58 L. Ed. 1166. The conclusion I reach is that the orders of the referee complained of must be approved and affirmed. The order to this effect will not be entered for ten days, so that petitioner here asking revision may have time to prepare papers for appellate review if such review is desired.

[4] The holding herein that the bankrupt attempted transfer of his property to the corporation was in fact no transfer thereof disposes of the objections made to his discharge. He must have actually "transferred" such property or removed it, so that it will be beyond reach of creditors and the bankruptcy court's jurisdiction to summarily seize. This I have held he did not do; therefore he is entitled to his discharge, not having violated clause 4, subsec. "b," § 14, of the Bankrupt Act (Comp. St. 1916, § 9598).

William MacDonald, of Keyser, W. Va., for appellants.

Frank C. Reynolds and Taylor Morrison, both of Keyser, W. Va., for appellees.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

PER CURIAM. We are satisfied with the disposition of this case in the court below and with the reasons assigned therefor by the learned District Judge. The decree is accordingly affirmed on his opinion.

Affirmed.

JOHNSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. December 17, 1917.)

No. 2891.

1. EVIDENCE ⟸83(1)—PRESUMPTIONS—OFFICIAL DUTY.
   There is a presumption that a United States marshal will perform his duty in serving a special venire without favor.
2. JURY ⟸70(11)—SPECIAL VENIRE—DRAWING.
   Rev. St. § 803 (Comp. St. 1916, § 1256), declares that writs of venire facias, when directed by the court, shall issue from the clerk's office, shall be served and returned by the marshal in person or by his deputy, or, in case the marshal or his deputy is interested, by such fit person as may be specially appointed for that purpose by the court, while section 804 (section 1257) declares that when, from challenges or otherwise, there is not a petit jury to determine any civil or criminal case, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel, and, when the marshal or his deputy is disqualified,

jurors may be so returned by such disinterested person as the court may appoint. In a prosecution for gambling, after 7 jurors had been drawn from the box, the panel was exhausted. Thereupon the court ordered a special venire of 25 jurors, returnable the following morning. Before the venire was issued, defendants moved that a special officer be appointed to serve the same, on the ground that the United States marshal and his deputies were not indifferent persons and were interested in the case. It appeared that the marshal out of his own funds hired a private individual to detect gambling, and on information furnished by such individual, who admitted that he participated in the offenses, a prosecution was instituted against defendants. *Held* that, notwithstanding the presumption that the marshal would perform his duty without favor, he could not be deemed an indifferent person, and a special officer to serve the venire should have been appointed.

3. JURY ⊂70(11)—SELECTION—SPECIAL VENIRE.

As Comp. Laws Alaska, § 222S, declaring that when an action is called for trial the clerk shall draw from the trial jury box the ballots containing the names of the jurors until the jury is completed, or the ballots are exhausted, and that, if the ballots become exhausted before the jury is completed, the marshal under the direction of the court shall summon from the bystanders or the body of the district so many qualified persons as may be necessary to complete the jury, does not provide for the appointment of an elisor, and there is no such provision in the Alaska statutes, Rev. St. §§ 803, 804, providing for the appointment of a special officer to summon bystanders or a special venire when the marshal or his deputy is interested in the outcome of the case, are applicable.

In Error to the District Court of the United States for the Second Division of the District of Alaska; J. R. Tucker, Judge.

Ed Johnson and A. C. Laird were convicted of gambling, and they bring error. Reversed and remanded for new trial.

The plaintiffs in error, Johnson and Laird, were convicted of gambling by playing "stud poker" on January 5, 1916. They were fined, and thereafter sued out writ of error. Many errors are assigned, but we need only consider one. When the case was being proceeded with for trial, and 7 jurors had been drawn from the box, the panel was exhausted. Thereupon the court ordered a special venire of 25 jurors returnable the following morning. Before the venire was issued counsel for defendants moved that a special officer be appointed to serve the venire about to issue for additional jurymen, on the ground that the United States marshal and his deputies were not indifferent persons and were interested in the event of the cause. The motion was based upon the affidavit of George B. Grigsby, Esq., one of the counsel for defendants, who set forth: That on April 26, 1916, there had been a previous trial of the action in the same court in which it was then pending, which had resulted in a disagreement of the jury; that on the previous trial one N. V. Nelson testified that on December 30, 1915, he was employed by E. R. Jordan, United States marshal for the Western division, district of Alaska, to look for gambling in the town of Nome; that thereafter, pursuant to such employment, Nelson gambled for money in the Arctic Billiard Parlors, and that on January 5, 1916, he had gambled for money with certain of the defendants; that during the progress of the game he had reported the existence of the gambling to Deputy Marshal Holland; that thereupon Nelson returned to the billiard parlor, and shortly thereafter Holland, with three other deputy marshals, entered the place and arrested the defendants without a warrant; that at the former trial Jordan testified that he employed Nelson and paid him $65 for his services out of his personal funds; that on the former trial one Moore testified that before December 25, 1915, he heard Marshal Holland say to the defendant Johnson, "I am coming after you and I am going to get you;" that Jordan and all of his deputy marshals were witnesses on the former

trial, and with the exception of Nelson and the deputy marshals named there was no evidence tending to prove that defendants played the games mentioned in the indictment, nor any evidence that the games mentioned in the indictment were played for money, except the evidence of Nelson; that the prosecution originated in the marshal's office, without the complaint of any private citizens; that by reason of the foregoing facts the marshal and his deputies were unduly interested in securing a conviction. The court overruled the motion, and the marshal proceeded to serve the special venire. Exception was preserved, and error was assigned.

Section 803 of the Revised Statutes of the United States is as follows: "Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ." Comp. St. 1916, § 1256.

Section 804, Revised Statutes of the United States, provides: "When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section." Comp. St. 1916, § 1257.

George B. Grigsby, of Juneau, Alaska, Hugh O'Neill, of Nome, Alaska, Thomas R. White, of San Francisco, Cal., and O. L. Willett, of Seattle, Wash., for plaintiffs in error.

F. M. Saxton, U. S. Atty., of Nome, Alaska.

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

HUNT, Circuit Judge (after stating the facts as above). [1, 2] Zeal in performing official duty is to be commended, and activity by the proper officials in detecting violations of the law by using all proper means and methods is not at all inconsistent with indifference to any particular result other than the efficient administration of the law. But when a marshal, without authority of law or instructions from competent authority, hires a private individual to detect suspected violations of a particular law and pays such person out of his own private funds, and upon the information furnished by such person, who admits that he also participated in the offense under investigation, prosecution is instituted against certain persons, and the principal evidence relied on is to come from such employed detective, a situation is presented where, if on the trial a jury panel is exhausted, and it becomes necessary to draw jurymen from the bystanders, a defendant may well object to the drawing of such jurymen by the marshal or his deputies, upon the ground that he is not an indifferent person, and, if there be no denial of the facts and circumstances shown, the duty of the court is to specially appoint a fit person as provided by the statute.

The question is not whether there is a personal malice or ill will on the part of the marshal, but whether his acts and the surrounding circumstances have been such that they impel the belief that he is no

longer indifferent in his official attitude as between the United States and the persons on trial, and for that reason is not a fit person to be intrusted with the power to return jurymen from bystanders to complete the panel for the immediate case. We are keeping in mind the presumption that the marshal will do his duty without favor; but, lest he may not do so, the particular statute quoted interposes, with the object of insuring that absolute fairness of procedure, which can best be had by not allowing one who is not indifferent to select jurors from bystanders.

[3] It is said that as the procedure in criminal cases in Alaska is statutory, and as there is no statute expressly authorizing the appointment of an elisor, the United States statutes (803 and 804) quoted are not applicable. It is undoubtedly correct, in a general way, to say that the Alaska Criminal Code and Code of Criminal Procedure provide for nearly every step in criminal proceeding, including the method of drawing jurors. Summers v. United States, 231 U. S. 92, 34 Sup. Ct. 38, 58 L. Ed. 137. And as relating to the drawing of additional jurors we quote section 2229, Compiled Laws of Alaska:

"The trial jury shall be formed as follows: When the action is called for trial the clerk shall draw from the trial jury box of the court, one by one, the ballots containing the names of the jurors until the jury is completed or the ballots are exhausted. If the ballots become exhausted before the jury is complete, the marshal, under the direction of the court, shall summons from the bystanders or the body of the district so many qualified persons as may be necessary to complete the jury."

Certainly this statute must control as a rule. But, if it should come about that a showing is made of the manifest unfitness of the marshal to summon jurors, in the absence of local legislation directing how to proceed, the general law of the United States becomes wholly applicable and controlling. If this were not so, we would find that the guaranty that one accused shall have the right to trial by an impartial jury would mean less in Alaska than in the states. We are unable to assent to such a proposition. Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061.

Reversed and remanded for a new trial.

In re RUSSELL.

SCANDINAVIAN-AMERICAN BANK OF BIG TIMBER, MONT., v. ELLINGSON.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 3016.

BANKRUPTCY ⊂=440—REVIEW—MODE.

Bankruptcy Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1916, § 9608), provides that 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. Section 25a (Comp. St. 1916, § 9609) declares that appeals

as in equity cases may be taken in bankruptcy proceedings to the Circuit Court of Appeals of the United States, and to the Supreme Courts of the territories, from a judgment adjudging or refusing to adjudge the defendant a bankrupt, from a judgment granting or denying a discharge, and from a judgment allowing or rejecting a debt or claim of $500 or over. After hearing testimony, a claim based on a chattel mortgage was denied as a preferred claim; the mortgage being declared fraudulent and void. *Held* that, as the questions involved were questions of fact, they could not be reviewed by a petition to superintend and revise, but should be reviewed by appeal, and, as the jurisdiction of the court under petition for revision is restricted to questions of law, the petition must be dismissed.

Petition for Revision of Proceedings of the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

In the matter of the bankruptcy of W. N. Russell. A mortgage of the Scandinavian-American Bank of Big Timber, Mont., a corporation, filed as a preferred claim, was, on objection of John G. Ellingson, trustee, declared fraudulent and void, and, the determination of the referee being affirmed, claimant petitions for revision under Bankruptcy Act, § 24b. Petition dismissed.

Chas. W. Campbell, of Big Timber, Mont., and Miller, O'Connor & Miller, of Livingston, Mont., for petitioner.

Frank Arnold, of Livingston, Mont., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a "petition for revision and review under section 24b of the Bankruptcy Act of 1898" (Comp. St. 1916, § 9608). The petitioner seeks to review an order in bankruptcy, declaring fraudulent and void a certain chattel mortgage made by the bankrupt, W. N. Russell, to the petitioner bank. In June, 1915, Russell made a chattel mortgage covering a stock of goods consisting of paints, lumber, and other things to the bank. The mortgage contained a clause authorizing the mortgagors to sell in usual course for cash or credit, not exceeding 30 days, and that the mortgagors would keep accounts, and deduct from the proceeds of sales their living expenses, current business expenses, and could replenish the stock and deposit the net daily with and to the credit of the bank on account of the mortgage debt. Russell was adjudged a bankrupt in March, 1916, and in due course the bank offered to file proof of its preferred claim with the referee in bankruptcy. Objections were filed by creditors to the allowance of the claim as a preferred claim, on the ground that the mortgage was taken by the bank with intent to hinder, delay, and defraud creditors of the bankrupt, and that when the mortgage was made it was not intended that the provisions relating to the conduct of the business should be complied with. The referee, after hearing much testimony, made elaborate findings of fact and conclusions in favor of the objectors, and the District Court, upon petition to review, affirmed the findings and decision of the referee. No appeal under section 25 was taken to this court.

The errors assigned assail the decision of the court, upholding the findings of the referee that the parties intended the mortgage to pro-

tect them from interference from other creditors, and to shield payments to such creditors as the mortgagee preferred, and to keep the stock for the protection of the mortgagee, and that the mortgage was invalid. The respondent has moved to dismiss the petition upon the ground, among others, that it appears from the record that the order of the District Court should be reviewed by appeal under section 25a of the Bankruptcy Act, and not by petition to revise under section 24b of the Bankruptcy Act, for the reason that both questions of law and of fact are sought to be reviewed.

It is perfectly plain that what the appellant seeks here is to have this court consider the evidence upon the merits of the rejection of a claim as a preferred claim, and then to reverse the order of the lower court. This calls for review of the evidence as upon appeal, comprehended by paragraph 3 of subdivision "a" of section 25 of the Bankruptcy Act. But the petition to superintend and revise is not the appropriate method for review, where, as here, the record shows that the controversy is one arising in bankruptcy proceedings, as contradistinguished from proceedings in bankruptcy. The right of appeal under section 25, subdivision "a," of the Bankruptcy Act (section 9609, U. S. Comp. St. 1916), gives a right to review questions of law and of fact, while review under subdivision "b" of section 24 is confined to matters of law only. Under subdivision "a" of section 25, the right of appeal is:

"(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

It is unnecessary to state the case at length or to make any extended allusion to the authorities, inasmuch as the question has been definitely settled by our own decisions which we cite. Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, 100 C. C. A. 647; Howard D. Thomas v. Beharrell et al., 229 Fed. 691, 144 C. C. A. 101. The Supreme Court has held to like effect in the Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, where the court referred to appeals under section 25 of the Bankruptcy Act as providing a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and held that the proceeding under section 24b, permitting the review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25. The court said:

"Under section 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons, who could avail themselves of the remedy by appeal under section 25, a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where the facts are not in controversy, or orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate."

See Globe Bank v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583; In re Graessler v. Reichwald, 154 Fed. 478, 83 C. C. A. 304;

Bothwell v. Fitzgerald, 219 Fed. 408, 135 C. C. A. 212; Pindel v. Holgate, 221 Fed. 342, 137 C. C. A. 158, Ann. Cas. 1916C, 983; Olmsted-Stevenson Co. v. Miller, 231 Fed. 69, 145 C. C. A. 257; Matter of Creech Brothers Lumber Co., 240 Fed. 8, 153 C. C. A. 44; Remington on Bankruptcy, §§ 2888, 2916.

The jurisdiction of this court being narrowed under petition for revision (Duryea Power Co. v. Sternbergh, 218 U. S. 299, 31 Sup. Ct. 25, 54 L. Ed. 1047), the petition must be denied, and the proceeding dismissed.

LEHIGH VALLEY R. CO. v. KRUSZCKENSKI.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 81.

MASTER AND SERVANT ⟸279(5)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER.

In an action by plaintiff, injured in unloading a grain car, it appearing that his ankle was caught by the rope attached to the large scoop, which his fellow servant used, and which was operated by machinery, evidence *held* insufficient to disclose any negligence on the part of the defendant master.

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

Action by Joseph Kruszckenski against the Lehigh Valley Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Alexander & Green and Allan McCulloh, all of New York City (Clifton P. Williamson and Edward W. Walker, both of New York City, of counsel), for plaintiff in error.

Stephen A. Machinski, of New York City (John C. Robinson and Vine H. Smith, both of New York City, of counsel), for defendant in error.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is a writ of error to a judgment rendered on the verdict of a jury in favor of the plaintiff for personal injuries.

April 13, 1916, about 11:30 p. m., the plaintiff, who had been in the employment of the defendant for 10 years, was with another fellow servant, in a box car, engaged in unloading grain into a chute leading to an elevator at Black Tom, Jersey City, in pursuance of a well-understood practice, which is as follows: Each man had a wooden shovel 34 inches wide and 30 inches high, with two handles at the top and a bridle chain fixed at the corners of the bottom and attached to a rope running through a sheave outside of and opposite the side of the car door, and from thence to a shaft on the elevator operated by steam power. The sheaves were 3 feet 3 inches apart. The plaintiff stood at one corner of the car, and his partner at the other corner, and their

ropes crossed. Each man had a helper outside the car to hold his rope. When the helper lets go, the shaft begins to pull the rope, and the man in the car holds the shovel like a plow, pushing the grain forward to the chute opposite the door. While he is pushing forward, his partner is walking back with his shovel. When the first man reaches the door of the car, his helper stops the shaft from winding up his rope, and he walks back to his corner, while the helper of the other man lets go, and he moves forward from his corner with his shovel, pushing the grain toward the door. The ropes cross each other in reaching their respective sheaves.

The plaintiff and his witnesses testified that the assistant foreman ordered him to take his rope from under and put it over his partner's rope. At this time the car was quite full of grain, neither shovel was moving, he was standing near the door of the car, and his partner standing back in his own corner. Immediately after he had made this change and was stepping back, the assistant foreman ordered his partner's helper to let go, with the result that his partner's rope looped tight around the ankle of his left leg, dragging him to the sheave at the door of the car, and causing him severe injuries.

The trial judge submitted the question of negligence to the jury as follows:

"The charge in the complaint is of rather a general character; that is, it is not very clearly indicated just what negligence on the part of the defendant it is claimed resulted in the injury, but in the course of the trial counsel for the plaintiff contended for two different grounds of negligence: One, that the defendant company failed to use due prudence in directing the plaintiff to make the change in the ropes at the time in question in a certain way, after the plaintiff had started to make the change in a different way, which it is contended would be the safer way; second, the charge is that after this change was made, or while it was being made, and before the plaintiff could take a position of safety, the plaintiff's foreman or assistant foreman in charge of the work gave a signal, to one of the other employés, as the result of which the machinery was started in motion and one of the ropes became entangled with the plaintiff's leg, resulting in the injury.

"As you have probably already heard me say, and I say now to you, there is not sufficient evidence to warrant a verdict upon the first ground; that is to say, there is no evidence tending to show that the method of changing the ropes, which the plaintiff claims he was directed to use, was more dangerous than that which he started to use; and that leaves only one possible ground upon which, or one possible respect in which, you may possibly find the defendant guilty of any negligence. I say possibly, because, under the instructions which I am giving to you, it is for you to determine the issues of fact where the evidence is conflicting, and it is for you to draw the proper inferences where the evidence is of such a character that two different inferences may be drawn. * * *

"You will understand that the defendant company as all other corporations, must act through its officers or employés, and it is not to be held responsible here for this accident, unless its foreman or assistant foreman was negligent; that is, acted carelessly; and I have to say to you that, generally speaking, the definition of negligence or carelessness, as the term is used in an action of this kind, is the doing of something which, under all the circumstances under which it is done, an ordinarily prudent man, with proper regard for the welfare of others, would not have done, or the leaving undone of something which, under all the circumstances, an ordinarily prudent man would have done. So that the question is: Did the foreman or his assistant negligently (as I have defined that term) give the signal resulting in the starting of the machinery?"

The testimony of the plaintiff and of his witnesses is that, when he put his rope over his partner's, both were covered by the grain; his partner's being loose. They could not be seen, and the plaintiff, in making the change, did not even feel his partner's rope. Conceding that the defendant is responsible for the act of the assistant foreman, if it was negligent, we fail to discover any evidence of negligence. The practice being pursued was an operation familiar to all concerned and entirely safe in its nature. The particular danger which developed was peculiar, not to be anticipated, and not obvious. But for it the foreman's order to let go was proper and timely. The plaintiff himself, who was in the best position to know, did not know that his partner's rope was in dangerous proximity to his left leg. How, then, can it be said that the assistant foreman was wanting in ordinary and reasonable care for not knowing or foreseeing this when he gave the order to let go? We think what happened was a pure accident, and a verdict should have been directed for the defendant.

The judgment is reversed.

HERRITT v. CLARK.

In re RAKER.

(Circuit Court of Appeals, Third Circuit. January 21, 1918.)

No. 2292.

1. BANKRUPTCY ⟸188(1)—TRUSTEE—RIGHTS OF.

One holding a bill of sale to property in possession of a bankrupt at the time of the filing of the petition has no lien superior to the rights of the trustee in bankruptcy, for such trustee has the rights of an execution creditor of the bankrupt.

2. BANKRUPTCY ⟸188(1)—MORTGAGEES—RIGHTS OF.

The bankrupt, on purchasing in fee several parcels of timber land and the right of removal of timber on other lands, executed a purchase-money mortgage on such property. A timber railroad was located on the property. Thereafter, the bankrupt, having removed the timber and reduced the mortgage by payments, removed the timber railroad with the consent of the mortgagee. Assuming that, while the mortgagee had a lien on the road while it was on the mortgaged premises, yet, having consented to the removal of the equipment, he had no lien thereon superior to the rights of an execution creditor, and hence the trustee of the bankrupt, who had the rights of such a creditor, was entitled to the property as against the mortgagee.

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

In the matter of the bankruptcy of C. D. Raker. The claims of liens on railroad equipment made by L. D. Herritt and the First National Bank of Renovo, Pa., were opposed by E. E. Clark, trustee. From a decree sustaining the order of the referee, awarding the fund represented by such property to the trustee, L. D. Herritt appeals. Affirmed.

Mortimer C. Rhone and Charles L. Peaslee, both of Williamsport, Pa., for appellant.

Harry S. Knight, of Sunbury, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This case grows out of the bankruptcy of C. D. Raker. On his adjudication August 12, 1915, the trustee found the bankrupt possessed a small locomotive, a number of timber cars, and some railroad equipment, consisting of rails, frogs, switches, and the like. These articles were lying at or near a railroad station, where they had been brought by Raker, the bankrupt, for shipment. These articles were claimed by the First National Bank of Renovo, Pa., under a bill of sale from Raker dated December 17, 1914. A lien upon them was claimed by L. D. Herritt, by virtue of a mortgage given to him by Raker, dated November 27, 1911, and recorded in Clinton county on December 7, 1911. The property was subsequently sold by the trustee, with the understanding that the claims of the several parties should be transferred to the fund and the rights of all parties adjudged by the court in said bankruptcy. In pursuance thereof, the referee, after proofs and hearing, awarded the fund to the trustee. On entry of a decree by the court, approving the referee's action, the bank abandoned its claim; but Herritt, the mortgagee, took this appeal.

[1] After argument and due consideration, we find no error in the findings and conclusion reached by both referee and court. Without discussing the many questions raised and the numerous authorities cited, all of which have received due consideration, the case resolves itself into simple lines. That the title to these several articles and the possession of them were in Raker when the bankruptcy was begun there is no question. And as the right which then passed to the trustee was that which an execution creditor of Raker would have had, it is clear that the bank's bill of sale, with Raker, the vendor, still remaining in possession, could not avail against such execution creditor, and therefore against the trustee. A like execution creditor's status also inured in favor of the trustee against Herritt, unless he can show a lien superior thereto. This Herritt seeks to do by his said mortgage.

[2] The proof tended to show that on November 27, 1911, Herritt sold and conveyed by deed to Raker (1) a timber tract of 300 acres of timber land in fee; (2) another timber tract of 50 acres in fee; and (3) stumpage or the right to remove the timber on 8 acres—all of which were in Clinton county, Pa. On the same day Raker executed a purchase-money mortgage covering said three items, for $17,000, which mortgage was duly recorded as above recited. The property thus conveyed to Raker was a timber operation, which he carried on from 1911 until a considerable time before his bankruptcy, in which time he had taken off all the timber and reduced the mortgage indebtedness to about $4,300. We will assume, for present purposes, that during this period Herritt had a lien against the timber railroad and its appur-

tenances as trade fixtures annexed to the realty and necessary to the removal of the timber therefrom. But this assumption is not decisive of this case, for the question here involved is not whether Herritt had a lien while the property in question was on the mortgaged premises and the lumbering operation was going on, but whether he had a lien when the timber was exhausted and when the trade fixtures were thereafter, with his knowledge and acquiescence, removed from the premises and thereafter treated by Raker as free to be disposed of by him. A statement of these facts, and such in substance is the proof and the finding of the referee, which the court approved, shows that Herritt could not hold the articles, had they been levied on by a creditor of Raker. They were in Raker's possession; Herritt had no apparent connection with them; the execution creditor was without actual notice of Herritt's alleged lien; and when they were removed in the presence of Herritt and with his knowledge and consent from the mortgaged premises, it did not lie in Herritt's power to insist that any notice given by the record of the mortgage followed the detached and removed property, whenever Raker took it.

The strong trend of Pennsylvania decisions is against secret liens, and, without citing such decisions, we may say they would sustain the right of an execution creditor against such a secret lien as is here set up. Such being the right of an execution creditor, a trustee in bankruptcy stands on the same footing.

The decree below should therefore be affirmed.

SMITH v. TOSTEVIN.

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

No. 52.

1. BANKRUPTCY ⊂=165(1)—PREFERENCES—WHAT ARE.

The bankrupt borrowed a sum of money from the defendant bank, pledging as security shares of corporate stock, property of his wife, delivered for that purpose by her. Becoming aware of his insolvency and with the privity of his wife, the bankrupt paid the bank its loan and received back the stock, which on the same day he delivered to his wife. Petition in bankruptcy was filed against him within a week, and the trustee attacked the transaction on the ground that the payment to the bank was in fact a preference to the wife, voidable under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1916, § 9644), being within four months of the petition. *Held* that, if wife had been a surety for the loan, the payment to the bank would have been preferential as to her, because relieving her of liability, and hence, though the pledge was a bailment, nevertheless the transaction was preferential as to the wife, for, having pledged the stock, the bankrupt's wife was entitled to exoneration by him to the extent her property was pledged.

2. SUBROGATION ⊂=7(1)—ALLOWING ANOTHER TO PLEDGE PROPERTY.

In general, one who delivers property to another, allowing him to pledge it to a third person for his debt, has the rights of a surety, and is, if the pledge be sold, entitled to subrogation to the status of the creditor.

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

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

Bill by Richard O. Smith, as trustee in bankruptcy of Clifford Le P. Tostevin, against Rose H. Tostevin and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Appeal from a final decree dismissing a bill in equity upon its face for insufficiency. The substantial allegations of the bill were as follows: On September 22, 1916, one Tostevin borrowed of the defendant bank $3,600 and pledged as security 13 shares of corporate stock, the property of his wife, given for that purpose by her. On November 9th, being aware of his insolvency and with the privity of his wife, Tostevin paid the bank its loan and received back the stock, which on the same day he delivered to his wife, the other defendant. Petition was filed against him on November 15, 1916, and the plaintiff is his trustee in bankruptcy. The theory of the suit is that the payment to the bank was in fact a preference as to the wife, which, being within four months of petition filed, is voidable under section 60b of the Bankruptcy Act. The decree was granted upon the theory that the stock had only been bailed to the bankrupt, and that after its redemption he might return it to the bailor.

Jacob S. Gross, of Binghamton, N. Y., for appellant.

George Edwin Joseph, of New York City, for respondent.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] If Rose Tostevin, the wife, had been a surety for the loan, it is settled that the payment would have been a preference under section 60b. Swartz v. Siegel, 117 Fed. 13, 54 C. C. A. 399; Re Lyon, 121 Fed. 723, 58 C. C. A. 143. Before insolvency the surety, by payment of the debt, gets through subrogation the status of a transferee, and that status protects him from loss. After insolvency, while he is, of course, still subrogated, his subrogation will not protect him. He must pay without recourse, and he loses to the extent of the insolvency. A payment to the creditor discharges him, therefore, precisely as though made directly to him. Hence it was inevitable that such a payment should be held a preference, whether made to the innocent creditor or to the surety; the effect was identical, whichever course was chosen.

If we now substitute a pledger of property upon the debt of another in the place of a surety, precisely the same situation arises. The pledgor will be entitled to exoneration against the principal. Robinson v. Gee, 1 Vesey, Sr., 251. If the pledge be sold, he is entitled through subrogation to the status of the principal, and upon insolvency he is certain to suffer a loss, measured by the extent of the insolvency. To the extent of the pledge he is the creditor, as much as though he had already discharged his property and taken an assignment of the claim. A payment to the creditor discharging the pledge is therefore a payment upon a claim upon which the pledgor cannot collect; his loss is equally relieved whether it is made to the pledgee or to him. The analogy is therefore perfect, and the same principle should apply to each case. It has in general been held that such a pledgor has all the rights of a surety. Dibble v. Richardson, 171 N. Y. 131, 63 N. E. 829; Bank of Albion v. Burns, 46 N. Y. 170; Price v. Dime Savings Bank, 124 Ill. 317, 15 N. E. 754, 7 Am. St. Rep. 367;

Rowan v. Sharps' Rifle Mfg. Co., 33 Conn. 1, 21–24. If so, he must be subject to his disabilities.

The defendant's point is good, so far as it goes, that the delivery was a bailment; but it does not touch the important features of the situation. It was a bailment, but something more; it gave the bankrupt the right to subject the property to the hazards of his own credit which a bailment does not do. When those hazards turned against the pledgor by the bankrupt's insolvency, she became subject to the limitations of all those who had assumed the chance; i. e., that what remained of his property should be subject to a trust for equal distribution. It made no difference in that aspect that the hazard was of the bankrupt's ability to redeem the pledge rather than to redeem any other of his promises. Only in case he succeeded in performing that promise could the parties resume the relation of simple bailor or bailee. This suit attacks, not the redelivery of the property bailed, which, taken alone, would have been innocent, but the necessary payment out of the bankrupt's own estate, which was a condition upon his power to redeliver. He had no right to prefer any one of all those who had parted with their property upon the equal chance that his projects might miscarry and his performances fail.

Decree reversed, and cause remanded for trial.

SHELDON v. MESSERSCHMIDT et al. (No. 2973.)

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

NAVIGABLE WATERS ⊂=43(4)—TIDELANDS—RIGHT OF OWNER OF LITTORAL—INJUNCTION.

The owner of upland abutting on an arm of the ocean, though entitled as a littoral proprietor to have access over the land between high and low water mark for navigation purposes, is not entitled to exclude all persons but the United States from such tidelands; and where persons occupying the tidelands do not interfere with his access, he is not entitled to enjoin the maintenance of improvements placed thereon by them.

Appeal from the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Suit by Cyrus F. Sheldon against Gus Messerschmidt and others. From a decree for defendants, complainant appeals. Affirmed.

Cheney & Zeigler, of Juneau, Alaska, for appellant.

Hellenthal & Hellenthal, of Juneau, Alaska, for appellees.

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

HUNT, Circuit Judge. Appellant, Sheldon, seeks to enjoin the maintenance of certain improvements placed by the defendants upon tidelands immediately in front of and abutting land claimed by appellant under a homestead near Juneau, Alaska. On the trial these facts were adduced:

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

Plaintiff owns 47.34 acres of land on Gastineaux Channel, an arm of the Pacific Ocean, and owns upland having a water frontage of about 2,065 feet on Gastineaux Channel. Defendants' structures consist of piles and caps upon two strips of tidelands, one of 106 and the other of 70 feet in length, and it is charged that buildings will be built thereon. Plaintiff lives upon his land, except when doing some assessment work. He has no improvements in the way of buildings upon the land, except the house in which he resides, which is approximately 700 feet northwesterly from the structure built by defendants. Plaintiff offered no evidence to show that he had any actual use for any of the tidelands lying in front of the uplands, or that he ever intended to make any use of the tidelands or any part thereof. In the judgment the District Court finds no evidence that defendants have interfered or are about to interfere with plaintiff's ingress or egress from or to the upland or to and from the navigable water, nor that plaintiff has used or is about to use his said right of ingress or egress, and dismisses the complaint.

Appellant claims the exclusive right to the free, unobstructed use of all of the tideland immediately in front of and abutting his upland against all the world, except the United States as trustee, and that until the tideland is taken for public use, no private person can claim that right for his use against the appellant. As cases have arisen where the opinion and decision of this court has been called for in respect to the rights of a littoral proprietor, it has been held that the owner or locator of lands in Alaska, which border upon navigable or tidal waters, has, by the general law, right of access to such water for purposes of navigation, but that he can acquire no right or title below high water mark, and therefore can have no right of possession upon which he can base an action against an intruder, alleged by him to be interfering with and obstructing him in the erection and use of a structure upon the shore line below such high-water mark. The qualification of the rule, however, gives to such owner or locator the right to bring action against an intruder who puts obstructions on the shore that prevent him from having access to the navigable water. In Columbia Canning Co. v. Hampton, 161 Fed. 60, 88 C. C. A. 224, the authorities are examined and the rule of decision clearly announced. The doctrine does not go so far as to give the owner or locator the exclusive right of access to the navigable waters, as against all persons except the United States. In Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 Fed. 966, 144 C. C. A. 248, the rule was applied. The appellee there had need of access to the waters of Gastineaux Channel in connection with its mining plant built on the upland, and, in order to avail itself of the right of access, it was necessary to construct a wharf covering the whole space in front of the upland. This court sustained the right of access to the navigable waters of the channel and declined to interfere with the decree of the lower court, upon the ground that greater or more extensive right had been accorded to the appellee than was reasonable under the circumstances of the case. The principle of these decisions has been upheld in this circuit in the following cases: Dalton v. Hazelet,

182 Fed. 561, 105 C. C. A. 99; Barron v. Alexander, 206 Fed. 272, 124 C. C. A. 336.

We find no error, and affirm the decree.

Affirmed.

UNION COAL & COKE CO. v. UNITED STATES.

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

No. 4844.

1. MINES AND MINERALS ⟸11—COAL LAND ENTRIES—LIMITATIONS TO SINGLE ENTRY.

Under Rev. St. § 2350 (Comp. St. 1916, § 4662), relating to entry of coal lands, and which provides that "the three preceding sections shall be held to authorize only one entry by the same person or association of persons, and no association of persons any number of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof," a corporation which received the benefit of an entry made by an individual cannot make another entry, either itself or through another, although it did not acquire the maximum quantity allowed by the statute.

2. PUBLIC LANDS ⟸123—LANDS ERRONEOUSLY PATENTED—SUIT TO RECOVER VALUE.

Act March 3, 1891, c. 559, § 1, 26 Stat. 1093, limiting the time for bringing suits for the cancellation of land patents, does not apply to a suit by the United States to recover the value of lands erroneously patented.

In Error to the District Court of the United States for the District of Colorado; Jacob Trieber, Judge.

Action by the United States against the Union Coal & Coke Company. Judgment for the United States, and defendant brings error. Affirmed.

W. W. Anderson, of Denver, Colo., for plaintiff in error.

Eugene B. Lacy, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for the United States.

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

CARLAND, Circuit Judge. This is an action by the United States to recover from the Coal Company the value of certain coal lands situated in Colorado, to which it is alleged the Coal Company fraudulently obtained title by conspiring with certain individuals to make coal land entries for its benefit, when it had already received the benefit of sections 2347–2351, R. S. U. S. (Comp. St. 1916, §§ 4659–4663), authorizing the disposal of public coal lands.

We agree with the trial court that the undisputed evidence showed that coal land entry No. 313, made February 3, 1903, in the name of William F. Oakes, for lots 1 and 2, section 19, township 29 S., range 65 W., containing 84.4 acres, for which patent issued June 26, 1903,

was made by Oakes for the benefit of the Coal Company. We are also satisfied that the same is true as to the subsequent entry of Westlake. The squier entry becomes immaterial, as no recovery was had in regard to that. The other questions in the case are questions of law. The demurrers to the complaint were properly overruled. If the Coal Company desired the pleader to specify in what respect it was not qualified to enter, purchase, or hold coal lands, it should have made a motion to that effect, as a demurrer was not the proper remedy.

[1] The trial court ruled that, although the Coal Company was entitled under sections 2347 and 2348, R. S. U. S., to 320 acres of coal land, it could make but one coal land entry, and that if, in making this entry, it did not claim the amount of coal land to which it was entitled, nevertheless it could not make a subsequent coal land entry. We think this ruling was right in view of section 2350, R. S. U. S., which reads in part as follows:

"The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions."

It is not contended that Westlake could not enter coal lands for the Coal Company in the absence of evasion as to quantity (United States v. Colorado Anthracite Co., 225 U. S. 219, 32 Sup. Ct. 617, 56 L. Ed. 1063), but that the Coal Company, having received the benefit of the entry made by Oakes, could not make another entry either itself or by an agent. There is nothing in the case cited opposed to this view. The restriction to one entry found in section 2350, supra, must be given full effect. To decide that an individual or an association could make several coal land entries, provided the total amount of land filed upon did not exceed the maximum allowed by the statute, would be to read out of section 2350 the words "only one entry." United States v. Keitel, 211 U. S. 370–388, 29 Sup. Ct. 123, 53 L. Ed. 230.

[2] It is claimed by counsel for the Coal Company that this action is barred by Act March 2, 1896, c. 39, 29 Stat. 42 (Comp. St. 1916, §§ 4901–4903), limiting the time in which suit shall be brought to vacate and annul any patent to lands erroneously issued under a railroad or wagon road grant. As was decided by this court in Pitan v. United States, 241 Fed. 364, —— C. C. A. ——, and as appears from the act itself, the law refers to patents issued under a railroad or wagon road grant. Counsel cites us to a statement made by this court in United States v. Norris, 222 Fed. 19, 137 C. C. A. 552; but what this court there stated was made in reference to section 1 of the Act of March 3, 1891 (26 Stat. 1093, c. 559), limiting the time in which suits must be brought by the United States to vacate and annul any patent heretofore or thereafter issued. But neither of these acts by their very terms apply to suits like the one at bar. This court decided, in United States v. Koleno, 226 Fed. 180, 141 C. C. A. 178, that an action like the one we are considering would lie at the suit of the government. Southern Pacific R. R. Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50

L. Ed. 507. This court also decided in Pitan v. United States, supra, that:

"The mere fact that the government permitted the patent to become valid by the statute of limitations in place of by its express ratification would not affect the question of the right to maintain an action for damages. It was not only so held by the court below in this case, but to the same effect in United States v. Jones [D. C.] 218 Fed. 973, and there is no decision to the contrary."

Counsel for the Coal Company, for some reason not apparent, cites section 1047, R. S. U. S. (Comp. St. 1916, § 1712), which limits the time within which suits to recover penalties or forfeitures shall be sustained. This is not a suit for a forfeiture or to recover a penalty. Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127.

The judgment below is affirmed.

THE VEDAMORE.

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

No. 1529.

COLLISION ⊂⊃66—STEAMSHIP AND TOW—CROWDING WHILE PASSING ANCHORED DREDGE.

A finding that a collision between a steamship and a scow in tow, both passing down a channel in Baltimore Harbor, when they were abreast of an anchored dredge, the position of which was known to both, was due solely to the fault of the steamship in failing to allow sufficient room for the tug and tow to pass safely between herself and the dredge, *held* sustained by the evidence.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty for collision by Albert Connolly, master of the steam tug Marian, against the steamship Vedamore; the Johnson Line Foreign Agency, Limited, claimant. Decree for libelant, and claimant appeals. Affirmed.

R. E. Lee Marshall, of Baltimore, Md. (Daniel R. Randall, of Baltimore, Md., on the brief), for appellant.

John Henry Skeen, of Baltimore, Md., for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and DAYTON, District Judge.

KNAPP, Circuit Judge. On January 28, 1916, in the late afternoon, the steam tug Marian was towing a loaded scow down Locust Point channel in the harbor of Baltimore. At the same time the steamship Vedamore, which had just backed out from Pier 8, was also going down the channel on a nearly parallel course. Directly ahead of these vessels, on the northerly side of the channel, was a dredge, held by anchor ropes, which had been there about a year and was plainly visible. From some cause, which is in sharp dispute, the scow came

into collision with the steamship, as they were approaching the dredge and almost abreast of it, with the result that the tug was capsized and sunk. The court below found:

"In a sense the primary cause of the accident was the fact that the dredge narrowed the usual fairway. The Vedamore was so navigated that it did not allow sufficient room for the Marian and her tow to pass safely between the Vedamore and the dredge. The dredge was, of course, properly in the position in which it was, and it had been in the same spot or very close to the same spot for a long time. The pilot [of the Vedamore] knew where it was. * * * The testimony as well as the inspection of the charts and common knowledge show that the ordinary and proper course in and out of Baltimore Harbor is between the position of the dredge and the Locust Point side. The Vedamore, in going out of the harbor, knowing, as she did, the position of the Marian and the dredge, was bound to navigate with a view of giving the Marian sufficient room to pass safely between her and the dredge. She did not do so. * * * Whatever his [the pilot's] reasons were, it is certain he did not give the Marian sufficient space safely to pass. The fault of the Vedamore is clear. The evidence does not show that the purpose of the Vedamore to keep close to the dredge buoys was known to the Marian in time for the latter safely to have attempted to pass to the port side of the dredge and its buoys. To have done so would have required her to have gone about 450 feet to the port of her course. * * * As the evidence does not convince me that the master of the Marian knew in time that the Vedamore intended to keep so close to the dredge and her buoys that he would not have room safely to pass, I do not see my way clear to hold the Marian at fault. The Vedamore will therefore be held solely liable."

The case turns wholly on this question of fact, and no sufficient reason appears for disagreeing with the conclusion reached by the learned District Judge.

Affirmed.

AVERY-LOEB ELECTRIC CO. v. MARKEL.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1917.)

No. 3003.

1. PATENTS ⟸328—INVENTION—INSULATOR.
   The Markel patent, No. 878,302, for a two-part porcelain insulator knob composed of two duplicate matching and registering members, and having tenon fitting into a keeper mortise, claim 1, *held* void for lack of invention in view of the prior art.

2. PATENTS ⟸24—"INVENTION"—MULTIPLICATION OF PARTS.
   Ordinarily "invention" does not lie in merely making in two parts that which before was made in one.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention.]

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

Suit in equity by Harley R. Markel against the Avery-Loeb Electric Company. Decree for complainant, and defendant appeals. Reversed.

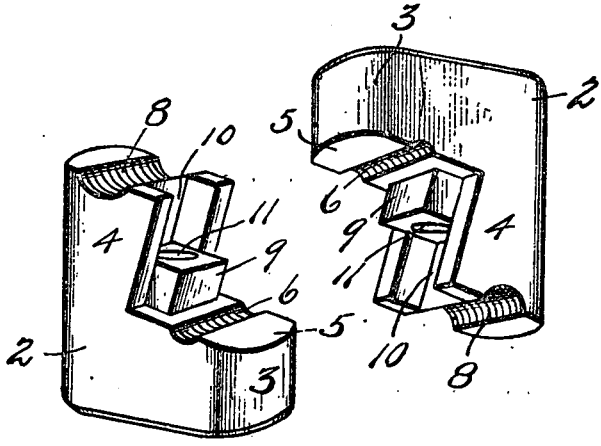
⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Wm. F. Hall and David P. Wolhaupter, both of Washington, D. C., and Watson, Stouffer, Davis & Gearhart, of Columbus, Ohio, for appellant.

Chester C. Shepherd, of Columbus, Ohio, for appellee.

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

KNAPPEN, Circuit Judge. Suit for infringement of patent No. 878,302, February 4, 1908, to Markel. The device of the patent is a two-part porcelain insulator knob, composed of two duplicate (and thus interchangeable) matching and registering members, designed to protect the electric wires passing through it against contact with the nail or screw which fastens the knob to its support. Figures 3 and 4 of the patent drawings (here reproduced) are details in perspective of the duplicate parts.



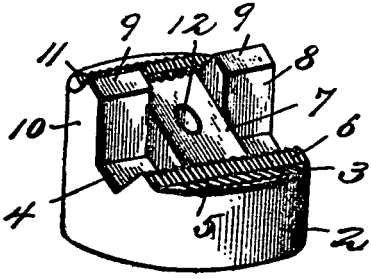
[1] The first claim, which is the only one in issue, reads thus:

"1. An insulator having a two-part body consisting of a pair of duplicate matching members provided with similarly arranged wire openings, and each having a central guard tenon presenting a shoulder next to the adjacent wire opening, and a keeper mortise for the tenon on the other member."

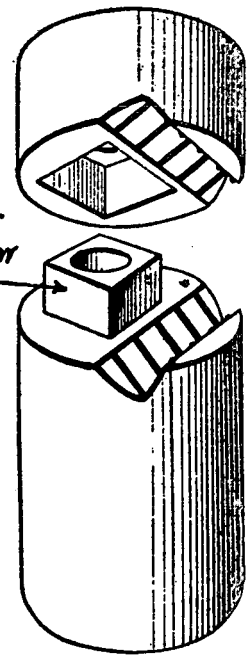
In the drawings, *6* and *8* represent the wire openings, *9* the duplicate halves of the guard tenon, and *10* the duplicate halves of the keeper mortise. The nail or screw passes through the hole *11* in the guard tenon, and by this construction the block members are prevented from lateral displacement and the wires kept from contact with the screw or nail by the shoulder nature of the inclosing tenons. The District Court held the claim in question valid and infringed.

The advantages of having a knob formed of duplicate parts are conceded. But Markel was not the first to disclose an insulator made in exactly duplicate parts. Nichols had several years before shown an insulator composed of two exactly duplicate members, whose inclined abutting faces when brought together made a blocklike body, through which the nail or screw passed, and by which it was sepa-

rated from the two wires, which, as in Markel, lay one on either side of it and at different elevations. One of Nichols' patent drawings, giving a detailed perspective view of one of the members, is here inserted.



Nichols' device differed substantially from that of Markel only in that its guard was not in the form of a tenon fitting into a keeper mortise. The Trenton Porcelain Company, however, had marketed an insulator which, while not in duplicate parts, had a guard tenon upon one part which fitted into a keeper mortise in a complementary part, as illustrated by the subjoined cut.



The Trenton tenon and mortise performed the identical functions of those of Markel, and in precisely the same way. The General Electric Company had put upon the market insulators of a type similar to the Trenton, the tenon taking the form of a truncated cone. Evans also had shown a porcelain "cleat," as distinguished from a "knob," composed of two exactly duplicate matching and registering parts, the screw and wires being entirely isolated from each other.

Markel's advance over the prior art thus consisted merely in using, in Nichols' duplicate part knob, the Trenton guard tenon and keeper mortise theretofore used in separate, complementary, but not duplicate sections, or, otherwise stated, in putting half of the Trenton guard tenon and one-half of its keeper mortise in each of two old duplicate sections, instead of having the entire tenon in one section and the entire mortise in another.

[2] We agree with the District Judge that Markel was not anticipated by Nichols. We also think neither the Trenton, the General Electric, nor the Evans devices direct anticipations. The important question, in our opinion, is whether what Markel did amounted to in-

vention, in view of the prior art. While we also agree with the District Judge that Markel's step did not consist merely in building up Nichols' table, we think the conclusion below failed to give due weight to the prior art, including the Trenton and similar devices. Ordinarily invention does not lie in merely making in two parts that which before was made in one (Standard Caster Co. v. Caster Socket Co. [C. C. A. 6] 113 Fed. 162, 169, 51 C. C. A. 109), and that is really what Markel did with the Trenton structure, in view of the prior use of porcelain knobs in duplicate parts. We recognize no element of novelty or invention in the so-called "shoulder" presented by Markel's central guard tenon. The Trenton guard tenon presented the same shoulder. The feature of oblique disposal of guard tenon and keeper mortise, with reference to the longitudinal center of the block, is not involved here.

Markel's device doubtless had utility, as evidenced by its commercial success, and by defendant's adoption of it. But giving due weight to the feature of commercial success, which, however, is not important when lack of invention is clear (McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Caster Socket Case, 113 Fed. 166, 51 C. C. A. at page 109), we think what Markel did fell short of invention.

The judgment of the District Court is reversed, and the record remanded to that court, with directions to enter decree finding claim 1 invalid.

STANDARD TOBACCO STEMMER CO. v. TOBACCO STEMMING MACH. CO.

(Circuit Court of Appeals, Third Circuit. December 1, 1917.)

No. 2258.

PATENTS ⇐328—INVENTION—TOBACCO STRIPPING MACHINE.

The Hutcheson patent, No. 713,886, for a tobacco stripping machine, *held* void for lack of patentable novelty and invention, in view of the prior art.

Appeal from the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Suit in equity by the Standard Tobacco Stemmer Company against the Tobacco Stemming Machine Company. From a part of the decree, complainant appeals. Affirmed.

For opinion below, see 237 Fed. 822.

Rogers, Kennedy & Campbell, of New York City (Robert Fletcher Rogers and William R. Kennedy, both of New York City, of counsel), for appellant.

William F. Hall, of Washington, D. C., Joseph C. Fraley, of Philadelphia, Pa., and J. Granville Meyers, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is a suit for infringement of eight letters patent for tobacco stripping machines, owned by the plaintiff. It is here on the plaintiff's appeal from the part of the decree by which the District Court dismissed the bill as to claims 3, 4 and 8 of Letters Patent No. 713,886, issued to J. A. Hutcheson, on the ground of non-infringement. 237 Fed. 822.

The art to which the patent relates, the inventions in the art, and the claimed invention of the patent in suit are so fully stated in the opinion of the District Court, that we shall address ourselves to the art and the patents as there disclosed and described, stating only so much as may be necessary to an understanding of our conclusions.

The art of stripping or stemming tobacco leaves was not new when Hutcheson entered it. It was so far developed that he expressly disclaims that his invention is primary or pioneer. The art has to do with the separation of the thick, brittle and valueless portion of the stem of a tobacco leaf from its thin, fragile and valuable membrane. It is practiced both by hand and machinery. We are concerned only with the mechanical practice, and only with the part of it in which the membrane of a folded or matted leaf, intended for use in smoking tobacco, is removed from the stem by chopping, cutting, ragging or tearing.

The stemming machines of the branch of the art to which this controversy relates have three common characteristics. They are, (1) means for gripping the leaf, (2) means for carrying the leaf when gripped to (3) means for stripping the stem. The usual gripping means is either a pair of gripper bars or a set of mechanical fingers adapted to clamp or grip the leaves. Carriers are either endless belts or reels, which convey the leaf to the stripping mechanism. The stripping means usually consists of a pair of rolls with cutting grooves or a great number of wire bristles extending radially from their peripheral surfaces. These rolls are so arranged that they separate to let the gripper bars through, and then close upon the gripped tobacco leaf as it passes between them, and cut, rag, or tear the membrane from the stem.

Hutcheson does not claim for his invention any element or characteristic not commonly found in such machines of the prior art, (excepting, perhaps, a feed control attachment, presently to be mentioned). He maintains, in substance, that he has invented a certain new and valuable adjustment of the old elements of carriers and rolls, and for this invention makes claim in his patent, as follows:

"4. In a tobacco-stripping machine, a pair of coacting leaf stripping rolls, means for intermittently moving both of said rolls asunder in relatively opposite directions, and a pair of coacting drawing-in bars moving in a rectilinear path; the aforesaid parts being constructed and arranged so that a leaf on being grasped between said drawing-in bars is thereby carried between the said stripping-rolls to be subjected to the action thereof and the stem transported away from said rolls, substantially as described."

If there is invention in this claim, it resides in what the plaintiff characterized at the argument as the "Hutcheson main thought." This is the movement of the drawing-in or gripper bars "in a rectilinear path" and the movement of the rolls "asunder in relatively

opposite directions" to permit the bars to pass between them. This manifestly is the essence of the patent, and, aside from the particular means employed to put it into practice, is the whole of Hutcheson's thought.

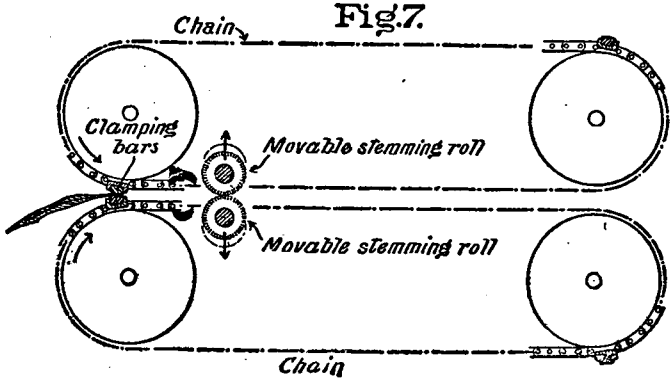
The questions in this controversy, therefore, are—Whether the thought credited to Hutcheson was in fact his; and, if so, whether the thought, as developed by the means he employed, involved patentable novelty in view of prior patents to Cochrane, No. 538,660, and to Guerrant, No. 630,334 in the tobacco stemming art, and of the patent to Peterson & Clark, No. 426,603 in an art claimed to be analogous.

The idea of the separation of rolls to permit the passage of gripper bars or fingers, is old, and is not claimed by Hutcheson. The idea of moving *both* rolls "asunder in relatively opposite directions" though claimed by Hutcheson as a part of his conception, is manifestly not his at all, for Guerrant had that conception and had reduced it to practice three years before Hutcheson.

Though Guerrant's means for separating both rolls was barred to Hutcheson, Guerrant's conception of their separation, being merely a function, was not barred to him. Therefore, Hutcheson was free to embody it in any novel means of his own. This he proceeded to do. What was the means he employed in doing it?

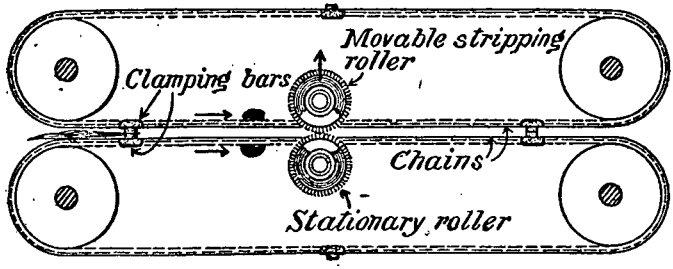
Hutcheson took the old upper and lower endless belts or chains of tobacco steming machines, with their transverse gripper bars arranged to close together and grip the waiting tobacco leaf at a predetermined point and time and mounted cams upon both sets of belts. In operation the cams on the upper belt move under the upper roll and the cams on the lower belt move above the lower roll. The rolls are seated in what in effect are vertical guides supported by springs. As both sets of belts move the cams of the upper belt press the upper roll upward and the cams of the lower belt press the lower roll downward, thus separating them at a time and to an extent which permits the passage of the gripper bars between them. As the cams pass beyond points of contact with the rolls, the springs press the rolls back to their normal positions in contact with the moving leaf. The following diagram shows in outline the principle and the means of the patent:

Fig.7.



While the conception of a simultaneous separation of stripping rolls was Guerrant's, Hutcheson claims that the means for carrying that conception into practice in the way shown by his patent, is his. If it is, he is doubtless entitled to a patent for it. But we are very clear that the means in which he claims invention and for which alone he may claim a patent, is not his. In developing Guerrant's idea, Hutcheson evidently went to the art and there he found Cochrane. Cochrane had the same upper and lower endless belts with transverse gripper bars and the same stripping rolls. Cochrane separated the rolls to permit the passage of the gripper bars between them, but he effected separation not by moving both rolls, but by holding the lower roll stationary and moving the upper roll away from it. The upper roll was set in vertical guides supported by springs, and was moved up as the cams of the upper endless belt came under it and was forced back by the springs as the cams passed on. The following diagram shows in outline the principle and means of Cochrane:

Fig. 2.



In prosecuting his application through the Patent Office, Hutcheson very naturally encountered Cochrane. Beginning with claims which did not limit the invention to a separation of *both* rolls, and having them rejected on reference to Cochrane, claims 3 and 4 were finally allowed with such a limitation.

We are thus brought to the question, whether Hutcheson's practice of Guerrant's conception of moving *both* rolls by the same means employed by Cochrane in moving *one* roll, involves the inventive faculty and amounts to patentable novelty. If there was merit in Guerrant's conception of the separation of both rolls, Cochrane made perfectly obvious the means by which such separation could be effected. Hutcheson did in both rolls essentially and almost precisely what Cochrane did in one, with little deviation of means and none of function. We are clearly of the view that in carrying out Guerrant's conception by Cochrane's means, Hutcheson invented nothing,—unless he thereby conceived and achieved something beyond the scope of Cochrane's invention.

Hutcheson claims that his invention meets this test, and that in doing in two rolls what Cochrane did in one, he did something that Cochrane neither thought of nor did. This comprises the other element of Hutcheson's main thought, namely, the movement of the gripper bars

with the tobacco leaf in their grasp "in a rectilinear path." This he claims is a novel and useful thing which solved a problem and made an advance in the art meriting a patent. He bases this claim upon two facts: First, that the path of the gripper bars and the tobacco leaf in Guerrant, while substantially rectilinear, is in fact orbital, the arc of the path being wide or narrow according to the diameter of the reel; and, second, that a true rectilinear path in Cochrane is prevented by the stationary roll which causes the lower gripper bars to climb up and ride over it. It is not clear from the evidence that the slightly arcial path of Guerrant, or the rise in the path of Cochrane, presented difficulties involving problems from which the art called for relief. Indeed, it does not appear that Hutcheson's claim of an advance made by a path geometrically rectilinear, was recognized by the art as a matter of importance. Unless Hutcheson, in adopting Cochrane's roll-separating means has solved some real problem or has contributed some new and useful thing to the art, he has not made an advance which entitles him to a patent.

After a very careful study of the record, we are satisfied that whatever merit may be contained in Hutcheson's idea of a true rectilinear path, it does not involve invention. We are of opinion, therefore, that claims 3 and 4 of the patent are invalid. We base our judgment of their invalidity not upon the ground of anticipation, but because we think that they involve no patentable novelty in view of the prior art.

We reach this conclusion upon the prior patents of this art alone, as we find it unnecessary to go to the analogous art cited, in which is the prior patent to Peterson & Clark, No. 426,603, where there is a separation of both rolls and a movement in a true rectilinear path in the precise principle and by almost the identical means of the patent in suit.

Claim 8 is for a controlling device used in connection with the tobacco-stripping machine of the type of the patent in suit. It is as follows:

"In a tobacco-stripping machine, a pair of coacting leaf-stripping rolls, means for intermittently separating said rolls, a pair of coacting drawing-in bars moving in a rectilinear path and passing between said rolls when said rolls are separated, and a controlling device governed by said bars for intermittently arresting the movement of the leaves in position to be grasped by said bars, substantially as described."

We are of opinion that this claim also is invalid for lack of patentable novelty, especially in view of Letters Patent, No. 591,436 to Underwood, in this art. The device appears to us to be nothing more than an expedient commonly resorted to in this and in other arts where feed control is desired.

It is ordered that that part of the decree below, which is here on appeal, be affirmed.

WARREN BROS. CO. v. PACE et al.

(District Court, N. D. Ohio, E. D. June 26, 1916.)

No. 319.

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PAVING MATERIAL.

The Warren patent, No. 727,505, for a street pavement consisting of broken stone of different sizes down to an impalpable powder in generally specified proportions, in connection with a bitumen binder, claims 5, 6, and 11, construed, and *held* valid, but not infringed by defendants, whose composition is not within the proportions specified in the claims.

In Equity. Suit by the Warren Bros. Company against W. S. Pace and T. S. Pace, individually and as partners doing business as Pace Bros. On final hearing. Decree for defendants.

Westenhaver, Boyd & Brooks, of Cleveland, Ohio, and James M. Head, of Boston, Mass., for plaintiff.

Charles K. Offield, of Chicago, Ill., and Guthery & Guthery, of Cleveland, Ohio, for defendant.

CLARKE, District Judge. This suit is brought by Warren Bros. Company, a corporation, against the defendants, individually and as partners, to enjoin the carrying out of a contract entered into by the defendants with the commissioners of Cuyahoga county, Ohio, for the construction of a highway of materials such that the plaintiff claims it would infringe the fifth, sixth, and eleventh claims of United States letters patent No. 727,505 owned by the plaintiff.

A considerable part of the roadway had been completed when the case was tried, and the claim of the defendants is that the composition required by the terms of the contract to be used was departed from with the consent of the inspecting and of the county engineers for the reason that the quantities of materials specified were such that they would not absorb the required amount of bituminous matter without making the surface of the road too soft for the use to be made of it. For this reason all parties concerned confined the testimony to the pavement as actually laid, with the assumption that the remainder of it would be of the same character.

In Warren Bros. Co. v. City of Owosso, 166 Fed. 309, 92 C. C. A. 227, the Circuit Court of Appeals for this (the Sixth) Circuit, decided that the patent in suit is valid, and that claims No. 5, No. 6, and No. 11 were in that case infringed, but what mixture of materials was contemplated or used does not appear from the report.

In Warren Bros. Co. v. City of New York, 187 Fed. 831, 109 C. C. A. 591, the Circuit Court of Appeals of the Second Circuit, following the decision in the Owosso Case held the patent to be valid, and the specifications appearing in the report are held to infringe claims No. 5, No. 6, and No. 11.

A due subordination of authority requires this court to accept as controlling the decision in the Owosso Case, but except for this ob-

ligation, upon the record before me, I should have great difficulty in sustaining this patent. This disposition to question the validity of the conclusion of the Court of Appeals springs chiefly from the impression made upon the mind of this court by the affidavit of Logan Waller Page, which by reference in the affidavit of the defendants' expert, Samuel N. Pond, becomes a part of the record in this case. The testimony of this witness was not in the Owosso Case, but in part at least it appears to have been before the courts of the Second circuit in the New York case.

Page, when he made the affidavit referred to, was director of the office of public roads of the United States Department of Agriculture; he is obviously a man of high scientific attainments, and had served by appointment of the President of the United States at least twice as the representative of the United States at International Road Congresses, one held in Paris and one in Brussels. He states that he had frequently refused to testify in patent cases, and that he had consented to do so only in cases which, though not in form, were in fact against the cities of Chicago and Indianapolis and of New York, and he says that he made exceptions to his practice in these cases because he thought it was his duty to be of service to the public. This witness gives a condensed statement of the industry of road making with stone, and refers to publications in 1893 and 1895, which seemingly disclose clearly enough what Warren describes in the specification of the patent in suit as his discovery, viz. that the best provision for eliminating voids and for establishing stability in paving materials is to be found not, as was supposed before his discovery, in the use of sand or of fine gravel, but in the use of mineral components of relatively large size. He points out very pertinently that the permissible percentages of mineral aggregate stated in the patent in the suit are such as to render the so-called invention extremely vague and uncertain, and he illustrates this statement by showing that if the minimum of the intermediate sizes in the Warren preferred mixture, ranging from one-fourth inch to impalpable powder, is taken, it will be impossible to obtain a 100 per cent. mixture by employing the maximum amounts of the other two ingredients, e. g., 3 per cent. of impalpable material, plus 10 per cent. of material between impalpable powder and one-fourth inch in size, plus 80 per cent. of material larger than one-fourth inch in size, equals 93 per cent. He gives the results of four combinations of stone and impalpable powder, all seemingly within the scope of Warren's preferred mixture, yet in each of these the percentage of voids is above that of claim No. 11, and in three of the cases is very materially above it. From publications long prior to the application for the Warren patent he shows that the statement is seemingly without foundation; that except by his method it is impossible to reduce the void space in an aggregate of rock below 21 per cent. Further to this experienced and obviously candid road builder, the use which Warren makes of the expression, "inherent stability" is, as it seems to this court to be, extremely vague, and he declares that the proportions and gradations of material described cannot be produced except by a most careful separation by measures and screens for different sizes of stone, by selecting the prescribed proportion of

such sizes and by then mixing them in the manner suggested by the patent.

The record in the Owosso Case, though not in evidence, has been inspected by this court, and it is significant that this last statement describes the manner in which the witness (in this case Schultee) testified in the Owosso Case, the plaintiff prepared and mixed its materials in order to obtain the patented combination.

It may be noted in passing that no evidence was introduced in the trial of this case which tends directly to modify the views thus expressed by Mr. Page, and that two cases commenced by the plaintiff, in which his testimony was used, were dismissed after a motion for preliminary injunction was denied.

These observations will suggest why, although this court feels it its duty to follow the Owosso decision, it also regards itself as constrained to put a somewhat strict interpretation upon the claims of this patent, in determining the question whether or not it has been infringed by the defendants, which is the only question which the decision of the Circuit Court of Appeals leaves open for our determination.

The patentee of the patent in suit declares that his invention consists in the discovery that the best composition of the street pavement mixture, to which his patent relates, is one "as free from voids as possible and also stable and nonliable to displacement," and this is obtained, he says, by using larger sizes, grains or pieces of stone—"say up to those which will pass through a 2-inch ring," and by employing with these larger grains, proper quantities of the smaller sizes down to impalpable powder. This general description of his invention is followed by a statement of the "proper quantities" of the indicated ingredients which he has found from experience give the best results, which is "1 per cent. to 3 per cent. of impalpable powder, from 10 per cent. to 30 per cent. of material between impalpable powder and one-fourth inch in size and from 50 per cent. to 80 per cent. larger than one-fourth inch in size."

It cannot escape notice that that part of the specification thus condensed is so indefinite that, as Mr. Page points out, if the minimum amount of the material between impalpable powder and one-fourth inch in size be taken, and the maxima of the two other ingredients be taken, the result is a total of but 93 per cent.; and also that if the maxima of the first and second, the two finer ingredients be taken—3 per cent. of the first and 30 per cent. of the second—it results that there must be taken 67 per cent. of the coarsest, larger than one-fourth inch in size.

Further reading of the specification finds the patentee declaring that:

> "Because of the inherent stability obtained by me by the careful selection and proportioning of several grades of mineral ingredients I am enabled to use an asphalt or bituminous uniting medium of a softer nature and at a lower temperature than could otherwise be used. This is because in my case, the wear and strain fall upon the mineral ingredients and not upon the binder, which latter may be as soft as desirable."

This is important in arriving at just what the patentee claimed his discovery to be, and it obviously suggests that the mixture which he had in mind should be one including stones larger, perhaps much larger

than 1 inch in size. It is notable in this connection that in the first four claims of the patent one element of the mixture claimed to be a discovery consists in material, 50 per cent. to 80 per cent. of the whole, composed of mineral ingredients lying between one-fourth inch and 3 inches in diameter.

The first four claims of the patent give, though somewhat indefinitely, the percentages of the various elements of the mixture proposed, but claims No. 5 and No. 6 are much more general in terms, and are really so indefinite that if they are read unmodified by the specification and earlier claims, they would grant a monoply to the patentee for almost every conceivable mixture of broken stone, provided only that it possessed the quality which the patentee describes as "inherent stability." It would seem clear enough that this is an interpretation of the claims which the Court of Appeals cannot have had in mind as a result of its decision, and it makes it of first importance that we should obtain, if possible, a clear definition of the expression "inherent stability," as it is used once in the specification and in 7 of the 13 claims, including the fifth and sixth claims.

Schultee, one of the expert witnesses for the plaintiff, testifies that with the exclusion of bitumen "inherent stability is the stability of the aggregate per se." The plaintiff's witness, Howard, defines "inherent stability" as meaning "that mineral aggregate mutually supports itself; the larger voids of the larger stones being filled by the next smaller and on down, so that you have a compact piece of mineral aggregate of very unusual inherent stability." And again this witness was asked whether or not "Warren proposes to obtain inherent stability by the use of these stones of such size and in such way, nested and associated together so as, without any bitumen at all, they will mutually support each other," and he answered, "That is really what is new and novel in the patent."

This discussion of the patent and of the evidence introduced on this trial brings us to the crucial question for decision, viz., Does the paving which the defendants are proved to be laying infringe claims No. 5, No. 6, and No. 11 of the patent in suit?

As we have said, a considerable part of the pavement has been finished, and the case was tried upon the theory that the remainder of the work would be done in the same manner as that already completed. For the plaintiff two witnesses, Schultee and Howard, testify on this subject.

Schultee testifies that the sample of the pavement laid by the defendant which he analyzed, exclusive of bitumen, contained 48.8 per cent. of material coarser than one-fourth inch; 3.4 per cent. of impalpable powder, and the rest of it, 47.8 per cent., was graded between the two, and is defined as "sand" by Howard. It contained, Schultee says, 14.2 per cent. of voids. He adds:

> "The whole structure was so proportioned as to cause the stones to interlock with each other and produce the inherent stability that is claimed by the patentee"

—and that the stone used was a limestone, the run of the crusher, between 1¼ inch and one-fourth inch.

Howard testifies that he analyzed a part of the sample sent him by Schultee, and that, excluding bitumen, the amount of the aggregate which passed a 200th-inch mesh was 5.5 per cent. the amount which passed a one-fourth inch sieve was 46.8 per cent., and that the amount which was coarser than one-fourth inch was 47.7 per cent. He made the voids 13.6 per cent. He says that in the sample he used there were one or two pieces "just one or two possibly" which on shaking would not have gone through a 1-inch sieve; "you might say, if you took an enormous pile, it would have a few particles larger than 1 inch in size." Though skillfully led, this witness would not go the length of saying that this mixture falls within the preferred proportion of the patent. Obviously it does not, for it contains 46.8 per cent. between impalpable powder and one-fourth inch stone, while the preferred maximum of this size is 30 per cent. This witness says that he would classify that portion of the material as sand which ran from one-fourth inch down to 200th inch; coarser than this he would classify as crushed stone or gravel. The 200th-inch material he classifies as dust. He also divides sand somewhat indefinitely into coarse and fine sand. In this classification of the witness, the sample which he used yielded 5.5 per cent. impalpable powder, 46.8 per cent. of sand, and 47.7 per cent. of stone.

For the defendants Arthur Lee, W. S. Pace, C. E. Betts, and W. E. Heineke testify upon this subject.

Lee is the foreman in charge of the work, and he gives the weight of one batch of material which he says was typical as stone and sand without limestone dust, 859 pounds, limestone dust, 65 pounds. He says that as nearly as he could estimate it, 2,300 pounds of stone were used to each 3,000 pounds of sand, and this is the only division he gives of the amount of sand and stone used. Working out the percentages by familiar methods, this testimony of Lee results in the conclusion that the mixture used by the defendants contains (omitting fractions) 53 per cent. sand, 40 per cent. stone and 7 per cent. dust. The specification in the contract called for three parts stone and two parts sand, and this witness says that it was necessary to depart from these proportions because there was not sand enough in that mixture to carry the bitumen without leaving the pavement too soft, and that the mixture he gave was adopted with the consent of the inspecting chemists and of the county engineers.

W. S. Pace, one of the defendants, testifies much more generally than does Lee, and does not speak of percentages except where he includes bitumen as a part of the total. He says (and Lee and he agree on this) that the material used consists of limestone in size varying from 1¼ inch to one-fourth inch and two kinds of sand, one coarse and one finer. He says that the stone is kept in one pile and two kinds of sand in separate piles; that the two kinds of sand are mixed as nearly as he can judge in about equal weights, and are used with the stone in the proportion of about 2,500 pounds of stone (Lee makes it 2,300) to 3,000 pounds of sand. His description of the quantity of pulverized stone or powder is the same as Lee's. It results that while Pace is not as definite as Lee, their testimony is in substantial agreement.

C. E. Betts is a chemist who analyzed a sample of defendant's pavement as laid, and obtained the result following: Six per cent. of im-

palpable powder; 52.1 per cent. passing a one-fourth inch mesh and retained on the 200th-inch mesh, which would be sand; 41.9 per cent. retained on one-fourth inch mesh, which under the definitions used in this testimony would be stone. Betts used a sample which had a surfacing of bitumen and gravel, so that his results would not be as strictly accurate as those of Schultee and Howard, but the sample produced in court would indicate that the analysis on this account would be more favorable to the plaintiff than the defendant. The approximation of this result to the statement of the composition of the paving made by Lee is impressive.

W. E. Heineke is a representative of the Pittsburg Testing Laboratory, having charge of the inspection of the work done by the defendants in the interest of the county, and for two weeks before the trial he had been making hourly examinations of the mineral aggregate used. He says that the endeavor was to get about a wheelbarrow full of stone to a wheelbarrow full of sand (half coarse and half fine sand) which were alternately fed into the mixing machine. He says that in the same volume the sand would be heavier than the stone, and that they aim to keep the volume approximately the same, but he does not undertake to say how much heavier the sand would be than the stone. He confirmed the testimony of Lee to the extent of saying that about 65 pounds of the pulverized stone is used in a batch of 1,000 pounds of the mixture, and he approves as typical the two samples of sand which are introduced in evidence, one fine and the other coarse.

Assuming now that Lee and Pace and Betts have given the composition of the mixture used by the defendants with approximate accuracy as stone dust 7 per cent., stone one-fourth inch to 1¼ inch in size, 40 per cent., and sand 53 per cent., it cannot reasonably be said to infringe the preferred mixture of the patent, which requires at most 3 per cent. of impalpable powder and 30 per cent. of sand with not less than 67 per cent. of stone larger than one-fourth inch in size; neither does it infringe either the first or second claim of the patent because it contains only 40 per cent. of ingredients between one-fourth inch and 3 inches in diameter, while each of these claims requires a minimum of 50 per cent. of such stone, which with the variations from the other materials used is too great a departure from the formula of these two claims to permit of its being considered an infringement of them. Neither does it infringe the fourth claim because it contains but 40 per cent. of material between one-fourth inch and 3 inches in diameter (none of it larger than 1 inch in diameter) instead of the minimum of 50 per cent. as specified in the claim, and also because of the excess of sand and of impalpable powder which it contains over the quantities specified in this fourth claim.

However claims No. 5 and No. 6, which have been held valid by the Circuit Court of Appeals, do not specify any definite amounts of the various grades of materials to be used. But in these the invention is claimed to reside in so grading the materials "as to give the structure an inherent stability," using the expression as it is defined for us by Schultee and Howard in the terms already quoted in this opinion. Samples of the two kinds of sand and of the stone used by the defendants are before this court, as are also samples of the pave-

ment as completed structure. Schultee and Howard say that in their opinion the compound of materials used by the defendants as shown by their analyses possesses the required inherent stability, but the composition which their analyses of small samples show is so greatly different in proportions of sand and of stone and of powder used from that testified to by the witnesses for the defendant that their conclusion might be applied to the samples used and yet not be true as to the actual roadway constructed. With the evidence thus far from satisfying on this important question, it is quite impossible for this court to believe that such small pieces of stone as the exhibits show are used by the defendants can be mixed with such sand as is shown to be used in the proportions of approximately 40 per cent. of the former to 53 per cent. of the latter, and that by simply mixing, without bitumen, they can be so nested and associated together as to create a stable mass, meaning thereby a mass with a stability sufficient to permit its supporting such vehicles and animals as are used upon public highways. It would seem that the utmost that can be said for the testimony introduced by the plaintiff on this point is that it leaves the court in very great doubt as to whether the mixture used by the defendants possesses "inherent stability" as defined by its witnesses, and such a doubt is of course fatal to the plaintiff's claim, which must be specifically proved (Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945) by a preponderance of the evidence (Bene v. Jeantet, 129 U. S. 683, 9 Sup. Ct. 428, 32 L. Ed. 803).

The eleventh claim of the patent is, if possible, more general in terms than the fifth and sixth claims, and makes the distinguishing quality of the mixture consist in the "spaces between the mineral ingredients being less than 21 per cent. of the whole, and the plastic binder occupying such space." Judge Lurton in the Owosso Case declares that:

"The fundamental idea of Warren is not that the 'density' of his composition gives the stability which he claims, but that the mineral aggregate should of itself resist displacement by traffic."

The effect of this declaration makes claim No. 11 practically identical with claims No. 5 and No. 6, and requires that before any material used can infringe this claim No. 11 it must have the "inherent stability" of the fifth and sixth claims, regardless of the less than 20 per cent. of voids, and therefore if our conclusion that the mixture used by the defendants does not infringe the fifth and sixth claims is correct, we must also conclude that it does not infringe the eleventh claim.

It results that a decree will be entered sustaining as valid claims No. 5, No. 6, and No. 11 of the patent in suit, but finding that the construction of the defendants does not infringe them, and that therefore the bill must be dismissed and the defendants recover their costs.

UNITED STATES v. BAKER et al.

(District Court, D. Maryland. July 11, 1917.)

1. ARMY AND NAVY ⟸40—SELECTIVE DRAFT ACT—ATTEMPT TO SECURE REPEAL.
   Every man has a perfect right to any opinion he may form about a proposed or existing law, and he may do anything in itself legal to secure a repeal of a law in force, using such arguments as commend themselves to his reason and judgment, even though such law be the Selective Draft Act (Act May 18, 1917, c. 15).
2. ARMY AND NAVY ⟸40—OFFENSE—SELECTIVE DRAFT ACT.
   As long as a law is in force, it is the duty of every man to obey it; hence any one, who, under pretense of arguing against the wisdom of the Selective Draft Act or advocating its repeal, does anything with intent to procure its violation, is guilty of an offense.
3. ARMY AND NAVY ⟸40—OFFENSES—JURY QUESTION.
   In a prosecution for acts tending to induce violations of the Selective Draft Act, the sole question for the jury is whether defendants, in anything they did, intended to persuade those subject to the act not to comply with its provisions; the questions whether their statements and arguments were well founded being immaterial.
4. ARMY AND NAVY ⟸40—OFFENSES—VIOLATIONS OF SELECTIVE DRAFT ACT.
   While it is an offense to urge a violation of law under cover of advocating the principles of any political party, defendant's distribution of a circular containing a lurid description of the horrors of war, stating that conscription was upon the country and the Selective Draft Act a fact, which further argued that if everybody had voted the Socialist ticket there would have been no war, and ended with an appeal to subscribe to a Socialist paper, does not show an attempt to induce those subject thereto to violate the Selective Draft Act.

Romanus E. Baker and Jacob M. Wilhide were indicted for the offense of attempting to induce those subject to the Selective Draft Act to disobey it. Defendants acquitted on directed verdict of not guilty.

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

Frederick Haller, of Hagerstown, Md., and Charles B. Backman, of Baltimore, Md., for defendants.

On Ruling upon Admissibility of Testimony.

ROSE, District Judge. I might as well make perfectly clear what I understand to be the issue in the case.

[1, 2] Every man has a perfect right to any opinion he may see fit to form about any proposed law, or about any law that is on the statute books. Any man may do anything, in itself legal, to secure the repeal of any law in force. To that end he may make any argument that commends itself to his reason and judgment against the policy of any particular law, whether it be the law for a selective draft or any other. And he is not answerable for the wisdom of his arguments. He could not very well be put on trial even for the good faith of some of them. I am afraid, if he could be, most of the political orators in every campaign would be liable for much they say about the other

party. We all of us say more against our political opponents than we really believe. But there is one limit. As long as the law is the law, it is the duty of every man to obey it; and he may not, under color or pretense of arguing against the wisdom of the law, or of advocating its repeal, do anything with intent to procure its violation.

[3] Now, I have not seen these circulars that were distributed by the defendants. They may be wise or unwise, temperate or intemperate. I do not know a thing about them. But the one thing that the jury is to inquire into is not as to the wisdom or the lack of wisdom of any statements in those circulars, or their truthfulness or their fairness. That is not the question. The one sole question in the case is whether these men, in anything they did, intended to persuade men not to register under the draft, or, after they were registered, to persuade them not to obey the order to come to the colors. That is the one question. So the real inquiry here is: Can the government show, always beyond a reasonable doubt, that these men were trying to persuade people to disobey the law? Whether they approached candidates for enlistment, or persons within the age for enlistment, and made any statements to such persons which might naturally make such persons reluctant to obey the law, is one of the facts to be taken into consideration by the jury; but the jury cannot convict, unless they are satisfied, of course beyond a reasonable doubt, that these men were then engaged in doing something which they purposed and intended should prevent men within the military age from obeying the law. If the jury is satisfied beyond a reasonable doubt, then the case is made out. If they have any doubt about the purpose of these men, they must acquit them, however mistaken the jury may happen to think they were about the policy of the law—however unfair or extravagant the jury may think their arguments against it were.

At Conclusion of the Government's Case.

The Court: I do not think there is anything to go to the jury in this case.

[4] You may have your own opinions about that circular. I have very strong individual opinions about it, and as to the wisdom and fairness of what is said there; but so far as I can see it is a circular principally intended to induce people to subscribe to a Socialist newspaper and to get recruits for the Socialist party. I do not think that we ought to attempt to prosecute people for that kind of thing. It may be very unwise in its effect, and it may have been unpatriotic at that particular time and place; but it would be going very far indeed, further, I think than any law that I know of would justify, to hold that there has been made out any case here, even tending to show that there was an attempt to persuade men not to obey the law.

There is a very lurid description of the horrors of war in that circular—some of it well written; some of it not so well written. But, after all, there is no difference of opinion that war is a terrible catastrophe, and involves many terrible things. The circular develops some sort of a theory, not very clearly argued out, that if everybody had voted the Socialist ticket there would have been no war. The circular

ends up with an appeal to subscribe to the Socialist paper for 50 cents a year, or 25 cents for every six months.

Mr. Latane: The side of it that appealed to the government was this, your honor. Of course, we are perfectly satisfied with your honor's determination of the matter; but, just in explanation, it starts out with the words, "Conscription is upon us and the draft law is a fact."

The Court: That I understand to be a fair and reasonable deduction that from their point of view it all could have been avoided if the people earlier had taken this Socialist paper and had voted the Socialist ticket.

Mr. Latane: The point that occurred to the government is this: These people are too clever to directly, in print, to attack the draft law; so, under guise of advocating the principles of the Socialist party, they give the whole draft proposition a very raw deal.

The Court: That is possible, but you must prove the intent beyond the possibility of a reasonable doubt.

Mr. Latane: All we want is to get some judicial determination of the matter.

The Court: The judicial determination of the matter is that in whatever form they put what they say or do, whether that of advocating the principles of any political party, Republican, Democratic, Prohibitionist, Socialist, or under any other guise whatsoever, it is an offense to do anything with the intent of bringing about a violation of the law; but the commission of that offense must be proved, the intent must be established by evidence which will justify a jury in holding that it was made out beyond a reasonable doubt, and in this case there is no such evidence.

Gentlemen of the jury, you have the instructions of the court to return a verdict of not guilty.

In re PARSONS MFG. CO.

(District Court, D. Massachusetts. March, 1917. On Review of Order of Referee, July, 1917.)

1. BANKRUPTCY ⊜126—ELECTION OF TRUSTEE—REVIEW OF APPROVAL.
Individual creditors, conceiving themselves aggrieved by the action of the referee in approving the election of a trustee, may take review in their own names.

On Review of Order of Referee.

2. BANKRUPTCY ⊜123—TRUSTEES—APPOINTMENT.
Where, after bankruptcy of a corporation, its president and former manager, who was also one of the three directors, favored composition and reorganization, and the receivers and the other two directors favored adjudication and winding up of the corporate affairs, and each side, in soliciting claims to vote on the selection of a trustee, went beyond what was proper, claims solicited by the president, who yet held his office, cannot be disfranchised, while those solicited by the receiver and other directors are voted, even though the president, without authority, used the corporate name in attempting to resist adjudication; the president being guilty of no fraud.

3. BANKRUPTCY ⟸123—SELECTION OF TRUSTEE—VOTING OF CLAIMS.
That a bankrupt had a large claim against one who collected claims and desired to vote them to control the trustee is no ground for disfranchising such claims, although it might be for questioning the fitness of the trustee so chosen.

4. BANKRUPTCY ⟸126—TRUSTEE—DECISIONS OF REFEREE.
While the court will defer to a decision of the referee in approving an election of a trustee in bankruptcy, yet where error of a fundamental character, affecting the rights of a substantial body of creditors, appears, the referee's decision cannot be upheld.

5. BANKRUPTCY ⟸126—TRUSTEE—APPROVAL OF ELECTION.
Where a referee's order appointing a trustee is set aside on petition to review, the court should remand the proceedings to the referee, instead of appointing a trustee itself.

In Bankruptcy. In the matter of the Parsons Manufacturing Company. On petition by individual creditors to review orders of the referee relative to the choice, appointment, and approval of trustees. The case having been recommitted to the referee to state the facts, the order affirming the appointment of trustee was vacated, and the case returned to the referee for further proceedings.

Jacobs & Jacobs, of Boston, Mass., and Clarence E. Tupper, of Worcester, Mass., for petitioners.

Swift, Friedman & Atherton and Lee M. Friedman, all of Boston, Mass., for trustees.

MORTON, District Judge. [1] The practice of permitting individual creditors, who conceive themselves aggrieved by the action of the referee in approving the election of a trustee, to take review in their own names, is too well settled in this district to be disregarded (see In re Kellar, infra; In re Rosenfeld-Goldman Co. [D. C. Mass.] 36 Am. Bankr. Rep. 520, 228 Fed. 921; In re William J. Snow [No. 20983] 248 Fed. 295; In re Max Grat [D. C. Mass.] 36 Am. Bankr. Rep. 524, 228 Fed. 925), especially as it has received the silent approval of the Court of Appeals for this circuit (In re Kellar [C. C. A. 1st Cir.] 27 Am. Bankr. Rep. 715, 192 Fed. 830, 113 C. C. A. 154).

I have examined the transcript and briefs sufficiently to satisfy myself that the present case cannot be adequately dealt with on review without a certificate from the referee stating the facts in reference to the disfranchisement of claims, the relation of the present trustees to previous proceedings in the case, the solicitation of claims, and perhaps other significant circumstances.

Case recommitted to referee to state facts.

On Review of Order of Referee.

This is a controversy over the election of trustees. Until the bankrupt corporation got into financial difficulties, one Gerrish was its dominating spirit. He was its president, treasurer, clerk, and manager, as well as one of its three directors. With the assent of all the directors, it made an assignment for creditors. Shortly afterwards, and as part of the arrangement, an involuntary petition in bankruptcy

was filed against it in this court, upon which receivers were appointed, three in number, two of whom had been assignees. At this time all interests were acting in harmony, and Gerrish was employed by the assignees and by the receivers as manager of the business.

A difference of opinion later developed between the receivers and two directors acting with them on one side, and Gerrish on the other. He favored composition and reorganization; the others, adjudication and winding up. The business and assets of the corporation were then completely in the hands of the receivers. Gerrish still held his stock and his offices in the corporation. He attempted to authorize counsel to act for it in resisting adjudication; but his fellow directors joined against him and employed other counsel to answer for it, admitting the allegations of the petition. This phase of the controversy was heard by Referee Warner, who ruled that the directors controlled the corporation's action and that the counsel selected by them was its authorized representative. Adjudication was accordingly made, and the first meeting of creditors was duly held.

[2] While the controversy was going on, Gerrish had actively solicited creditors to put their claims in his hands. The common-law assignees had solicited claims before the disagreement arose, and one of the receivers had done so in writing after that time. At the meeting there were two factions—one led by the assignees and receivers, which controlled a majority in amount of the claims proved; the other led by Gerrish, which controlled a majority in number. The learned referee found and ruled that the Gerrish claims were solicited and voted in the interest of the bankrupt, and he accordingly disfranchised them all. This left the candidates of the other faction with a majority both in number and amount. The learned referee declared them elected. He entered an order approving the choice, from which this review is taken.

It seems to me that he was clearly wrong in so doing. In endeavoring to control the election of trustees, Gerrish's purpose obviously was to advance, as he supposed, his plan for compromise and reorganization. The plan does not appear to have involved any fraud. It was a legitimate way of settling the bankrupt's affairs, and Gerrish had a right to do what he properly could to put it through. He was acting for his personal interest, just as the opposing creditors were acting for theirs, but, in spite of his unauthorized use of the corporate name in soliciting claims, it does not appear that he was endeavoring to secure for the bankrupt unlawful advantages or improper administration of its assets. Both parties went beyond what was proper in the solicitation of claims, and both offered to represent creditors without charge. What Gerrish did in this respect was not so far beyond what the other side did as to justify disfranchising his claims on account of it, while allowing theirs to be voted.

[3] It is suggested that the bankrupt had on his books a large claim against Gerrish, which was disputed by him, and that for this reason, also, votes controlled by him ought not to be received. But obviously this was a matter touching the fitness of Gerrish's candidate to be trustee—if he should be chosen—rather than the right to vote on claims

placed in Gerrish's hands. In re Wilson (D. C. Pa.) 194 Fed. 564, 37 Am. Bankr. Rep. 867.

[4] While this court is strongly disinclined to set aside decisions of the referees on questions of this sort, it must be recognized that they are not final. Where error in them clearly appears, which is of a fundamental character, affects the rights of a substantial body of creditors, and changes the result, the election must be set aside.

[5] It was suggested in argument that, if the order approving the appointment of trustees should be vacated, the court itself should make the appointment. The proper course, however, seems to me to be to vacate the order from which review was taken and to return the case to the referee for further action.

It is unnecessary to decide the further questions which have been argued as to the alleged disqualification of the trustees chosen, by reason of two of them having been assignees and all of them receivers. Such questions may not arise on a new election.

Order approving appointment of trustees vacated; case returned to referee for further proceedings.

In re VON BERNHARDI.

(District Court, E. D. New York. June 22, 1916.)

ALIENS ⊂=68—NATURALIZATION—RIGHT TO—DECLARATION OF INTENTION.

Naturalization Act June 29, 1906, c. 3592, § 3, 34 Stat. 596 (Comp. St. 1916, § 4351), declares that the naturalization jurisdiction of all courts specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts. Section 4 (Comp. St. 1916, § 4352) provides that an alien may be admitted only by complying with certain acts, of which one is to declare on oath before the clerk of any court authorized to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, his intention to become a citizen and various other matters, including his present place of residence in the United States. An applicant filed a declaration of intention in the Southern district of New York while temporarily sojourning in that district, and in the absence of himself and his wife from his home, which was in the Eastern district of New York. It appeared that the applicant, understanding that he had a legal right to claim as his residence the place where he was actually living for a short time, gave in his first papers the residence of his brother-in-law. *Held* that, in view of the rule that jurisdiction attaching to a court upon the filing of a final petition is not thereafter lost by the removal of the alien from that jurisdiction, and as the requirement that an alien state his residence in his declaration of intention is for the purpose of determining which clerk shall be entitled to fees, and to enable authorities to verify the statements of the alien as to his movements in the interim, the error made by the alien in his statement as to his residence does not warrant the rejection of his declaration of intention and necessitate a denial of the petition for admission to naturalization.

At Law. In the matter of the application of Botho Von Bernhardi to become a citizen of the United States. Application granted.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for the United States.

Botho Von Bernhardi, in pro per.

CHATFIELD, District Judge. It appears that the applicant filed a declaration of intention in the Southern district of New York, while temporarily sojourning in that district, and in the absence of both himself and his wife from his home, which was within the Eastern district of New York. It appears from the record that the applicant made the statement in the first papers that he resided at 230 East Eighty-Third street, New York, which was the address of his brother-in-law, and that when he swore to this statement he intended to make a truthful statement, and understood that he had the legal right to claim as his residence the place where he was actually living for a short period.

Under section 3 of the Naturalization Law, the jurisdiction to naturalize extends only to aliens resident within the respective judicial districts of the court entertaining the proceedings.

It has been held in the case of United States v. Fokschauer, 184 Fed. 990, 106 C. C. A. 668, that this jurisdiction attaches to the court upon the filing of a final petition, and is not thereafter lost by the removal of the alien from that jurisdiction. By section 4 it is provided that an alien may be admitted only by complying with certain acts, of which one is to declare "on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission," various matters, including "the present place of residence in the United States of the said alien."

If the words should be construed strictly, this would mean that the alien must declare his intention in the district in which he subsequently had a residence and where he would take out final papers; but such interpretation would be ridiculous, and it is apparent that the purpose of the section is to require from the alien at the time of declaring his intention a true statement in order that petitions for which a fee is charged shall be presented to the clerk of the district entitled to the fee, and so that the statements of the alien or his movements during the period in question can be subsequently verified.

If at least two years after filing the declaration of intention and when the alien was present in court, upon a petition showing his address at that time, the government should need to investigate the alien, there would be no purpose in holding that he should not be allowed to give testimony as to the residence which he had claimed two years before. It is evident that the provision is like that held to be regulatory (and mandatory in the sense only that it must be complied with in form) in the case of United States v. Ness, 230 Fed. 950, 145 C. C. A. 144, Ann. Cas. 1917C, 41, decided in the Circuit Court of Appeals for the Eighth Circuit. Unless there is evidence to indicate that the alien was intentionally guilty of making a false oath, in giving as his residence, in the declaration of intention, a place which might not be held to be his "legal" residence, but which he in good faith intend-

ed to claim as such at the time, and unless the government can show that this unintentional false oath was of such a nature as to indicate that the petitioner was not of good moral character, there is no reason why the applicant should now be deprived of the benefit of his honest and sincere declaration of intention to disavow allegiance to his former sovereign.

The declaration in form complied with the statute and has had no effect other than to leave in the hands of the clerk of one district the filing fee which might properly have been claimed by the clerk of another. The government is still entitled to any necessary adjournment, if it thinks that the facts can be shown to be other than as they appear upon the record, but unless such adjournment is requested, the application should be granted.

The alien may be admitted to citizenship.

UNITED STATES v. SMITH.

(District Court, E. D. New York. December 13, 1917.)

1. ALIENS ⊂⊃71½ [New, vol. 7 Key-No. Series]—NATURALIZATION—CANCELLATION—NATURE OF REMEDY.
   Where the result would be the same in any event, the question whether a suit to cancel a certificate of naturalization will lie, or whether a writ of error in the naturalization proceedings was the only remedy, need not be determined.
2. ALIENS ⊂⊃68—NATURALIZATION—RIGHT TO.
   When a petitioner for naturalization appeared and filed his declaration of intention, the clerk asked for his address, and, upon being told "280 Broadway," wrote it in the blank opposite the word "residence," and added, without inquiry, "New York City, N. Y." There are probably five 280 Broadways in New York City, and the applicant was not allowed to read the declaration, or do more than swear the answers he had given the clerk were true. *Held* that, while an alien seeking naturalization is seeking a high privilege, and naturalization cannot be based upon purely constructive residence, the petitioner's declaration, being a bona fide declaration, cannot be rejected because of his admission that he lived in a district other than that stated in the declaration of intention; the error being that of the clerk taking the declaration of intention.

In Equity. Bill by the United States against William Richmond Smith to cancel a certificate of naturalization. Bill dismissed.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for petitioner.
Arnon L. Squiers, of New York City, for respondent.

CHATFIELD, District Judge. [1] This is an application to cancel a certificate of naturalization, which was granted after full hearing on testimony at which the United States was represented by the United States Attorney, and where the same question was considered as is now presented. So far as this court is concerned, at least, the question has been disposed of, as no new facts have been presented. Whether this suit will lie, or whether a writ of error was the only remedy, need

not be determined, as the result is the same. See United States v. Mulvey, 232 Fed. 513, 520, 146 C. C. A. 471.

In the Mulvey Case the court held an action to cancel a certificate of naturalization, and to set aside the order directing the issuance of that certificate, would lie, even if the question of "legality" raised what is generally referred to as "error" on the part of the court granting the original certificate, in a proceeding where the United States had not contested the matter, and where the lower court had heard only the customary examiners of the Department of Labor.

In Johannessen v. United States, 225 U. S. 237, 32 Sup. Ct. 613, 56 L. Ed. 1066, it was held that proceedings to cancel a certificate of naturalization could be had where fraud was shown, and where the government had not been represented. But, even if this suit can be heard, the ruling of this court upon the same question and record, when disposed of upon the merits, would ordinarily stand until disturbed by a higher court. No different facts are shown, and no new reason given why the court should change the order made.

[2] It now further appears from the record that the clerk before whom the applicant appeared when he filed his declaration of intention asked for his address, and, upon being told "280 Broadway," wrote it in the blank opposite the word "residence," and added, without inquiry, "New York City, N. Y." There are probably five "280 Broadways" in New York City, and the testimony shows that the applicant was not allowed to read the declaration, nor to do more than to swear that the answers which he had given to the clerk were true.

The courts have many times upheld technicalities with regard to matters of naturalization, upon statement that the alien seeking naturalization was seeking a high privilege. United States v. Gulliksen, 244 Fed. 727, — C. C. A. —; In re Pearlman (D. C.) 226 Fed. 60; United States v. Spohrer (C. C.) 175 Fed. 440; Johannessen v. United States, supra. In some cases the courts had held slight technical objections sufficient to defeat the application, even though the court was satisfied that the applicant would make a good citizen, and when the application had been fully investigated.

The conditions now confronting the United States go far to justify the position, which has always been taken by this court, that a duty rests upon those aliens who are enjoying the privilege of living in the United States to bear their share of the burdens of citizenship, in order to participate in whatever benefits follow therefrom. All officers of the government and the general public are seeking to assist them in qualifying themselves to become citizens. Hence this court has never been able to see that the standard will be raised, or the privilege of citizenship protected and made more desirable, by causing delay, trouble, and further expense to a petitioner whose papers have been satisfactorily investigated, and as to which no fraud can be imputed, when that person is otherwise qualified and has met every mandatory and substantial requirement. Such rulings are not thought to be within the intent of Congress as stated in the law, and would keep as alien enemies or friends many who otherwise would be useful citizens. Nor

does the court think this contrary to United States v. Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853.

As was held in the Mulvey Case, supra, naturalization cannot be based upon purely constructive residence, but to throw out a bona fide declaration of intention, because of the applicant's admission that his actual domicile was in an adjoining district of the United States to that in which he had been caused to swear he was a resident, by a clerk who did not distinguish between five separate localities, of which three were entirely outside the jurisdiction of the clerk at the time, would be but lifting the realm of technicality to a point where it would plainly defeat justice and injure the United States as well.

The previous determination that an immaterial fault in a claim of constructive residence in a declaration of intention, where no harm can result therefrom, should not be treated as depriving the court of jurisdiction to naturalize the alien, who was then in all other respects desirable and properly before the court, will be redetermined. The same point was previously decided by this court in In re Von Bernhardi (June, 1916) 247 Fed. 129.

The respondent should have judgment dismissing the bill.

FOREMAN et al. v. J. M. BENAS & CO.

(District Court, S. D. New York. December 17, 1917.)

1. SEAMEN ⟸7—ARTICLES—PAROL EVIDENCE RULE.
   Oral representations are merged in subsequently signed articles for voyage, and afford seamen no ground for recovery.
2. SEAMEN ⟸7—COMPENSATION—CONSIDERATION.
   An agreement, after the signing of articles for a voyage, to pay seamen, in event of the happening of a contingency, a sum greater than they would be otherwise entitled to, is unenforceable, because without consideration.
3. SEAMEN ⟸16—COMPENSATION—DESTRUCTION OF VESSEL—CARRYING OF CONTRABAND.
   Where seamen signed articles for a voyage on an American vessel from New York to London and such other ports in Europe, including the war zone prescribed by the German Empire, as the master might direct, and back to a final port of discharge in the United States, and the vessel was torpedoed, apparently in the war zone prescribed, that the vessel, unknown to the seamen, carried contraband to belligerents engaged in war with such empire does not entitle the seamen to wages after the destruction of the vessel, for, as the German Empire had prescribed a war zone in violation of international law, the fact of the carrying of contraband without notice to the seamen did not increase the risk for which the articles provided by authorizing passage through the war zone.
4. SEAMEN ⟸16—WAGES—RIGHT TO.
   The torpedoing by a German submarine of an American vessel terminated the voyage, the articles contemplating such termination by prescribing that the voyage might extend through the war zone; and hence, under Rev. St. § 4526 (Comp. St. 1916, § 8317), seamen were entitled only to wages prior to that event.

In Admiralty. Libel by A. T. Foreman and others against J. M. Benas & Co. Libel dismissed.

Silas B. Axtell, of New York City, for libelants.
John D. Stephanidis, of New York City, for respondent.

AUGUSTUS N. HAND, District Judge. [1, 2] The respondent excepts to the libel on the ground that it states no cause of action. Libelants were seamen, who signed articles for a voyage on an American vessel from New York to London, and such other ports in Europe, "including war zone," as the master might direct, and back to a final port of discharge in the United States, north of Cape Hatteras. The vessel was torpedoed by Germany in March, 1917, apparently in the war zone, for so the original libel alleged. The amended libel sets up representations by the respondent that in case of any disaster the libelants would be paid their wages up to the date of their arrival back to the port of shipment, and alleges that the vessel carried contraband. Suit is brought for wages from date of destruction of vessel to their arrival in the United States. If the representations were made before the articles were signed, they are merged in the articles; and if made later they were of no effect, because without consideration. No deception as to the contents of the articles is alleged, or failure to read the same to the seamen pursuant to law. Under such circumstances oral promises can have no legal effect. Northwestern S. S. Co. v. Turtle, 162 Fed. 256, 89 C. C. A. 236.

[3, 4] The carrying of contraband did not increase the legal risk if the ship was sunk in the war zone. Even if it was not, the case of Austin-Friars S. S. Co. v. Strack, 2 K. B. (1905) 315, can hardly be regarded as applicable to the present situation. In that case it was held, where articles were signed before hostilities between Russia and Japan commenced, that the taking on of a cargo of contraband goods thereafter created a venture materially different from that for which the seamen had engaged, and that a capture of the vessel was not a "loss of the vessel" which terminated the seamen's contract and right to wages. When that case was decided, the Russian-Japanese war was being conducted according to recognized principles of international law, which were abandoned by Germany prior to the time when the articles were signed in this case. The proclamation of the Imperial Government as to the "war zone," and the subsequent proclamation limiting the number per week and defining the permissible route of American vessels, rendered every American vessel engaged in European trade, which was not armed, or under convoy, exposed to daily risk of destruction by German submarines. This was particularly so after the severance of diplomatic relations with this government. I think it is ignoring the substance of things to regard the carrying of contraband without notice to the seamen, where the articles provided for passage through the war zone, as a material variation of the libelants' contract. The torpedoing of the vessel was in my opinion a loss which terminated the voyage, and entitled the libelants, under section 4526 of the Revised Statutes (Comp. St. 1916, § 8317), only to wages prior to that event.

The exceptions must be sustained, and the libel dismissed.

In re JOHNSON.

(District Court, N. D. Georgia. January 11, 1918.)

1. BANKRUPTCY ⟸467—REFEREE'S DECISION—REVIEW.
A finding of fact by a referee in bankruptcy, who heard the witnesses, will not be disturbed, unless clearly and manifestly erroneous.

2. BANKRUPTCY ⟸396(5)—HOMESTEAD EXEMPTION.
Under the Georgia laws, a bankrupt cannot be denied a homestead in a stock of goods because the property is subject to taxes and purchase money, though the property, after being set aside as a homestead, is subject to payment of purchase money.

In Bankruptcy. In the matter of the bankruptcy of J. W. Johnson. The bankrupt's application for the allowance of a homestead exemption was granted by the referee over objections, and objecting creditors petition for review. Affirmed.

Moon & Davis, of La Grange, Ga., for objector.
Meadors & Wyatt, of La Grange, Ga., for bankrupt.

NEWMAN, District Judge. This is an application by the bankrupt for the exemption of a stock of goods in La Grange, Ga. The opinion of the referee and his decision allowing the homestead, which I am asked to review, is as follows:

"Objections to the Homestead Filed by the La Grange Grocery Company.

"All the objections as to the bankrupt's not being entitled to homestead upon goods not paid for, and as to his right to claim more as homestead than he put into the business, I overrule, as not being sufficient in law.

"I have carefully examined the facts upon the objections charging that bankrupt had not made a full disclosure of all his assets, but had concealed some of them, and cannot reach the conclusion that the evidence submitted authorizes me to sustain the charge of fraud, and therefore I find that he is entitled to the property set off to him by the trustee.

"A statement agreed upon by counsel for objectors and bankrupt, showing the sums paid out by bankrupt and then a cashbook kept by bankrupt, showing what he had taken in for months before he filed his petition in bankruptcy, and up to a week or ten days before said filing, were offered in evidence. This register of the cash taken in by day up to within a few days before the filing of said petition, and then the bills showing how he had paid same out, as shown by said files and statement, rebut the idea of fraud. It seems to me that, if he should have intended to defraud his creditors, he would not have registered cash received so near to the time of filing said petition, and then paid cash out as shown by said statement.

"Nor do I think the discrepancy between the goods on hand at bankruptcy and what witnesses swore were on hand a few months before forces a finding of fraud, because some witnesses swore that there were not more than half what those other witnesses said there were, and especially when you consider the great number of goods sold to bring in as much cash as said cashbook shows was taken in. There is no evidence that he took any of these goods out of the store.

"All the values put upon the goods were only estimates. No invoice or inventory was taken. I do not think I should find fraud upon inference based upon the opinions of witnesses, when they were contradicted by other witnesses.

"The statement and bills paid do not go back to September, 1916, and the brief of objector's counsel goes back to September 22, 1916, and that makes $502 difference against the bankrupt, as shown by book and statement.

"The bankrupt and his counsel, months after his store had been taken possession of by trustee, went into same and found the bills paid as set out in said statement. Said book was found in the same way. When bankrupt turned over his store to the court, he turned over everything in same, bills, invoices, checks, and books. If there are any in said store now, the trustee should have presented them to the court.

"Said cashbooks show that in January, February, and March, 1917, he received $2,809.04, and said statement shows that bankrupt paid to receipted bills of merchants some $2,400 or $2,500, and the statement shows that he paid for two months' rent, $55, clerk's hire, $80, expenses of bankruptcy proceedings, filing fee, $35, attorney's fee, $75. There were other small items, amounting to some $75, and then bankrupt says various sums were paid for country produce bought from wagons, of which no entry was made. This takes no account of family expenses.

"It appears that he kept cashbook to within a few days of time he went into bankruptcy, and that he paid out closely in January, February, and March, 1917, what he took in. For this reason I do not think any intention of fraud, much less actual fraud, was shown.

"I therefore find that bankrupt is entitled to his homestead, hereby overruling all objections to same. Counsel for objectors shall have till the 10th day of August, 1917, to file petition for review."

[1] The decision of the referee is, I think, sufficiently supported by the evidence. As I have said in so many cases, the referee had the witnesses before him, he saw them and heard them examined, and reached his conclusion as to the facts. I am not authorized to differ with such conclusion, unless it is clearly and manifestly erroneous. It is not so in my opinion.

[2] I have heretofore held, following the decisions of the Supreme Court of the state, in J. E. Maynard & Co. (D. C.) 183 Fed. 823, as to the question made in this case as to the fact that some portion of this stock is subject to claims for the purchase money, as follows:

"It would seem, therefore, that the scheme of the constitutional provision is that the homestead should be set apart, and that, after being so set apart, it is subject to the taxes, purchase money, etc. There are a number of decisions by the Supreme Court of the state on the question as to whether or not the ordinary, in passing upon the exemption under the state law, has any jurisdiction to entertain an objection on the ground that the purchase money has not been paid. These opinions are all cited and discussed, and a conclusion reached, in the opinion of Judge Lumpkin, for the Supreme Court, in Dix v. Dix, 132 Ga. 630, 64 S. E. 790."

It is clear, therefore, that so far as any portion of this stock, set apart as an exemption to the bankrupt, is subject to purchase money, the rights of the creditors can be readily enforced in the proceedings said to be now pending in the state court.

As to the bankrupt's failure to make a full and fair disclosure of his property, as required by section 3380, Park's Code of Georgia (section 2830, Code of 1910), I think the decision of the referee is sufficiently supported by the evidence taken before him.

I think the other questions made here by the petition for review are also sufficiently supported by the evidence to justify the court, if not to require that the action of the referee be approved.

The action of the referee in this case is approved, but the stock of goods in question should be held, at least until the officer appointed

by the state court shall have an opportunity to take possession of it for the purpose of determining what part thereof is subject to the purchase money; and it is ordered accordingly.

SUSQUEHANNA COAL CO. v. CASUALTY CO. OF AMERICA.

(District Court, S. D. New York. August 18, 1917.)

EXCEPTIONS, BILL OF ⊂=38, 43(2)—TIME OF SETTLING—"EXTRAORDINARY CIRCUMSTANCE."

A bill of exceptions cannot be settled, after the expiration of the term at which judgment was rendered, without an express order of court made during the term, or by consent of the parties, save in very extraordinary circumstances; and a mere misunderstanding of the rule is not an "extraordinary circumstance," such as the absence or inability of the judge to sign the bill of exceptions, which will allow settlement after expiration of the term.

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

At Law. Action by the Susquehanna Coal Company against the Casualty Company of America. There was a judgment for plaintiff. On motion for an order to extend defendant's time to settle and file a bill of exceptions, and also for an order settling such bill nunc pro tunc as of the date within 90 days from rendition of judgment. Motion denied.

Max D. Steuer, of New York City, for the motion.
Abram J. Rose, of New York City, opposed.

AUGUSTUS N. HAND, District Judge. This is a motion for an order to extend defendant's time to settle and file a bill of exceptions to August 31, 1917, and also for an order settling said bill nunc pro tunc as of the date within 90 days from April 27, 1917. The judgment was entered against the defendant on the last-named date, and the term expired under the local rule in this district on the 27th day of July last. While the time for the allowance of the writ of error has not expired, the time to settle the bill of exceptions and the term have expired.

I think it is settled by the decisions of the Supreme Court, as well as by the ruling of the Circuit Court of Appeals of this circuit, that a bill of exceptions cannot be settled after the term has expired without an express order of the court made during the term, or consent of the parties, save in very extraordinary circumstances. The absence or inability of the judge to sign the bill of exceptions has been regarded as such a circumstance. Here the failure to settle the bill of exceptions was doubtless due to a misunderstanding of the rule. No order was made like that of Judge Lacombe in the case of Talbot v. Press Publishing Co. (C. C.) 80 Fed. 567, or the declaration of the trial judge referred to in the case of Koewing v. Wilder, 126 Fed. 472, 61 C. C. A. 312, for the extension of time to settle the bill of excep-

tions which has been treated as in effect an extension of the term. The rule laid down by the Supreme Court in the cases of Muller v. Ehlers, 91 U. S. 251, 23 L. Ed. 319, and Jennings v. Phila., etc., Ry. Co., 218 U. S. 255, 31 Sup. Ct. 1, 54 L. Ed. 1031, therefore applies in its rigor. The case of Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508, does not govern, because, in that case, there was an order that the defendant have 40 days within which to serve a bill of exceptions, and the bill was served, though not settled, within that time. I regret very much to reach this conclusion, but it seems to be required by the decisions of the appellate tribunals.

The motion is denied.

NOTE.—The defendant thereafter applied to the Circuit Court of Appeals for a writ of mandamus to compel the District Judge to settle the bill of exceptions nunc pro tunc, and that application was denied.

In re LINDNER.

(District Court, E. D. New York. December 5, 1917.)

1. ALIENS ⟸62—NATURALIZATION—PETITION.
   There is no statute forbidding the filing by an alien of a petition for naturalization while a state of war is existing between the United States and the country of which he is a subject; but such petitions should be received, and will go far to show the real purpose of those acting with loyalty to the United States.
2. ALIENS ⟸68—NATURALIZATION—ADMISSION.
   Act April 14, 1802, c. 28, § 1, 2 Stat. 153, as amended by Act July 30, 1813, c. 36, 3 Stat. 53, now Rev. St. § 2171 (Comp. St. 1916, § 4362), declares that no alien, who is a native citizen or subject or a denizen of any country or state with which the United States are at war at the time of his application, shall be then admitted to become a citizen of the United States. A subject of the German Empire, shortly before the declaration of war between that empire and the United States, filed his petition for naturalization. Due to the mistake of the clerk of another court, who omitted his signature from the certified copy of the declaration of intention, the application was rejected. *Held* that, after the declaration of war with Germany, the court was without power to actually receive the petition nunc pro tunc and take jurisdiction of the proceeding, even though the error was not the fault of the applicant; this being so, though the statute, which was enacted when the application and hearing thereon could be completed at one hearing, is inapplicable to those cases in which the application for admission to citizenship was filed before the declaration of war, but the hearing did not take place until after.

In the matter of the application of Karl Albert Lindner for a writ of mandamus, directed against the clerk of the District Court. Writ denied.

Harry Wandmaker, of New York City, for petitioner.
Melville J. France, U. S. Atty., of Brooklyn, N. Y.

CHATFIELD, District Judge. The applicant seems well disposed to the United States. His wife was born in this country and appears to protest against her alien status by marriage. As soon as possible the

applicant attempted to file (on March 12, 1917) his petition, and evidently could be naturalized at once if the application had been received. His failure to perfect the filing of his papers was due to the mistake of a clerk in another court, who omitted his signature from the certified copy of the declaration of intention. The clerk of this district refused to allow the applicant to complete his petition.

[1, 2] The applicant has, of course, expressed under oath his intention to renounce allegiance to the German Emperor, and has at all times continued in that purpose. He has since the declaration of war obtained a correctly certified copy of his declaration, and has sworn to his renunciation of German allegiance by actually filing his petition since war was declared. There is no statute forbidding the filing of a petition while a state of war is existing. On the contrary, such petitions should be received when offered, and will go far to show the real purpose of those honestly acting with loyalty to the United States. But the law of April 14, 1802, as amended by the act of July 30, 1813 (section 2171, R. S.), prohibits the admission "then"—i. e., during the war—of a subject or denizen of the country at war with the United States. The court might have allowed the applicant to file his application before the declaration of war and the accidental omission of a clerical signature could have been later supplied. But the court has not the power to actually receive the petition after the declaration of war and "then" complete a court proceeding over which jurisdiction had not been obtained before the declaration.

The statute was enacted when the application and hearing could be completed at one hearing. The present law compels the elapse of 90 days before final hearing, and the case of United States v. Meyer, 241 Fed. 305, 154 C. C. A. 185, established the law for this circuit by excluding from the effect of section 2171 those cases in which the application was made (petition filed) before the declaration of war. But this does not allow the court to file nunc pro tunc those petitions which the court might feel would, if some physical occurrence had not intervened, have been actually on file. In this view of the matter the question of responsibility for the applicant's misfortune cannot change his actual status.

The application for mandamus will be denied.

In re P. J. SULLIVAN CO., Inc.

(District Court, N. D. New York. January 4, 1918.)

1. PLEDGES ⇐11—VALIDITY—TRANSFER OF POSSESSION.

Transfer of possession to the pledgee is necessary to create a valid pledge, and the possession must be actual, and not merely constructive, unless from the nature of the case the property is not susceptible of manual delivery; hence, where a contracting company covenanted to save the surety on its bond harmless, and for better protection of the surety did assign, transfer, and convey to the surety all its right, title, and interest, tools, equipment, and materials of any nature which the

company might have upon the work, or in or about the site thereof, including materials purchased for or chargeable to the contract, which might be in process of construction, or stored elsewhere, or in transportation to the site, the agreement was invalid as a pledge, the contracting company at all times retaining possession of such materials, tools, and equipment.

2. CHATTEL MORTGAGES ⊂=18, 188(1)—FRAUDULENT CONVEYANCES ⊂=142—PLEDGES ⊂=7—ENFORCEMENT—CREDITORS.

In the state of New York, mortgages or contracts pledging subsequently acquired property, though void at law, will be enforced in equity, as between mortgagor and mortgagee, as agreements to give liens, and also as against purchasers with notice, but they will not be enforced against creditors.

3. COURTS ⊂=365—PRECEDENCE—DECISIONS.

The federal courts are, as to questions of liens created either by chattel mortgage or pledge, controlled by the decision of the highest court of the state where the case arises.

4. CONTRACTS ⊂=147(1)—CONSTRUCTION—INTENT.

While, in construing a contract, it should be given that meaning which the parties evidently intended, a court is not justified in adding provisions to a contract which the parties themselves omitted, for the purpose of doing what the court may deem justice.

5. PLEDGES ⊂=11—VALIDITY—DELIVERY OF POSSESSION.

A contracting company, which became bankrupt, entered into a contract with a high school commission for the furnishing and installing of heating and ventilating apparatus for a high school building, which was being erected or to be erected, which provided that if the work to be done under the agreement should be abandoned by the company, or if the contract should be assigned, or the work sublet other than as specified, or if at any time the architect should be of the opinion and shall certify that performance of the contract was unnecessarily or unreasonably delayed, and that the company was violating any of the conditions or covenants, the commission should have the power to require the company to discontinue all work on three days' written notice, and that the commission might complete the contract in the manner provided by law, charging the company with the expenses, materials, and labor, etc., which should be deducted from the contract price. The contracting company, which agreed to save a surety on its bond harmless, for that purpose executed an agreement reciting the assignment, transfer, and conveyance to the surety of all its title and interest in and to tools, equipment, and materials placed upon the site of the work, or which might be purchased for the work. *Held*, that the mere placing of tools and equipment on the site of the building did not, on the theory that the contract with the commission was one of pledge, give the commission title to the property superior to the trustee in bankruptcy of the company, even though it is not necessary in every case that the pledgee himself take possession, for, as the company remained in possession until bankruptcy, and had complete control of all of the property, it could not under any theory be deemed that the commission had possession.

6. PLEDGES ⊂=11—VALIDITY—POSSESSION.

In such case, the alleged pledge cannot be treated as valid, in view of decisions applicable to stockbrokers; the relation in that case being a peculiar one, and the possession of shares of stock by a broker for his principal being entirely different from the possession of the contracting company for the commission.

7. CHATTEL MORTGAGES ⊂=194—VALIDITY—POSSESSION.

An agreement by contractor, transferring to the surety on its bond its title and interest to equipment used in the work and materials placed on the site, etc., as security, is not good as a chattel mortgage against the

creditors of the contractor, where possession was not delivered and the contract was not registered: Lien Law N. Y. (Consol. Laws, c. 33) § 230, declaring that every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession, is void as against creditors of the mortgagor and subsequent purchasers and mortgagees in good faith, unless a mortgage or a true copy is filed as directed.

8. PLEDGES ⊂⊃11—POSSESSION—"DELIVERY OF POSSESSION."
In the case of pledge of bulky property, it is not necessary that there be an actual or physical handling, but some act or acts surrendering dominion on one part and transferring it to the pledgee on the other must be shown; it being sufficient in case of goods stored in a warehouse to deliver the warehouse receipts.
. [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delivery; First Series, Delivery of Possession.]

9. BANKRUPTCY ⊂⊃152—TRUSTEE—APPOINTMENT.
The title of a trustee in bankruptcy, on his appointment and qualification, relates back to the date of adjudication.

10. PLEDGES ⊂⊃23—CREDITORS—RIGHTS OF.
A judgment creditor, whose execution has been returned unsatisfied, has a specific lien on or right to the property of the judgment debtor, subject to an agreement to pledge superior to the right of pledgee, where the pledgee has not taken possession.

11. BANKRUPTCY ⊂⊃205—TRUSTEES—RIGHTS OF—PLEDGEES.
Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (Comp. St. 1916, § 9631), declares that trustee 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, and as to all property not in the custody of the bankruptcy court shall be deemed vested with the rights and remedies of a judgment creditor holding an execution duly returned unsatisfied. Section 67a (Comp. St. 1916, § 9651) declares that claims which for want of record or other reasons would not have been valid liens against the creditors of the bankrupt shall not be liens against his creditors, while section 67e declares that all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition and while solvent, and which were void against the creditors of such debtor by the laws of the state in which the property is situate, shall be deemed void against the creditors of such debtor if he be adjudicated a bankrupt. The bankrupt, before adjudication, contracted with a school commission to install heating and ventilating apparatus in a school building. It also agreed, for the purpose of securing the surety on its bond, to assign to it all its right, title, and interest in the equipment and material placed upon the site for installation of the heating apparatus or order therefor. Prior to bankruptcy neither the commission nor the surety had possession of property or equipment placed on the site by the bankrupt, though after the adjudication the commission, under authority of the contract, notified the bankrupt to discontinue work, took possession of material on the premises, and completed the work. Tools and equipment were stored. *Held*, that as the trustee's right related back to the time of adjudication, and he had all the rights of a judgment creditor whose execution was returned unsatisfied, neither the surety nor the commission was entitled to the property or equipment, for the contracts, not having been recorded, were not good as chattel mortgages, and the agreement of pledgee was unavailing, the pledgee not having been inducted into possession before bankruptcy, for the possession taken by the commission after bankruptcy did not divest the rights of the bankrupt's creditors, this being true both as to the equipment

which the bankrupt owned when it entered into the contract and the materials subsequently acquired.

12. PLEDGES ⊂⊃11—POSSESSION—AGREEMENT.

In such case, where it was the understanding of the parties that the contractor should possess and exercise dominion over the tools, equipment, and materials, and such possession was absolutely essential to it in performing the contract, it cannot be deemed that, prior to bankruptcy, either the surety or the commission had possession of the bankrupt's property.

In Bankruptcy. In the matter of the bankruptcy of P. J. Sullivan Company, Incorporated. Application by H. A. Whiting, trustee in bankruptcy, and Frank B. Hodges, ancillary receiver, for an order or decree directing the Vocational High School Commission in the city of Syracuse to deliver to the trustee and receiver certain property, or in default thereof to pay the value of such property. The Fidelity & Deposit Company of Maryland appeared and answered the petition, praying that it be dismissed, and that the property in question be adjudged to have been rightfully obtained and used, and that certain materials, tools, and equipment not used or retained should be adjudged to belong to it under an agreement with the bankrupt. Petition granted.

This is an application by H. A. Whiting, trustee in bankruptcy of the P. J. Sullivan Company, Incorporated, now bankrupt, and Frank B. Hodges, ancillary receiver of said bankrupt, for an order or decree directing the vocational high school commission in the city of Syracuse, appointed under and by virtue of chapter 299 of the Laws of 1914, and which went into effect April 11, 1914, and the city of Syracuse, to deliver to said trustee and receiver, one or both, the property mentioned and described in the petition herein, or in default thereof to pay to said trustee and receiver, one or both, the value of said property, alleged to be $8,882.89.

The said city of Syracuse and said commission answer the petition, and claim that the property belonged to and was in the possession of the city or board of commissioners, one or both, and was rightfully and lawfully withheld and used by them, and that neither the city nor the said commission are liable for the value thereof, but of course ask that the petition be dismissed.

The Fidelity & Deposit Company of Maryland appears and answers the petition, and prays that the petition be dismissed and that it be adjudged that the property mentioned in the petition taken and used or in the possession of the board of commissioners and the city of Syracuse and retained for use by the commissioners, and the proceeds thereof, be adjudged to have been rightfully retained and used, and that certain tools, equipment, and materials not used or retained for use by the board of commissioners and the said city be adjudged to belong to and to be the property of the Fidelity & Deposit Company of Maryland under an agreement between it and the said now bankrupt company. The matter comes to this court on an agreed state of facts.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for trustee and receiver.

Stewart F. Hancock, of Syracuse, N. Y. (E. L. Robertson, of Syracuse, N. Y., of counsel), for city of Syracuse and Vocational High School Commission.

Gannon, Spencer & Michell, of Syracuse, N. Y., for Fidelity & Deposit Co. of Maryland.

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

RAY, District Judge (after stating the facts as above). On the 8th day of December, 1916, a petition was filed in the United States District Court for the District of Massachusetts, praying that the P. J. Sullivan Company, Incorporated, be adjudged a bankrupt, and pursuant thereto an adjudication was duly made, and thereafter, and on or about January 5, 1917, the petitioner Henry A. Whiting was duly appointed trustee of the estate, etc., of said bankrupt, and he duly qualified. In the meantime, and on December 13, 1916, for the protection and preservation of the property of said alleged bankrupt situate in the Northern district of New York, on petition of certain creditors, Frank B. Hodges, of the city of Syracuse, was appointed receiver of the estate of said bankrupt situate in the Northern district of New York. He qualified as such and has not been discharged.

In 1914, chapter 299, Laws of 1914, state of New York, was enacted and became a law April 11, 1914, with the approval of the Governor. Under the provisions of said act certain gentlemen of the city of Syracuse were appointed and qualified as a board of commissioners for the purposes set forth in said act, and were thereby authorized and empowered to erect, equip, and furnish a vocational high school building in said city of Syracuse. On or about the 17th day of February, 1915, the said board of commissioners, pursuant to the said act of the Legislature and the amendments thereto, entered into a contract in writing with the said P. J. Sullivan Company, Incorporated, for the furnishing and installing of the heating and ventilating apparatus for said vocational high school building, and which was being erected or to be erected on lands belonging to the said city in said city of Syracuse. This contract, inter alia, provided as follows:

"If the work to be done under this agreement shall be abandoned by the contractor, or if this contract shall be assigned or said work sublet by him, other than as herein specified, or if at any time the architects shall be of opinion and shall so certify in writing to the board of commissioners that the performance of this contract is unnecessarily or unreasonably delayed, or that the contractor is willfully violating any of the conditions or covenants of this contract, or executing the contract in bad faith, the board shall have the power to require the contractor to discontinue all work or any part thereof under this contract by a written three (3) days' notice to be served upon the contractor, either personally or by leaving such notice at his residence or with his agent in charge of the work; and thereupon the contractor shall discontinue such work or such part thereof as the said board may designate, and the said board shall thereupon have the power to contract for the completion of the work in the manner prescribed by law, and to place such and so many persons, and obtain by purchase or hire such animals, carts, wagons, tools, and plant as the said board may deem advisable, to work at and to be used to complete the work herein described, or such part thereof as the said board may deem advisable, and to procure materials for the completion of the same, and charge the cost and expense thereof to the contractor; and the expense so charged shall be deducted and paid by the board out of such moneys as either may be due or at any time thereafter become due to the contractor under and by virtue of this agreement or any part thereof; and in case such expense shall exceed the sum which would have been payable under this contract shall pay the amount of such excess to the board, and in case such expense shall be less than the sum which would have been payable under this contract if the same had been completed by the contractor, then the board shall pay the balance to the contractor; and when any particular

part of the work is being carried on by the board by contract or otherwise, under the provisions of this clause of the contract, and the contractor agrees to continue the remainder of the work in conformity with the terms of this agreement, and in such manner as in no wise to hinder or interfere with the persons or workmen employed as above provided by the said board, by contract or otherwise, to do any part of the work or to complete the same under the provisions of this clause of the contract."

On or about the 30th day of July, 1915, the said P. J. Sullivan Company, Incorporated, entered into a contract or agreement with the Fidelity & Deposit Company of Maryland, for the purpose of inducing it to become surety for said company on its bond for the faithful performance of its contract with the said board of commissioners and which contract and agreement inter alia contained the following provision:

"In further consideration of the company becoming surety as above applicant hereby covenants and agrees to indemnify the company and save it harmless against all loss, cost, damage, charge, and expense that may accrue to it, whether sustained or incurred by reason of any act, default, or neglect of the applicant, or on account of claims made under or in connection with said bond, or any extension or continuation thereof, applicant agreeing to repay to said company all such loss, cost, damage, charge, and expense, including the fees or other compensation and expense of any and all attorneys and agents employed by the company to investigate or adjust such claim or to defend any suit in which the company is directly or indirectly interested, and for the better protection of the said company applicant does as of the date hereof hereby assign, transfer, and convey to the said company all the right, title, and interest of the applicant in and to all the tools, plant, equipment, and materials of any nature and description that it may now or hereafter have upon said work or in, on, or about the site thereof, including as well materials purchased for or chargeable to said contract which may be in process of construction or storage elsewhere or in transportation to said site, hereby assigning and conveying also all its rights in and to all said contracts which have been or may hereafter be entered into and the materials embraced therein, and authorizing and empowering said company, its authorized agents or attorneys to enter and take possession of said tools, plant, equipment, materials, and subcontracts, and to enforce, use, and enjoy such possession upon the following conditions, viz.: This assignment shall be in full force and effect as of the date hereof, should the applicant fail or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in the event of any default on its part under the said contract."

The said Fidelity & Deposit Company of Maryland did become surety on the bond of said contracting company and at the time of entering into said contract with said commission the P. J. Sullivan Company, Incorporated, filed with the vocational high school commission the bond executed by the Fidelity & Deposit Company of Maryland for the faithful performance of said contract between the said contractor and the said commission.

After entering into the said contract with the said board of commissioners of the vocational high school and the filing of said bond the said P. J. Sullivan Company, Incorporated, purchased certain supplies, fixtures, and materials and brought them upon the site of the said vocational high school in the city of Syracuse to be used in carrying out and completing said contract between it and said board of commissioners.

December 8, 1916, at the time the petition in bankruptcy was filed, the said P. J. Sullivan Company, Incorporated, had not completed its contract with the board of commissioners aforesaid, and thereafter neither the trustee in bankruptcy nor the receiver did anything toward carrying out or completing the contract. On that date, December 8, 1916, the above-mentioned supplies, fixtures, and materials remained at the site of said school and were suitable for use in carrying out and completing the said contract.

December 28, 1916, the said board of commissioners served on the receiver and the P. J. Sullivan Company, Incorporated, a notice that pursuant to the opinion and certificate of the architects of said vocational high school the board of commissioners required the contractor and its successors or assigns to discontinue within three days thereafter all work under the contract hereinbefore mentioned. This notice was authorized by a resolution of the said board adopted December 22, 1916.

January 9, 1917, there was mailed to the said bankrupt company, its receivers, and to the said bonding company a resolution of the board of commissioners to the effect that the board had provided by resolution for the advertising and letting of the contract for the completion of the work covered by the contract of the P. J. Sullivan Company, Incorporated, and also giving notice to all who had filed liens, and on the same day copies of resolutions were served by mail on the bankrupt, its receivers, and the bonding company, all to the effect that the commission had decided that the work was unnecessarily and unreasonably delayed and that the contractor be notified and directed to discontinue work and notice given the surety company and that the board of commissioners advertise for proposals for the completion of the work in accordance with the original plans, etc. This resolution referred to was adopted January 4, 1917.

The supplies, fixtures, and materials hereinbefore mentioned remained upon the site of the said vocational high school building up to January 20, 1917, and from that time and thereafter were substantially all used by the said board of commissioners of the said vocational high school in carrying out and completing that portion of the vocational high school building included in said contract with said P. J. Sullivan Company, Incorporated. The supplies, fixtures, and materials so used or retained for use by the board of commissioners were of the value of $6,500.

The cost to the board of commissioners of completing said contract exclusive of any allowance for the supplies, fixtures, and materials used as aforesaid and retained for use will be in excess of the balance which would have been payable to the P. J. Sullivan Company, Incorporated, now bankrupt, for the completion of said contract under the terms thereof.

Prior to the commencement of this proceeding the said receiver and the said Whiting, as trustee, demanded of the city of Syracuse and of the vocational high school commission the said supplies, fixtures, and materials, or in case of their nonreturn their value, but such demand

was refused by both the city of Syracuse and the vocational high school commission.

On the 8th day of December, 1916, when said petition in bankruptcy was filed, none of said supplies, fixtures, and materials had been installed in, nor had any of them become a part of, the said building, nor was the same or any part thereof included in any estimate made by the architect in charge of said building, nor had same or any part thereof been paid for in cash to the said bankrupt, nor has same been paid for to the trustee or receiver of the bankrupt.

After entering into said contract with the board of commissioners of said vocational high school of the city of Syracuse, the said P. J. Sullivan Company, Incorporated, now bankrupt, brought upon the site of said school building certain tools and equipment and materials owned by the said contracting company other than the property above mentioned for use in performing said contract, and such tools, equipment, and materials remained upon the site of said school at the time of the filing of the petition in bankruptcy on the 8th day of December, 1916, and at the time of the appointment of said trustee and receiver herein. The said receiver, Frank B. Hodges, removed all of these tools and all of such equipment and materials except certain I-beams to a storehouse in the city of Syracuse, where same now remain in storage. Such tools and equipment were so removed without the consent of said Fidelity & Deposit Company of Maryland. No claim is made in this proceeding against the city of Syracuse or the board of commissioners for said tools, equipment, and materials last mentioned. The Fidelity & Deposit Company of Maryland consented to the use of the supplies, fixtures, and materials taken by the city of Syracuse or said board of commissioners and used or retained for use in the completion of said vocational high school building.

The contract between the vocational high school commission and the now bankrupt and the said bond executed by the said Fidelity & Deposit Company of Maryland were filed in the office of the clerk of the vocational high school commission, but were not filed with any other public officer or in any other place. The application for bond or agreement made between the Fidelity & Deposit Company of Maryland and the said P. J. Sullivan Company, Incorporated, was not filed in any public office or with any town or county clerk. The said P. J. Sullivan Company, Incorporated, after entering into the agreement with the said Fidelity & Deposit Company of Maryland and after entering into said contract with the vocational high school commission contracted debts, some of which were unpaid at the time of filing the petition in bankruptcy. The said P. J. Sullivan Company, Incorporated, was adjudicated a bankrupt on the same day the petition was filed.

The city of Syracuse and the said board of commissioners above mentioned claim that all the property taken and used and retained for use in the completion of said vocational high school building after the bankruptcy, and which was found on the site of the school was either theirs absolutely, or that they had such a lien and claim thereon and right thereto under the terms of the contract above mentioned that they had the right to retain and use same without paying therefor in

cash, while the receiver and trustee in bankruptcy claim that neither the commission nor the city had any right thereto or claim thereon, good as against either the receiver or the trustee in bankruptcy, inasmuch, first, as it was after-acquired property, and not owned by the P. J. Sullivan Company, Incorporated, at the time the contract was entered into, and that it could not be mortgaged or pledged as against creditors and the trustee in bankruptcy; and, second, that, if subject to mortgage, the mortgage or contract was never filed in the proper office, and that it was not legally pledged, inasmuch as the property was never delivered to the alleged pledgee or pledgees, the city of Syracuse or said commission.

The Fidelity & Deposit Company of Maryland claim that the other property hereinbefore mentioned belongs to it under the terms of its contract and agreement with the P. J. Sullivan Company, Incorporated, while the receiver and trustee claim that the contract, if treated as a mortgage, is invalid as against the trustee in bankruptcy, for the reason it was never properly filed, and that, treating it as a pledge, the property was never delivered to the pledgee or pledgees, the city of Syracuse and the commission above mentioned, or either of them.

All of the property hereinbefore mentioned was taken upon the site of the vocational high school building by the contracting company to be used by it in constructing and erecting the building. The materials mentioned were to be incorporated in the building as a part thereof, and in point of fact were suitable for that purpose. The tools, implements, etc., last mentioned, were taken upon the premises to be used in erecting and constructing the building, but were not to be incorporated therein. The city of Syracuse owned the lands upon which the building was being and was to be erected. Under the contract the P. J. Sullivan Company, Incorporated, had the right to go thereon and remain thereon for the purpose of erecting the said building, or the part thereof it was to construct, and to take its materials thereon.

There is no claim or pretense that any of the property first mentioned was examined, accepted, pronounced satisfactory, or turned over, either to the city or to the commission. After the contract was made the now bankrupt purchased it and became the owner thereof, and took it upon the site of the building for the purpose of incorporating it into the building and making it a part thereof. Neither the city nor the commission did anything whatever in regard thereto until after the bankruptcy. This property was not included in any estimate to be paid, or included in any estimate and paid for in whole or in part by either the city or the commission.

As to the other property last mentioned and actually taken by the receiver, and also as to the I-beams not taken away by the receiver, it was taken upon the grounds to be used in erecting the building, but the Fidelity & Deposit Company of Maryland never did anything in regard thereto. It never had any possession thereof, unless taking it upon the site of the school constituted a delivery of possession to the Fidelity & Deposit Company of Maryland. As to the property first mentioned and taken upon the site of the building for the purpose of being used in and incorporated into the building in process of erection

as a part thereof, it was never delivered to either the city or the commission, unless the taking of it upon the site of the building for the purpose mentioned constituted a delivery to the city or to the commission, or to both.

I fail to find anything in the contract between the city of Syracuse and the commission, either or both, on the one part, and the P. J. Sullivan Company, Incorporated, on the other part, which purports to transfer or convey or pledge the property mentioned, or any of it, to the city or to the commission, either or both, absolutely or by way of security for the performance of the contract or for any other purpose. I fail to find anything in that contract which creates even an equitable lien on the property mentioned or any of it.

[1-3] In the agreement between the surety, said Fidelity & Deposit Company of Maryland, and the P. J. Sullivan Company, Incorporated, we do find a provision of transfer to the Fidelity & Deposit Company of Maryland to secure and indemnify it for executing the bond. This contract is by way of and must operate either as a chattel mortgage or as a pledge. As the contract was not filed, and there was no change of possession of the property—that is, no transfer of possession—to the Fidelity & Deposit Company of Maryland, it cannot claim the property or any right thereto as against the receiver and trustee in bankruptcy. The contract is invalid as a chattel mortgage for want of filing. It cannot operate as a valid pledge of the property as possession was never transferred to the Fidelity & Deposit Company of Maryland. There was no agreement that the Fidelity & Deposit Company of Maryland should hold for the city or the commission, or that either the commission or the city should take and hold the property for the Fidelity & Deposit Company of Maryland. Neither was the agent of the other for any such purpose. After the bankruptcy the Fidelity & Deposit Company of Maryland consented that the city and the commission, one or both, take the property (I am not now speaking of that taken by the receiver), and use it in completing the building; that is, in completing the contract made by the P. J. Sullivan Company, Incorporated. If the Fidelity & Deposit Company of Maryland had the possession of the property and the right thereto as against the trustee in bankruptcy and the receiver, then it could confer that right upon the commission and the city, either or both; but how did the Fidelity & Deposit Company of Maryland gain such right? This was after-acquired property, and even if there was a qualified or mixed possession of such property delivered to the city or the commission, when the contracting company became the owner thereof and took it upon the school site, how or under what arrangement did that possession inure to the benefit of the surety of the contractor? In Titusville Iron Co. v. City of New York et al., 207 N. Y. 203, 100 N. E. 806, the Court of Appeals of this state expressly held that mortgages or contracts pledging subsequently acquired property, though void at law, will nevertheless be enforced in equity as between mortgagor and mortgagee as agreements to give liens, and also as against purchasers with notice. But, says the court, it is settled law in this state (New York) that they will not be enforc-

ed as against creditors. Transfer of possession to the pledgee is necessary to create a valid pledge, and the possession must be actual, not merely constructive, unless from the nature of the case the property is not susceptible of manual delivery and possession. It is unnecessary here to recite the facts of that case. They are so similar to the facts appearing here as to make it a decisive authority.

In a companion to the instant case just decided by me, while the facts differ somewhat, I have stated the facts in the Titusville Case and need only refer to that decision.

Duplan Silk Co. v. Spencer, 115 Fed. 689, 695, 53 C. C. A. 321, was cited by Chase, J., in the Titusville Iron Co. Case as sustaining his dissent from the second ground upon which the decision in the Titusville Case was made to rest. In New York there can be no valid pledge without delivery of the property pledged to the pledgee. The Duplan Silk Co. Case arose in the state of Pennsylvania, and in the state of Pennsylvania a valid pledge of personal property may be made without delivery of the property pledged. In re Twining (D. C.) 185 Fed. 555. A mixed possession will not do in case of a pledge. Security Warehousing Co. v. Hand, 206 U. S. 415, 416, 426, 27 Sup. Ct. 720, 724 (51 L. Ed. 1117, 11 Ann. Cas. 789). In that case the court said:

"The Security Company had, of course, full knowledge that the Knitting Company in fact at least shared in the possession of the property. It was itself an actor, or it acquiesced in the arrangement under which it had, at most, but a partial possession, and even that was subject to the control of the Knitting Company."

In the instant case it cannot be contended that either the city, the commission, or the surety had the right to the possession of the property in question, or any of it, as against the P. J. Sullivan Company, Incorporated, prior to the filing of the petition in bankruptcy. Neither in fact had any right to interfere with the possession and use of that property, or any of it, so long as the contractor remained on the premises in the performance of its contract according to the terms thereof. There is not a word in either contract that gives to the city, the commission, or the surety company the right to interfere with the possession of the contractor as to property it had taken there for use in the performance of the contract. If under the contract an estimate had been made of property incorporated into the building including work done and of property delivered on the grounds by the contractor for incorporation into the building and that estimate had been accepted and money paid on the faith thereof a different question would be presented. However, nothing of the kind appears in this case. As to liens created either by chattel mortgage or pledge the United States courts are controlled by the decisions of the highest court of the state where the case arises. This is now settled law and has been settled by many decisions of the Supreme Court of the United States. If the Fidelity & Deposit Company of Maryland had filed its contract in the proper office, it is possible that the contract would have taken effect as a valid mortgage when the property was placed on the grounds; but the contract was never filed and there was no possession whatever in the Fidelity & Deposit Company of Maryland. Credi-

tors of the contractor had no notice that the surety on the bond of the contractor had any claim whatever on this personal property.

[4, 5] The Fidelity & Deposit Company of Maryland, as well as the board of commissioners and the city of Syracuse, claim that a fair construction of the contract entered into between the board and the city makes it an agreement and contract of pledge of the property taken upon the school grounds by the contracting company for the purpose of being placed in the building as a part thereof, and also of the property taken there to be used in doing the work, effective the moment the property was placed on such grounds; that when such property, even though not owned by the contractor when the agreement was made, was taken on the grounds, it was then set apart and devoted to that work, and in a sense and to an extent became a part of the building; and that, being on the grounds for that purpose, a sufficient possession, qualified, it is true, was then delivered to the owner of the building in process of construction to constitute a valid pledge of such property. It is contended that an absolute unqualified physical possession on the part of the board or city, or both, was unnecessary to the validity of the pledge.

The case of Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, is cited as authority for this position and contention. That was a case of negotiable securities alleged and held to have been pledged by a banking firm in New York City to secure its drafts then and thereafter to be made on a foreign bank. The alleged pledgee was an English house, and for a long time the New York house had been accustomed to draw on it. The English house requested the New York firm to set aside securities for their drawing credit. The New York firm wrote that they had placed that day in a separate package in their safe deposit vaults certain securities named, the package being marked "Escrow for Account of Kessler & Co., Ltd., Manchester," and this was added:

"This escrow is intended as a protection against our [English] drawings against your good selves."

This letter was acknowledged, and stated:

"If at any time you have the opportunity of realizing these securities, or any part of them, you are at liberty to take them, and to replace them by others of equal value, though in that case we should, of course, like to see rather better quality."

In December following the English house suggested a form of certificate, viz.:

"We certify that we have specially set aside and hold for your account, on this, the 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities: Name. Securities. Market Value."

This request was complied with, and the New York house not only set apart the securities, but entered them and all substitutions on their lien book. Substitutions of securities were made from time to time and the English house notified. The securities were either negotiable by delivery or indorsed in blank always. They were marked and kept as stated in the letter upon a separate shelf of the New York

firm's vault, and were never removed, except on two occasions, in 1905 and 1906, when they were taken to the office of the New York house to be examined and checked off by a representative of the English company. The business between the two houses was conducted in this way until October, 1907, when, the stability of the New York firm being in doubt, it handed over the escrow securities to an agent of the English company then in New York, and he deposited them in a safe deposit vault in the name of the English company. In November following a petition in bankruptcy was filed against the New York company, and on November 27th, the New York firm was duly adjudged bankrupt. The trustee in bankruptcy on his appointment brought suit to set aside this transfer and recover the securities or their value as an alleged preference. The Supreme Court held that there was a sufficient delivery and possession by the English house to transfer the title or such a lien as to make the right of the English house superior to the claims of the trustee in bankruptcy. The Supreme Court said:

"In the case of ordinary goods and chattels, where, for instance, a man mortgages his stock in trade as it may be from time to time, retaining possession and full power to sell and replace or not as he sees fit, it well may happen that the security fails. * * * So a general promise to give security in the future is not enough. But the present was a more limited and cautious dealing. It was confined to specific identified stocks and bonds on hand, and purported to give an absolute present right, qualified only by possible substitution, and perhaps by a right of partial withdrawal, if the remaining securities had risen sufficiently in value. It purported not to promise, but to transfer; and the subject-matter was not goods and chattels in the sense of the New York mortgage law as we understand that law to be interpreted by the New York courts. * * * There can be no doubt, as was said by the court below, that before the bankruptcy the English house had an equitable right at least to possession if it wanted it. While the phrase equitable lien may not carry the reasoning further or do much more than express the opinion of the court that the facts give a priority to the party said to have it, we are of opinion that the agreement created such a lien at least, or in other words, that there is no rule of local or general law that takes from the transaction the effect it was intended to produce. * * * When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York, and in the absence of any controlling statute to the contrary such we understand to be what the law should be. Parshall v. Eggert, 54 N. Y. 18; National Bank of Deposit v. Rogers, 166 N. Y. 380 [59 N. E. 922]."

It is evident that here was a setting apart of specific securities for the security and protection of the English house, and that this was done by specific agreement and understanding of the parties. It was specifically agreed that the New York house should have the actual possession of the securities so set apart and kept in a specific place for the English house. The New York house was the agent or representative of the English house for that purpose, and the possession, such as it was, of the New York house, was the possession of the English house. In the instant case we have no such state of facts. First the property was owned by the P. J. Sullivan Company, Incorporated, and was in its possession and intended to be used by it in constructing the building. There was no agreement, express or implied, that this

property should be set apart as the property of the city or commission, or kept separate and distinct from other property of the contracting company. Between the city and commission and the contracting company there was no agreement whatever as to this specific property. Neither the city nor the commission made any advance upon it, or had it included in any estimate for which they paid or were to pay, and again it was property which comes within the specific terms of the New York chattel mortgage law. The chattel mortgage law of the state of New York requires that the mortgage be either recorded or filed in the proper clerk's office, or that it be accompanied by immediate possession by the mortgagee of the mortgaged property. See Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885; Zartman v. First National Bank of Waterloo, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083. In Union Trust Co. v. Wilson, 198 U. S. 530, 537, 25 Sup. Ct. 766, 768 (49 L. Ed. 1154) the court, in speaking of possession, says:

"So, again, if the goods had been in a place under the exclusive control of the company, even without the company's knowledge, they would have been in the company's possession. * * * When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense."

In the instant case neither the city, the board, nor the Fidelity & Deposit Company of Maryland had or assumed any control of this property whatever. Neither of them had any intent to exclude the contracting company from possession, and neither of them excluded or attempted to exclude that company from its possession. The board, of course, and the city, which owned the site, had access to the place as of right; but neither of them assumed or exercised custody or dominion of the property. I am unable to see that Sexton v. Kessler has any application in the instant case.

The instant case is also widely different from National Bank of Deposit v. Rogers et al., 166 N. Y. 380, 59 N. E. 922. It is well settled that, where goods are in storage and warehouse receipts have been issued, the indorsement and delivery thereof as security for loans constitute a pledge of the goods represented thereby, valid as against attaching creditors and a trustee in bankruptcy; but such is not this case, and here there was no delivery whatever to the Fidelity & Deposit Company of Maryland, and there is no pretense that the property was so bulky or of such a character and nature as not to be capable of full and complete delivery. There is nothing in the agreement between the P. J. Sullivan Company, Incorporated, and the Fidelity & Deposit Company of Maryland, or in the agreement between the board of commissioners and the P. J. Sullivan Company, Incorporated, that the taking of the property to be used in the construction of the building, or in doing the work, upon the site of the building, shall be considered or operate as a delivery of such property to either the city or the surety.

In re Midtown Contracting Co. (D. C.) 238 Fed. 871, has been reversed by the Circuit Court of Appeals (243 Fed. 56, —— C. C. A. ——), but upon the ground that the board of education had declared the

contractor in default and had taken possession of the building material before a petition in bankruptcy was filed, and that the title of the city or board of education to such material could not be determined in a summary proceeding, except with the consent of the board.

It is elementary law that in construing a contract we are to give it that meaning which the parties evidently intended it should have; but there is no rule of law, of which I am aware, that justifies a court in adding provisions to a contract which the parties themselves have omitted to place therein, for the purpose of doing what the court may deem justice between the parties. If the owner of a building lot, contracting with a builder to erect a structure thereon, desires and intends to have a lien on the personal property and material taken upon such grounds for the purpose of being incorporated into the building, as security for the performance of the contract, it should be so stated in the contract, and apt words used to create such a lien; and if the provision is by way of security the instrument should be filed in the proper clerk's office, or else the chattel mortgage filing law should be so amended as to exclude such a contract from its provisions. If under the circumstances stated, the mere taking of materials and implements upon the site of the building constitutes a delivery sufficient to constitute a valid pledging of such property, the courts may, of course, in the absence of a statute to the contrary, so declare. Thus far in New York the courts have adhered to the rule that to constitute a valid pledge of personal property there must be a surrender of dominion, possession, and control on the one part, and an assumption of dominion and control on the other part, except in certain specific cases, of which this is not one.

I am not unmindful of the remark of Judge Cullen in deciding the Titusville Iron Case to the effect that at best the question of possession was one for the jury. I cannot see how it can be found as matter of fact that possession of material taken by a contractor upon the premises of the owner of such premises for the purpose of incorporating such material into a building which he is to erect for the owner under contract passes to such owner of the premises prior to its incorporation in the building, in the absence of specific agreement to that effect.

In this case the agreement between the P. J. Sullivan Company, Incorporated, and the Fidelity & Deposit Company of Maryland is clearly one of security, and not an out and out sale of the property mentioned to the surety company. The agreement was intended as security, and not as a sale. The surety company had neither ownership nor possession of either the material or the school site.

[6] I do not think the line of cases, Markham v. Jaudon, 41 N. Y. 235, Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, and Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, can be applied to the instant case. So of In re Scofield Co. (Appeal of Thomas), 215 Fed. 45, 131 C. C. A. 353.

The relation of broker and customer is a peculiar one in many respects. See Markham v. Jaudon, 41 N. Y. 235, where the relation is

quite fully described. This is fully quoted and approved in the opinion of the court in Richardson v. Shaw, 209 U. S. 374, 376, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981. Jones on Pledges is also quoted and approved, and he says that the broker acts in a threefold relation —in purchasing the stock he is an agent, in advancing money for the purchase he becomes a creditor, and finally in holding the stock to secure the advance made he becomes a pledgee of the stock. The customer who orders the stock purchased usually never sees or handles the stock. But, says the author, "It does not matter that the possession of the stock was never in the customer." If, when the broker purchases the stock for the customer, he acts as agent for such customer, and he also advances money in making the purchase and then becomes a creditor, and when he takes the stock into possession he holds as pledgee of such stock as security for the advance, and there can be no doubt this is so, we have a relation and obligation imposed by law peculiar to such transactions and quite different from the ordinary purchase and pledge and mortgaging of goods, wares, merchandise, and chattels. The stock becomes the property of the customer, but the broker may again sell or pledge or substitute other shares of the same kind, etc. But all this gives no warrant for holding that when a contractor agrees to erect a structure on the premises of the owner thereof for a fixed sum, and then purchases material to put in such building, and takes such material on the premises for that purpose, he thereby pledges such materials to the owner as security, or makes them a part of such structure, or that the owner of the premises becomes a pledgee in possession. And if the contractor gives a bond with surety that he will perform his contract, and gives to his surety a bill of sale of the property he is to take on the building site for use in the erection of the building as security for executing the bond, retaining, as in this case, the right to possess, exercise dominion over, and use the materials in erecting the building, or change them in his discretion and in the exercise of his judgment, has such contractor pledged the materials to such surety? Clearly there is no delivery at the time. But in Parshall et al. v. Eggert, 54 N. Y. 18, it is held that:

"One who has a contract for a pledge, ineffectual for want of a delivery of the goods, may obtain a subsequent delivery, and thus validate the pledge, even as against an intermediate creditor."

But in the instant case the Fidelity & Deposit Company of Maryland never took possession. It consented that the commission or city might take and use the materials, and the commission did. But this was weeks after the bankruptcy and the appointment of a trustee in bankruptcy.

[7-12] Conceding that, by and through what was done by the city or commission with assent of the surety, the Fidelity & Deposit Company of Maryland took possession of the materials, etc., actually used by the city or commission under the agreement with the P. J. Sullivan Company, Incorporated, and that such agreement, made in consideration of the execution of the bond referred to, was an agreement of pledge which would have become valid and effective as between the

parties when possession of the property was obtained or taken by the pledgee, was it made effective as a pledge by taking and using the property after the bankruptcy, and after the appointment of the receiver and trustee in bankruptcy, as against them, and consequently as against the creditors of the P. J. Sullivan Company, Incorporated? In New York, in case of a chattel mortgage on ordinary goods and chattels, where possession is evidence of ownership or of some right thereon, "immediate delivery" and "actual and continued change of possession" give notice to all creditors of such right, whatever it may be. Filing of the chattel mortgage is a substitute for such change of possession and the equivalent thereof. If there is no filing within a reasonable time, and no actual and continued change of possession, the mortgage is good as between the parties, but invalid as to creditors and the trustee in bankruptcy. Zartman v. First National Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083; Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885.

Section 230, Lien Law of State of New York, provides:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels or of any canal boat, steam tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is 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, is filed as directed in this article."

This applies to every mortgage or conveyance intended to operate as a mortgage of goods and chattels, and such is the intent of the provision above quoted in the agreement between the contractor and the surety.

In the case of an agreement to make a pledge of personal property, there is no valid pledge until possession of the property is given. It is not necessary in the case of bulky property that there be an actual physical handling, but some act or acts surrendering dominion on the one part, and transferring it to the pledgee on the other part, must be done. In the case of goods stored in a warehouse, delivery of the warehouse receipts, or written evidence of title, and giving right of possession, may be enough. If possession is not given at the time of the agreement, and the pledge perfected, such possession may be given afterwards; but it stands to reason that, "to ripen" and perfect the pledge as against creditors and a trustee in bankruptcy, the lien should be made effectual by taking possession prior to actual bankruptcy and the appointment of a trustee, whose title, on his appointment and qualification, relates back to the date of adjudication. In the case of a pledge of personal property, possession by the pledgee is required for the protection of creditors, else it has no purpose at all. Possession by the pledgee is notice of his rights whatever they may be.

Section 67a of the Bankruptcy Act provides:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

And section 67e also says:

"And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Section 47 of the Bankruptcy Act provides that:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

In the instant case the trustee, on his appointment and qualification, became vested with the same rights a creditor would have had under the laws of the state of New York who had obtained a lien by judgment, and execution issued and returned unsatisfied; that is, he could hold the property as against all persons asserting a lien, which was not perfected and valid as such at the time the petition in bankruptcy was filed. Such a judgment and execution creditor would have a specific lien on or right to the property of the P. J. Sullivan Company, Incorporated, not in the actual possession of the pledgee although subject to an agreement, and hence the trustee in this case has the same right. In Parshall v. Eggert, supra, 54 N. Y. 18, the reference to "intermediate" creditors was to creditors at large, not creditors with judgment and execution returned unsatisfied, and the case so states. The court also expressly states:

"A creditor, who acquires a specific right to or lien on the thing pledged, may prevent the pledgee's interest in an undelivered chattel from attaching. But such is not the condition of the creditor at large."

As the trustee in bankruptcy in the instant case has the same rights as against the Fidelity & Deposit Company of Maryland, and consequently as against the city of Syracuse or the commission, that a judgment creditor with execution issued and returned unsatisfied would have, his right is superior to that of both the city or commission and the surety company, and in effect Parshall v. Eggert so declares. Again, section 67a, quoted above, says the claim of the surety company and of the city and commission shall not be a lien against the estate or this property, not for want of record, treating it as an agreement to give a lien, but "for other reasons," viz.—the property to be pledged had not been delivered to the pledgee. As against execution creditors, and hence as against the trustee, the claim under the agreement could not become a lien on the property, as it had not been delivered at the time of the filing of the petition.

In Titusville Iron Co. v. City of New York, supra, 207 N. Y. 203, at page 210, 100 N. E. 806, Chief Justice Cullen, in giving the opinion of the court, expressly quotes section 67a of the Bankruptcy Act, and

states its effect as to liens not perfected at the time of bankruptcy. This is the law of the state of New York, as declared by its highest court, and is controlling in the instant case. The federal courts, as to the extent and validity of a pledge of personal property, are not only controlled, but bound, by the decisions of the state court. Hiscock v. Varick Bank of N. Y., 206 U. S. 28, 37, 38, 27 Sup. Ct. 681, 684 (51 L. Ed. 945). Said the court in that case:

"The contracts of pledge were made, executed, and to be performed in the state of New York, and the rights of the parties were governed by the law of that state. * * * The questions of the extent and validity of the pledge were local questions, and the decisions of the courts of New York are to be followed by this court."

As to the property actually taken and put in storage by the receiver there can be no question whatever. While not after-acquired property, if we consider the contract or agreement between the surety company and the P. J. Sullivan Company, Incorporated, as a chattel mortgage, which in fact it is, it was not recorded or filed, and no possession was given or taken under it by either the mortgagor or the mortgagee or the city or the commission at any time. If we consider it as an agreement to pledge the property, the pledge was not perfected by any delivery to or possession in the pledgee, unless the placing thereof on the school grounds by the contracting company, to be used by it as its instrumentalities in doing the work contracted to be done, transferred possession and dominion. The decision of the Court of Appeals in the Titusville Case, supra, indicates clearly that such a placing of property on the grounds of the owner for such a purpose does not constitute possession. It was, of course, the understanding of the parties that the P. J. Sullivan Company, Incorporated, the contractor, should possess and exercise dominion over these tools, implements, and materials, as such possession and dominion were absolutely essential to it in performing the contract. On the agreed facts the finding must be that possession was not delivered to or taken by either the surety company, the city, or the commission, prior to the filing of the petition and adjudication in bankruptcy. Security Warehousing Co. v. Hand, 206 U. S. 415, 426, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789; Marquam v. Sengfelder, 24 Or. 2, 32 Pac. 676; Williams v. Gillespie, 30 W. Va. 586, 5 S. E. 210.

As already stated, neither the surety company, the city, nor the commission took or gained anything as against the receiver or trustee in bankruptcy by taking and using the materials and incorporating them into the building after the filing of the petition in bankruptcy and adjudication. Even if this taking and using would have perfected a pledge, had the taking been done before the petition was filed, such agreement of pledge could not be given life or effect as against the trustee in bankruptcy by taking or obtaining possession of the property thereafter. Fairbanks Shovel Co. v. Wills, 240 U. S. 642, 649, 36 Sup. Ct. 466, 60 L. Ed. 841. In that case (240 U. S. page 649, 36 Sup. Ct. 466, 60 L. Ed. 841), the court holds:

"Appellant's title was not perfected, as against the trustee in bankruptcy, by taking possession of the dredge under the mortgage after the filing of the petition in bankruptcy and before the adjudication. Since the amendment of

section 47a2 of the Bankruptcy Act by Act June 25, 1910, c. 412, § 8, 36 Stat. 838, 840, trustees have the rights and remedies of a lien creditor or a judgment creditor as against an unrecorded transfer. The estate was in custodia legis from the filing of the petition, and the title of the trustee related back to that date. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 307 [32 Sup. Ct. 96, 56 L. Ed. 208]; Everett v. Judson, 228 U. S. 474, 478 [33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154]."

In that case the chattel mortgage was valid as between the parties, the mortgagor (bankrupt), and mortgagee, and there was, of course, an equitable lien; but, not having been recorded in the proper county, the mortgage was held invalid as to the trustee in bankruptcy, although the mortgagee took actual possession of the mortgaged property, but only after the filing of the petition and before the adjudication and the appointment of the trustee. As we have seen, since the amendment of June 25, 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), the trustee in bankruptcy has all the rights and remedies of lien creditors as the Supreme Court expressly decides. It can make no difference whether the property in question here was subject to the equitable rights of a mortgagee, whose lien had not been perfected by filing or recording, or to those of a pledgee, whose lien had not been perfected by the delivery of possession of the property to the pledgee. As we have seen, the rights of a creditor with judgment and execution returned unsatisfied (which are the rights a trustee in bankruptcy now has) are superior to those of a person holding an agreement for a pledge unaccompanied by delivery of the property. Parshall v. Eggert, supra, 54 N. Y. 18.

It follows that the petitioners are entitled to the property in actual storage and to the agreed value of that taken and used.

So ordered.

NOTE. In the case filed the same day as the above case (January 4, 1918), wherein the Massachusetts Bonding & Insurance Company was surety for the contractor, there was a clause that all property taken on the grounds by the contractor was to be held by the city as security for the performance of the contract. There was a like clause in the contract between the surety company and the P. J. Sullivan Company, Incorporated, by which it was to have the property as security for the performance of the contract. The city, however, never took possession of the property taken on the school grounds known as the Delaware school until after default by the contractor and the filing of the petition in bankruptcy and the appointment of a receiver. The agreements referred to were not filed or recorded pursuant to the laws of the state of New York in any place as a chattel mortgage.

UNITED STATES v. PERLMAN.

(District Court, S. D. New York. December 21, 1917.)

1. GRAND JURY ⇐41—SECRECY.
   After an indictment has been found, and defendant has been apprehended and has submitted to the jurisdiction of the court and been released on bail, there is no impropriety in inquiring of the grand jurors, or in their telling, what transpired before them.
2. CRIMINAL LAW ⇐627½—MINUTES OF GRAND JURY—INSPECTION.
   The court may inspect the grand jury minutes to satisfy its own conscience; but the right should be sparingly exercised unless a strong case

is made out, requiring examination in the furtherance of justice or for the protection of individual rights.

3. CRIMINAL LAW ⊂627½—INDICTMENT AND INFORMATION ⊂137(4)—QUASHING—INCOMPETENT EVIDENCE.
An indictment will not be quashed, or the minutes of the grand jury inspected to see what evidence there was, merely because of a showing that incompetent evidence was given before the grand jury; it being enough if there was any competent evidence.

4. CRIMINAL LAW ⊂279—ABATEMENT—TIME OF PLEA.
A plea of abatement, filed 108 days after the filing of the indictment and the arraignment, there being nothing excusing the long delay, is not timely.

Prosecution of Louis H. Perlman by the United States. Heard on motion to strike out plea in abatement, and on motion to quash the indictment. First motion granted; second motion denied.

Francis G. Caffey, of New York City (Harold Harper, of New York City, of counsel), for the United States.

Silberberg & Davis, of New York City (Louis Marshall and A. A. Silberberg, both of New York City, of counsel), for defendant.

MANTON, District Judge. The defendant was indicted by the federal grand jury for the crime of perjury on July 20, 1917, and was arraigned on this day and pleaded not guilty, with leave to withdraw his plea and enter a demurrer. On August 8, 1917, he demurred to the indictment. On October 6, 1917, a motion to quash the indictment was served, based on the ground of insufficient evidence before the grand jury. On November 1, 1917, an order was filed overruling the motion to quash. On November 5, 1917, a plea in abatement was filed, and on November 7, 1917, a second motion to quash was served.

We have for consideration now a motion by the government to strike out the plea of abatement, upon the ground that it is not timely; also for determination the second motion to quash the indictment.

The defendant's perjury is alleged to have been committed while a witness in behalf of the Perlman Rim Company in a litigation instituted by it, over a patent, against the Firestone Tire & Rubber Company. The indictment charges:

"And the said Louis H. Perlman being duly sworn, as aforesaid, it then and there upon the trial of the said issue became and was a material matter and inquiry whether or not the said Louis H. Perlman has been and stopped in London, England, in the year 1895, and had been there concerned with a syndicate known as the American Ocyzone Syndicate, and had been there arrested and charged with an offense in connection with the conduct by the said Louis H. Perlman and one Edward Ames Weber of the said syndicate, and an examination had been had before one Magistrate Bridge at the Bow Street Police Court, and the said Louis H. Perlman thereafter had been indicted for larceny and cheating under the British law in such connection, and had been put in jail for two months and had finally furnished bail, and whether or not the said Louis H. Perlman, having been arrested, charged, indicted, put in jail, and bailed as aforesaid, had fled his bail, and was then and there, that is to say, at the time of the trial of the suit of Perlman Rim Corporation against Firestone Tire & Rubber Company, Incorporated, as aforesaid, a fugitive from justice, and whether or not the said Louis H. Perlman remembered, recollected, and recalled the aforesaid occurrences and events."

And it is further charged that as a witness in said case he swore falsely and corruptly, knowingly, and willfully, contrary to such oath, in substance that he did not remember, recollect, or recall whether or not he had stopped in London, England, in the year 1895, or whether or not he had been concerned in the syndicate known as the American Ocyzone Syndicate, or whether or not he had been there arrested and charged with an offense in connection with the conduct of said Louis H. Perlman, or whether or not an examination was had before Magistrate Bridge in the Bow Street Police Court, and there charged with larceny and cheating under the British law in such connection, and whether or not he spent two months in jail and finally was released on bail, and whether or not he thereafter fled his bail, and whether or not he was a fugitive from justice; the indictment charging further that he had knowledge of these occurrences.

The claim of the defendant is one Martin W. Littleton was called as a witness before the grand jury and gave testimony, which concededly is hearsay, which in substance was that he had heard or was told that somebody said that the defendant stated, in reference to the alleged facts which form the basis of the perjury charge, that the Firestone suit was not being tried fairly and that the Firestone people were trying to rake up old history, and it is claimed that this reference to old history is the sole basis for the identification of the defendant as the man who figured in the criminal prosecution in the London court.

It is claimed that the identification, one of the necessary links of the chain of accusation against the defendant, is predicated upon hearsay and illegal evidence, in that the testimony given by Mr. Littleton is the sole testimony as to the identification, and therefore the motion to quash the indictment should be granted. The affidavit of Mr. Odger is support of the motion to quash sets forth the source of information upon which the claim is based as the only evidence of identification of the person before the grand jury, and states that four of the grand jurors told him that there was no evidence of identification other than that given by Martin W. Littleton which has been referred to. The only evidence submitted in opposition is the affidavit of the assistant United States attorney, who says that the statement of what occurred in the grand jury room is not a true or correct statement. He does not state, however, what was the evidence before the grand jury, taking the position that he is not at liberty to do so because of the secrecy of the proceeding before that body.

[1] At the outset it might be observed that there was no impropriety in interviewing the grand jurors, or in the grand jurors telling what transpired if they recollected it. This information was solicited and obtained after the indictment was found, and the defendant apprehended and submitted to the jurisdiction of the court and his release upon bail. In discussing this question in Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97, 17 L. R. A. (N. S.) 1049, 15 Ann. Cas. 253, Judge Dayton said:

"But does this policy require secrecy as to the evidence adduced before the grand jury after such jury has made its presentment and indictment, publication thereof has been made, the grand jury finally discharged, and the de-

fendant is in custody? We think not. * * * What reason, therefore, can exist why the grand jurors, under such conditions, should be bound to secrecy? We can see none; and for these reasons we hold this fourth obligation of the grand juror's oath to require secrecy only so long as the policy of the law requires, and that that policy does not require it, so far as the evidence adduced before the grand jury is concerned, after presentment and indictment found, made public, and custody of the accused had, and the grand jury finally discharged."

[2] Further, the claim that there may not be an inspection of the grand jury minutes by the court, to satisfy the conscience of the court, is without merit. The right to inspect the grand jury minutes has been accorded to defendants where sufficient reason appears therefor, and this under the common-law practice, or in the absence of statute on the subject. Judge Learned Hand, writing in U. S. v. Violon (C. C.) 173 Fed. 501, refused to inspect the minutes of the grand jury on an application there; but I take it that must be applied to the particular facts involved in that prosecution. He recognized the authority of United States v. Kilpatrick (D. C.) 16 Fed. 765, but refused to follow it, observing:

"Of course, a case of misconduct within the grand jury room, as the use of liquors, or the like, might raise a very different question."

In this language he recognized the right of the judge to inspect the grand jury minutes to satisfy his own conscience, and it is not an authority against the right of the court to inspect the minutes. This right, however, should be sparingly exercised, unless a strong case is made out requiring examination of the minutes in the furtherance of justice, or for the protection of individual rights. As Judge Sanborn pointed out in McKinney v. United States, 199 Fed. 34 (117 C. C. A. 403):

"The grand jury is the organ of the court, subject to its jurisdiction and direction, and it is one of the legal duties of the court to see that its acts and findings accord with and are not in violation of the Constitution and the law. The Constitution and the law are superior to the theoretical secrecy of the proceedings of the grand jury, and courts should never permit the latter to induce, protect, or perpetuate violations of the former, or private or public wrongs."

While judges in the past have not been inclined to favor applications by defendants for inspection by them of the grand jury minutes, where good reason is shown in support of such motion, it should be granted. U. S. v. South Mayd, 6 Biss. 321, Fed. Cas. No. 16,361; U. S. v. Kilpatrick (D. C.) 16 Fed. 765; People v. Molineux, 27 Misc. Rep. 60, 57 N. Y. Supp. 936; People v. Glen, 173 N. Y. 395, 66 N. E. 112.

[3] Here, however, sufficiently strong reasons are not advanced to warrant the inspection of the grand jury minutes by the court, or to permit the defendant to inspect them. Assuming all that is set forth in the affidavit and petition of the defendant, it is not clear that there was no legal evidence to support the indictment. The hearsay evidence of Martin W. Littleton was not competent. Though defendant showed there was a reading of the minutes of the Firestone suit (and that of itself may have afforded a sufficient basis for the finding of the indictment), it is not stated what appeared in the minutes. The minutes might contain sufficient evidence to justify a conviction of the grand

jury that the testimony given by the defendant was false. The answers, "I don't remember," given by the defendant, may have been sufficient for the grand jury, so as not to require evidence of identification. A man who can remember so minutely the incidents in connection with his invention 14 years ago should undoubtedly remember whether or not he was in jail for 2 months 22 years ago, or whether he was in London and escaped therefrom as a fugitive from justice. This showing is not of sufficient strength to warrant an inspection of the minutes of the grand jury, or to quash the indictment on defendant's motion. The law is well settled that an indictment is not vitiated by the fact that incompetent evidence was given before the grand jury, if there was any competent evidence upon which an indictment might have been found. And it is not for the court to inquire into the sufficiency of the evidence. Holt v. U. S., 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138; U. S. v. Rintelen (D. C.) 235 Fed. 787; McKinney v. U. S., 199 Fed. 25, 117 C. C. A. 403; Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343.

In addition thereto, it appears that the defendant made an application to quash the indictment before Judge Ervin, and this was denied on November 1, 1917. The only additional information here is the affidavit which sets forth statements made to the affiant by grand jurors, and this chain lacks probative force and would not justify my doing other than Judge Ervin did, in denying the application.

[4] As to the motion to strike out the plea in abatement, it should be granted. It was not timely made because not filed until 108 days after the filing of the indictment and the arraignment which took place on the same day. There is nothing in the plea of abatement, nor in the argument of counsel now, which would justify the exercise of discretion by the court in excusing this long delay. Delays less flagrant were held inexcusable in the following cases: Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; Hyde v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; U. S. v. Rintelen (D. C.) 235 Fed. 787.

The plea in abatement has been referred to by the writers and the courts in the past as a dilatory plea, and it has been ruled that it must be filed promptly. Moffatt v. U. S., 232 Fed. 522, 146 C. C. A. 480. A refusal of the court to rule upon a plea in abatement, where there was a delay of seven months, was held no abuse of discretion in Matters v. U. S., 244 Fed. 736, —— C. C. A. ——.

For these reasons, the motion to strike out the plea in abatement must be granted, and the motion to quash the indictment denied.

BALDWIN v. KINGSTON.

(District Court, D. New Jersey. January 3, 1918.)

1. BANKRUPTCY ⟸175—CONVEYANCE—SETTING ASIDE.
A conveyance cannot be avoided by a trustee in bankruptcy, under Bankruptcy Act July 1, 1898, c. 541, § 67e, par. 1, 30 Stat. 564 (Comp. St. 1916, § 9651), unless actual fraud is shown.

2. BANKRUPTCY ⟸176—TRUSTEE—VACATION OF CONVEYANCE.
Under Bankruptcy Act, § 70e (Comp. St. 1916, § 9654), a trustee in bankruptcy may avoid any transfer by the bankrupt which could have been avoided by his creditors under the laws of the state, regardless of the question of the bankrupt's insolvency at the date of the transfer, and regardless of the time when the transfer was made.

3. BANKRUPTCY ⟸175—TRUSTEES—VACATION OF CONVEYANCE.
Under such section, and in view of the amendment of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838) to section 47a (Comp. St. 1916, § 9631), specifically vesting the trustee with the lien of judgment creditors, a trustee in bankruptcy may avoid a transfer by the bankrupt, although there were no creditors who, because they had no lien or judgment, would, at the time of the filing of the petition in bankruptcy, have been in a position to attack a conveyance by the bankrupt.

4. FRAUDULENT CONVEYANCES ⟸74(3)—VACATION—GROUNDS.
Under the laws of New Jersey, a voluntary conveyance is deemed fraudulent in law as to, and voidable at the instance of, a creditor whose debt existed at the date of the conveyance, irrespective of the actual intention of the grantor or grantee, or of the former's solvency or insolvency at the time of the conveyance.

5. HUSBAND AND WIFE ⟸278(2)—SEPARATION—AGREEMENTS—VALIDITY.
Where the parties had already separated, an agreement, executed between the husband and wife, providing for her support during the separation, is not opposed to public policy.

6. BANKRUPTCY ⟸178(1)—CONVEYANCE FOR WIFE'S SUPPORT.
A husband, who had ceased to live with his wife, having become enamored with another woman, and who had withdrawn her credit for necessaries, on the wife's demand that he make provision for her support, arranged that the marital homestead, in which the wife had continued to live, should be conveyed to her; the conveyance being made through a third party, acting as conduit of title. *Held* that, as it was competent for the parties, having already separated, to enter into such agreement, the conveyance was not a voluntary one, which under the New Jersey law would be constructively fraudulent, and voidable at the instance of existing creditors, and hence that it could not, on the bankrupt's subsequent bankruptcy be set aside, under Bankruptcy Act, § 70e.

In Equity. Bill by J. Wadsworth Baldwin, as trustee in bankruptcy of La Rue H. Kingston and William A. Burnett, individually and as copartners, against Etta C. Kingston, to set aside a conveyance alleged to have been made in fraud of creditors. Bill dismissed.

Andrew Van Blarcom, of Newark, N. J., and J. Russell Sprague, of Inwood, N. Y., for plaintiff.

McCarter & English, of Newark, N. J., for defendant.

HAIGHT, District Judge. This is a suit by a trustee in bankruptcy to set aside a conveyance of certain real estate made by a bankrupt, through an intermediary, to his wife, the defendant, upon the ground

that it was made to hinder, delay, and defraud his creditors. The transfer was made on September 4, 1914. The grantor, La Rue H. Kingston (hereinafter referred to as the "bankrupt"), was adjudicated a bankrupt on December 26, 1914, as was also, at the same time, his partner in business, William A. Burnett, and the plaintiff was subsequently appointed trustee in bankruptcy of the individual estates of both partners, as well as their copartnership estate. The property in question was the individual property of Kingston, and had been occupied by him and the defendant as a dwelling. For about a year preceding the conveyance, the bankrupt and the defendant had not lived together. He had apparently become enamored of another woman, with whom he lived in an adjoining city. The difficulties between him and his wife seem to have increased as the time passed, and latterly it had become very difficult for her to procure from him the money necessary for her support and maintenance. Before the conveyance was made, the bankrupt, apparently without justification, advertised in one or more newspapers in Newark, where his wife resided, that he would no longer be responsible for her debts, and specifically notified two merchants, from whom she had theretofore been accustomed to procure supplies on his credit, to withhold further credit from her. This action on his part resulted in a conference between him and the defendant, at which she pointed out his obligation to support her, the fact that he was not doing so, that he was apparently trying "to starve her out of house and home," and her destitute condition, and she made a demand that he make some adequate provision for her support. Thereupon, at her suggestion or upon his initiative—the evidence is not clear which—but clearly in order to comply with the defendant's demand it was arranged that the property in question should be conveyed to her. This arrangement was accordingly carried out and resulted in the conveyance now under attack. Admittedly, there was no consideration for the conveyance except the performance—whole or partial—of the bankrupt's obligation to support his wife, and possibly her relinquishment of any demand upon him for further or other support. I cannot find any evidence that the conveyance was made with any actual intent to defraud the bankrupt's creditors, either on his part or on that of the defendant.

[1] Indeed, the plaintiff does not contend that there was any such intent. It is therefore clear that the conveyance in question cannot be avoided under the first paragraph of section 67e of the Bankruptcy Act, which requires that actual fraud must be shown. Coder v. Arts, 213 U. S. 223, 244, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008. Furthermore, the evidence is not even sufficient to justify a finding that the bankrupt was insolvent at the time the conveyance was made, although I must confess to a very strong suspicion that such was the case. The bankrupt and his partner, Mr. Burnett, had been conducting a profitable restaurant business in the city of Newark for a number of years preceding the bankruptcy, and the bankrupt's insolvency was due solely to the failure of the firm. The evidence of Burnett, which is the only evidence on this point, is hopelessly contradictory as to whether the firm's financial condition was the same at the time the con-

veyance was made as it was at the time the petition in bankruptcy was filed.

[2, 3] The trustee claims that it is immaterial to his right to relief whether or not the conveyance was the result of actual fraud, or whether or not the bankrupt was insolvent at the time it was made, because under the laws of New Jersey, applicable to the situation presented in this case, the conveyance might have been avoided by certain of the bankrupt's creditors, and consequently, by section 70e of the Bankruptcy Act, can be avoided by the trustee in bankruptcy. The defendant, on the other hand, insists that section 70e, when a state law is invoked, must be read with the second paragraph of section 67e, and that in such a case the limitations contained in the latter section must be held to be applicable to the former. Hence he argues that, as insolvency on the part of the bankrupt at the time of the conveyance is an essential element of the second paragraph of section 67e, and as such insolvency has not been proven in this case, the bill must be dismissed. It needs but a cursory examination of the two last-mentioned sections to see that there is an apparent inconsistency and overlapping in them. If section 70e is applicable to a conveyance invalid as to creditors under the law of a state, it manifestly covers cases which are included within the second paragraph of section 67e, yet it contains neither the limitation of time nor the requirement of insolvency which the last-mentioned provision does. Perhaps this apparent inconsistency may be avoided if section 70e is held to apply to conveyances which are voidable, as distinguished from void, and the second paragraph of section 67e held to cover conveyances which are void, as distinguished from voidable. It will be noted that in section 70e the language is that the trustee may "avoid," which indicates not a void conveyance but rather one which is voidable, while in the second paragraph of section 67e the language is that conveyances "which are held null and void * * * shall be deemed null and void under this act." Or it may be that this overlapping and inconsistency can be explained, as Judge Lowell, in In re Mullen, 101 Fed. 413 (D. C. Mass.), appears to have thought, because section 67e became a part of the Bankruptcy Act subsequent to the incorporation of section 70 therein, and that neither was modified to conform to the other. However this may be, unless the plain terms of section 70e are to be disregarded, which, of course, is not permissible, it seems entirely clear that the trustee may avoid any transfer by the bankrupt which any creditor of the bankrupt might have avoided, under the laws of the state, had not bankruptcy intervened, irrespective of the time when the transfer was made and of the financial condition of the bankrupt at that time, provided only that conveyances to bona fide holders for value are protected. Such has been the uniform course of judicial decision, without dissent so far as I am aware. In the following cases, the right of a trustee in bankruptcy to set aside a conveyance made by the bankrupt more than four months before the filing of the petition in bankruptcy against him, and which could have been avoided under the laws of the state by creditors, is discussed and recognized: In re Julius Grahs, 1 Am. Bankr. Rep. 465, 469 (D. C. Ohio); In re Gray, 47 App. Div. 554, 62 N. Y. Supp.

618, 3 Am. Bankr. Rep. 647; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229, 8 Am. Bankr. Rep. 442; In re Scrinopski, 10 Am. Bankr. Rep. 221, 224 (D. C. Kan.); Skillen v. Endelman, 39 Misc. Rep. 261, 79 N. Y. Supp. 413, 11 A. B. R. 766, 769; Pratt v. Christie, 95 App. Div. 282, 88 N. Y. Supp. 585, 12 Am. Bankr. Rep. 1, 2; Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473, 19 Am. Bankr. Rep. 873; In re Mullen, 101 Fed. 413 (D. C. Mass.); In re Schenck, 116 Fed. 554 (D. C. Wash.); In re Toothaker Bros., 128 Fed. 187 (D. C. Conn.); In re Rodgers, 125 Fed. 169, 60 C. C. A. 567 (C. C. A. 7th Cir.); Bush v. Export Storage Co., 136 Fed. 918, 920 (C. C. Tenn.); Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929, 22 Am. Bankr. Rep. 643; In re Standard Telephone & Electric Co., 157 Fed. 106 (D. C. Wis.); Fourth St. National Bank v. Milbourne Mills Co.'s Trustee, 172 Fed. 177, 96 C. C. A. 629, 30 L. R. A. (N. S.) 552 (C. C. A. 3d Cir.); Manders v. Wilson, 230 Fed. 536 (D. C. Cal.); Senft v. Lewis, 239 Fed. 116, 152 C. C. A. 158 (C. C. A. 2d Cir.); Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665, 33 Am. Bankr. Rep. 808. In the following cases, fraudulent conveyances, made more than four months before the filing of the petition in bankruptcy, have been set aside at the suit of a trustee, and in all of them, apparently, the right to do so has been taken for granted and not discussed: Cowan v. Burchfield, 180 Fed. 614 (D. C. Ala.); Jackson v. Sedgwick, 189 Fed. 508 (C. C. E. D. N. Y.); Kirkpatrick v. Johnson, 197 Fed. 235 (D. C. Pa.); Peterson v. Mettler, 198 Fed. 938 (D. C. Wash.); Andrews v. Mather, 134 Ala. 358, 32 South. 738, 9 Am. Bankr. Rep. 296; Phillips v. Kleinman, 23 Am. Bankr. Rep. 266; Thomas v. Fletcher, 153 Fed. 226 (D. C. Me.).

It is a necessary conclusion, of course, that, if the four months limitation does not apply in a case brought under section 70e, neither is the question of the insolvency of the bankrupt at the time of the conveyance of any materiality, except it be made so by the state law, because one is as essential an element of section 67e as the other. It is also the right of a trustee to avoid a transfer, under section 70e, although there are no creditors who, because they had no liens or judgments, would have been in a position, at the time of the filing of the petition in bankruptcy, to attack the transfer. Fourth St. National Bank v. Millbourne Mills Co's. Trustee, supra; Mueller v. Bruss, supra; Thomas v. Roddy, supra; In re Standard Telephone & Electric Co., supra. Not only is the language of section 70e sufficiently comprehensive to alone justify this latter rule, as the above-cited cases point out, but, since all of them were decided, the amendment of 1910 to section 47a specifically vests a trustee with such a lien as is sufficient to enable a creditor to attack a fraudulent conveyance in a court of equity in most, if not all, states. Hence it follows that the plaintiff may attack the conveyance in question, irrespective of the solvency or insolvency of the bankrupt at the time the conveyance was made, provided that it could have been attacked by any creditor in the courts of New Jersey, had not bankruptcy intervened.

[4] It is unquestionably the law of New Jersey that a voluntary conveyance—one without consideration—is deemed fraudulent in law as

to, and voidable at the instance of, a creditor whose debt existed at the date of the conveyance, irrespective of the actual intention of the grantor or grantee, and of the former's solvency or insolvency, at the time of conveyance. Haston v. Castner, 31 N. J. Eq. 697; Severs v. Dodson, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641; Washington National Bank v. Beatty, 77 N. J. Eq. 252, 76 Atl. 442, 140 Am. St. Rep. 555; Horton v. Bamford, 79 N. J. Eq. 356, 378, 81 Atl. 761; Lougheed v. Armstrong, 84 N. J. Eq. 49, 92 Atl. 93. The evidence establishes that the claims of two or more of the bankrupt's present creditors existed at the time of the conveyance.

[5, 6] It remains, therefore, to consider next whether the conveyance in question was a voluntary one within the meaning of the New Jersey rule. It will be borne in mind that the defendant and the bankrupt, at the time of the conveyance, were living in a state of separation, and that the latter, immediately prior thereto, had publicly advertised that he would no longer be responsible for any debts contracted by the defendant. He, however, was under duty to provide reasonable means for her support. This duty he had not only neglected to perform, but he actually refused to do so. The defendant, therefore, could have forced him in any court of competent jurisdiction to perform it. Recognizing this, and as a result of her insistence that he provide means for her support, the bankrupt made the conveyance in question. I cannot comprehend how the fact that the defendant did not go into a court to enforce her rights can have any bearing upon the question now under consideration, providing, of course, that there was not an actual intent, by the means adopted, to defraud the bankrupt's creditors, as I have found there was not. It was entirely proper for them, in lieu of resorting to a court, to adopt the course which they did. The separation was already an established fact, and the contract was therefore not opposed to public policy. Pettit v. Pettit, 107 N. Y. 677, 14 N. E. 500, cases cited in 9 Cyc. 520. The whole or partial discharge, as the case may be, of the bankrupt's legal obligation to support his wife while living apart, was a valid consideration for the conveyance. Calkins v. Long, 22 Barb. (N. Y.) 97; Pettit v. Pettit, supra. It does not seem to me to be of any materiality, except on the question of good faith and the fairness of the consideration, whether the conveyance was in complete satisfaction of all claims which the wife had against the bankrupt or whether it was only partial. Surely, if it was competent for the parties to have made any agreement on the subject, they were at liberty to agree as to whether the conveyance should be in full satisfaction or partial satisfaction, as they saw fit.

While any final settlement that they may have made, would not, probably, under all circumstances, be binding on the Court of Chancery of New Jersey, if the wife should appeal to that tribunal for separate maintenance and alimony under the New Jersey statutes (Boehm v. Boehm [N. J. Eq.] 101 Atl. 423), it would surely be taken into account in determining what, if anything, should be awarded her (Moran v. Moran [N. J. Eq.] 2 Atl. 777; Boehm v. Boehm [N J. Eq.] 101 Atl. 425; see, also, cases cited in 14 Cyc. 770), and furthermore, it would protect the husband, providing it was reasonably

adequate, from any liability to answer for "necessaries" furnished to her (Calkins v. Long, supra). Thus it follows that the conveyance was not a voluntary one—a mere gift without consideration—but had a consideration to support it. Nor, taking into account all of the circumstances which ordinarily enter into the determination of what a husband, who has unjustifiably separated himself from his wife, should pay for her support, is there sufficient evidence to warrant the finding that the value of the property transferred was so disproportionate to the bankrupt's pecuniary obligation to the defendant, as to justify the application of the equitable doctrine, so exhaustively discussed by Vice Chancellor Garrison in Horton v. Bamford, 79 N. J. Eq. 356, 379, 81 Atl. 761, that where, under certain circumstances, the consideration for a conveyance is sufficiently inadequate, the conveyance will be sustained to the extent of the consideration actually given and declared voluntary and void as to the residue. The bill is not filed to set aside the conveyance as a preference under section 60b of the Bankruptcy Act (Comp. St. 1916, § 9644), if, indeed, a conveyance based upon a consideration such as is present in this case could under any circumstances be considered a preference (upon which question I do not intimate any opinion whatever), and hence the question whether or not it constituted a voidable preference is not presented.

Therefore, as no actual fraud has been proven, and as the facts necessary, under the New Jersey rule, to warrant the finding of constructive fraud, in whole or in part, are not present, it follows that the bill must be dismissed, with costs.

SMITH v. COURY et al.

(District Court, D. Maine. January 3, 1918.)

No. 760.

1. BANKRUPTCY ⟸159—PREFERENCES—"CREDITORS"—WHO ARE.
Indorsers and guarantors of notes and obligations of a bankrupt are creditors, within Bankruptcy Act July 1, 1898, c. 541, § 60, subd. b, 30 Stat. 562 (Comp. St. 1916, § 9644), relating to preferences.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor.]

2. BANKRUPTCY ⟸165(1)—PREFERENCES—WHAT CONSTITUTES.
Under Bankruptcy Act, § 60, subd. b, declaring that if a bankrupt shall have made a transfer of any of his property, and if at the time of the transfer, etc., and being within four months before the filing of the petition in bankruptcy, or after the filing thereof, and before the adjudication, the bankrupt be insolvent and the transfer, etc., then operate as a preference, and the person receiving it or to be benefited thereby, or, his agent acting therein, shall then have reasonable cause to believe that the enforcement of such transfer, etc., will effect a preference, it shall be voidable by the trustee; a transfer by insolvent debtors within four months of bankruptcy to creditors, or agents of creditors, who had reasonable cause to believe that the transfer would operate as a preference, is voidable as such, even though the creditors only received indirect benefit from the transfer by being relieved of their indorsements or guaranties.

3. BANKRUPTCY ⊂⊃303(3)—PREFERENCES—EVIDENCE—SUFFICIENCY.
In a suit by trustee to set aside a conveyance as a preference, evidence *held* to show that the grantees in receiving the conveyance were acting as agents of the creditors, within Bankruptcy Act, § 60, subd. b, declaring voidable as preferences transfers, where the creditors or their agents had reasonable cause to believe that they would effect a preference.

4. BANKRUPTCY ⊂⊃165(3)—PREFERENCES—TRANSFER VOIDABLE IN PART.
Though a transfer of property by a bankrupt was in part for a new consideration, and to that extent was not bad as affecting a preference, nevertheless the remainder of the transaction is, or may be, subject to attack, under Bankruptcy Act, § 60, subd. b, as preferential.

5. BANKRUPTCY ⊂⊃166(3), 175—TRANSFERS—DELAY OF CREDITORS.
Under Bankruptcy Act, § 67, subd. e (Comp. St. 1916, § 9651), declaring that all conveyances, etc., made by a person adjudged a bankrupt, and within four months prior to the filing of the petition, with intent on his part to hinder, delay, or defraud creditors, shall be null and void against the creditors of such debtor, except as to purchasers in good faith, etc., a conveyance which the grantee knows, or has reason to believe, will be preferential, because of the insolvency of the debtor, is fraudulent and void; for a transfer may be bad both as preferential and as one intended to hinder and delay creditors.

6. BANKRUPTCY ⊂⊃166(4)—CONVEYANCES—VALIDITY.
Under Bankruptcy Act, § 67, subd. e, a creditor who accepts a transfer or conveyance from a debtor, and has such information as to lead an ordinarily prudent man to believe he is being preferred, is chargeable with knowledge of the facts, which inquiry would have disclosed, and, if inquiry would have shown the transfer was preferential, it is bad as in fraud of creditors.

7. BANKRUPTCY ⊂⊃303(3)—TRANSFERS—EVIDENCE.
In a suit by a trustee, evidence *held* to show that creditors who received a preferential transfer from the bankrupt took with knowledge of that fact, so that the transfer was one in fraud of creditors, voidable under Bankrupcy Act, § 67, subd. e.

8. BANKRUPTCY ⊂⊃212—TRANSFERS—SETTING ASIDE.
Whether a mortgage was a valid claim against the bankrupt estate cannot be decided in a suit by the trustees against others to set aside another conveyance as preferential and in fraud of creditors, those interested in the mortgage not being before the court.

9. BANKRUPTCY ⊂⊃303(3)—TRANSFERS—EVIDENCE—SUFFICIENCY.
In a suit by the trustee in bankruptcy, evidence *held* sufficient to show a conspiracy between the bankrupts and defendants, whereby the bankrupts, before the filing of the petition, fraudulently transferred goods and merchandise to defendants.

In Equity. Suit by Carl W. Smith, trustee in bankruptcy, against Amos Coury and others. Decree for complainant.

Woodman & Whitehouse, of Portland, Me., for plaintiff.

A. S. Crawford, Jr., of Ft. Kent, Me., and Wm. R. Pattangall and Herbert E. Locke, both of Augusta, Me., for defendants.

HALE, District Judge. The Bankruptcy Act provides, in section 60(b), that if an insolvent debtor has, within four months before filing his petition in bankruptcy, made a property transfer, operating as a preference, and which the person receiving the same or to be benefited thereby, or his agent acting therein, has reason to believe was intended to give a preference, the transfer shall be voidable, and the trustee in bankruptcy may recover the property or its value. The act

also provides, in section 67(e), that if the bankrupt, within four months before the filing of the petition in bankruptcy, makes any transfer "with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them," it shall be null and void as against his creditors, except as to purchasers in good faith and for a present fair consideration, and that it shall be the duty of the trustee to recover the same.

Kenin Hobart and Simon Hobart, both of Ft. Kent, in Aroostook county, in this district, are Syrians; they are brothers. For some years they kept a country store at Ft. Kent in partnership with their cousins, Amos Coury and Selim Coury. Not being successful in trade, they dissolved early in 1915; and, upon dissolution, the Hobarts took the real estate and the stock in trade, and assumed the liabilities, which are said to have amounted to as much as the stock in trade, about $5,000.

After this dissolution, the Hobarts went into business individually, and continued to do business in this way until September, 1915, when they went back into partnership in the dry goods and clothing business, doing business as "K. Hobart & Bro." In the autumn of 1915, Amos and Selim Coury were also engaged in the same business, having stores at Ft. Kent, Eagle Lake, and Frenchville. In September, 1915, the Hobarts began to increase their stock. During the three months from September 1st to December 1st they purchased new goods, which, according to the invoices, amounted to $6,477. This was added to the stock on hand, which is variously stated to have been worth from $3,500 to $7,000. During the autumn of 1915 the Courys found out that the Hobarts were not doing a good business; that they were losing money; that they were deeply in debt; and were neglecting their business and wasting their money. The Hobarts were in the habit, at this time, of borrowing money from the Courys, or on their indorsement, from time to time. These loans are shown to have amounted to nearly $3,800, not including guaranties made by the Courys of something over $300.

On December 2, 1915, an attachment was put on the real estate of the Hobarts by J. H. Brackett Company of Portland on a debt of $109. The Hobarts applied to the Courys for help, saying that they could not raise the necessary amount to release the attachment, and asking the Courys to go on a bond for $200. Amos and Selim replied that they had already let the Hobarts have too much. They refused to go on the bond, unless the Hobarts would deed to them all the real estate, at a valuation of $7,000, to be applied against the debts of the Courys, and the notes on which they were liable as indorsers, and on the bills which they had guaranteed, and on moneys loaned by their wives and sisters, all of which, according to their statement at that time, amounted to $4,259. Accordingly, on December 2d, the Hobarts executed a warranty deed of the store, and the land and buildings owned by them in Ft. Kent, to the Coury Bros., subject to four mortgages enumerated, amounting to $3,100. This piece of property, covered by the warranty deed, had upon it a store building taken from a piece of land called lot 32, which had been covered by a mortgage to Israel Shur, enumerated in the mortgages to which I have referred. On the same

date with the warranty deed, an agreement was entered into in writing between the Hobarts and the Courys, and left in the hands of their attorney, but not recorded or otherwise made public, by which it was agreed, in substance, that the property should be taken by the Courys at the purchase price of $7,000; that, in consideration of the conveyance, the Courys should cancel their own indebtedness against the Hobarts, paying the notes at the Ft. Kent Trust Company on which they were liable as indorsers, paying the old bills which they had guaranteed, also the new bills on which they had not been previously liable, namely, the Brackett bill of $109, and a bill to Hannaford Bros. of $64.13, and paying off the claims of their wives and sisters; that if the amount of these claims, added to the mortgages, was less than $7,000, the Courys were to pay the Hobarts the difference between the amount of the debts and incumbrances and the purchase price of $7,000; but if the same exceeded $7,000, then the Hobarts were to pay the Courys the excess, to wit, the amount by which the debts and incumbrances exceeded the purchase price of $7,000. The Courys thereupon went on the bond for $200; and the Brackett attachment was released. Eight days later, on December 10, 1915, the Hobarts made a common-law assignment to their attorney for the benefit of creditors. Six days after, on December 16, 1915, an involuntary petition in bankruptcy was filed against them, both individually and as copartners. On January 6th they were duly adjudged bankrupts in both capacities; and on January 29th the plaintiff, Carl W. Smith, was duly qualified as trustee in bankruptcy.

After the filing of the schedules, it is found that the total tabulation of assets and liabilities, as shown in the inventory, discloses liabilities to the amount of.....$13,578 08
And assets to the amount of..... 5,300 05

Showing an excess of liabilities over assets of $ 8,278 03

The trustee in bankruptcy now brings this bill in equity against Amos Coury and Selim Coury, joining also as defendants Lizzie Coury, wife of Amos, Madeline Coury, wife of Selim, and Annie and Hazizey, sisters of Amos and Selim. The bill seeks to recover preferences under section 60(b) of the Bankrupt Act, and to set aside fraudulent transfers, under section 67(e) of the act. It charges a fraudulent conspiracy between the bankrupts and the Courys to transfer the store property of the Hobarts at Ft. Kent, constituting all their real estate, to the defendants Amos and Selim, by a deed absolute in form, but for an inadequate consideration, namely, certain debts due from the Hobarts to the Coury Bros., also notes of the Hobarts placed with the Ft. Kent Trust Company on which the Coury Bros. were liable as indorsers; also certain debts claimed by the Hobarts to be due to Lizzie, Annie, Madeline, and Hazizey, for whom, it is alleged, Amos and Selim were acting as agents, amounting in all to about $3,000, as the consideration for a transfer of the real estate, which was incumbered by certain mortgages, leaving an excess alleged to be $5,025. It is alleged that the defendants proposed to conceal the existence of this excess value from their creditors and from the common-law as-

signee, and from the trustee in bankruptcy, thereafter to be appointed, and that they were seeking to make a preference as to the amounts actually received and retained by the Courys on account of their claims.

The original bill related only to the transfer of the real estate. Soon after the filing of that bill, an amendment was filed, setting forth, as a part of the same conspiracy, that, between October 1 and December 1, 1915, the Hobarts should transfer goods in their store to the Courys, for the purpose of concealing those goods from their creditors, and thus hindering, delaying, and defrauding the creditors, and constituting a fraudulent transfer under section 67(e) of the Bankrupt Act.

[1, 2] 1. In order to make a preference under section 60(b), it is necessary for the plaintiff to show that the debtors were insolvent at the time they made the transfer; that it was within four months of filing the petition in bankruptcy; that its effect was to give a larger percentage to the defendants than to other creditors of the same class; that the persons receiving the preference were to be benefited by it, either by direct payment of their debt, or by relieving them from their indorsements or guaranties; that they were acting as agents of others who were so benefited; and that the persons or the agents had reasonable cause to believe that a transfer would operate as a preference.

It is clear that the deed of December 2d was a transfer within the meaning of the act, and was within four months before the filing of the petition in bankruptcy; that the Hobarts on December 2, 1915, were insolvent. They were insolvent on any showing brought to my attention either by the plaintiff or by the defendants; and this insolvent condition clearly existed on the day of the transfer, December 2, 1915, on the day of the making of the common-law assignment, December 9th, and on the day of the filing of the petition in bankruptcy, December 16th. It is clear that Amos and Selim were directly benefited, both by the cancellation of their direct claims against the bankrupts, and by being relieved from their indorsements on notes in the Ft. Kent Trust Company, which are in evidence, amounting to over $1,400; for there can be no question but that indorsers and guarantors are creditors within the meaning of section 60(b). Collier (11th Ed.) 810, cl. 2; Stern v. Paper (D. C.) 183 Fed. 228, 231; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521.

[3] The evidence shows that there were certain debts owing to the wives and sisters. Under section 60(b), it is sufficient if the person receiving the transfer is agent for the person to be benefited. It is contended on behalf of defendants that the evidence should not induce me to find that Amos and Selim were agents for their wives and sisters. The evidence as to the conduct of their business, however, leaves me in no doubt that the agency existed; and Selim testified affirmatively that his sisters gave to him and to Amos all their business, "and we were to do it ourselves for them."

[4] The proofs show that among the items which, by reason of the agreement of December 2, 1915, Amos and Selim Coury agreed to pay, were two bills on which they were not previously liable, the Brackett bill of $109, and an account of Hannaford Bros. of Portland for

$64.13; for these two bills, amounting to $173.13, there was a present consideration; and to this extent the transfer was not voidable as a preference under section 60(b). This does not, however, prevent the rest of the transaction from being a preference within that section.

[5] We now meet the more important question whether the whole transaction should be held to be a transfer made with intent to hinder, delay, or defraud creditors. Under section 67(e) the basis of invalidity is much broader than under section 60(b); it covers every transfer made by the bankrupts within four months before the filing of the petition with the intent and purpose to hinder, delay, or defraud their creditors or any of them; for a transaction may be invalid both as a preference and as a fraudulent transfer.

It is clear that, whatever the conveyance be, wherever the transferee receives property and advances, or pays money therefor, with knowledge or reason to believe that the money so advanced is to be used to make a payment to creditors, which would be preferential because of the insolvency of the maker of the transfer, it is a fraudulent transfer and void, under section 67(e). In Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, speaking for the Supreme Court, Mr. Justice Brandeis has made a clear exposition of the law on this subject, and has added a table of valuable citations. In Van Iderstine v. Nat. Discount Co., 227 U. S. 575, 582, 33 Sup. Ct. 343, 57 L. Ed. 652, the distinction is pointed out between the intent to prefer and the intent to defraud. It is shown that one is inherently always vicious; the other innocent and valid except when made in violation of the express provisions of a statute. A fraudulent conveyance is void regardless of its date, while a preference is valid unless made within the prohibited period.

[6, 7] It is necessary then to inquire whether Amos and Selim Coury acted in good faith, and thus received a conveyance unassailable under section 67(d), or whether they had reason to believe and to know that the debtors were making a preferential payment with bankruptcy in contemplation. If they did, the transaction was fraudulent, and was clearly within section 67(e). It is contended by the learned counsel for the defendants that the Coury Bros., whether they acted for themselves alone, or for themselves and their wives and sisters, did not have reasonable cause to believe that the transfer would operate as a preference, but that the testimony tends to show that the Courys had reason for suspicion only, and not for belief or knowledge. In Stevens v. Oscar Holway Co. (D. C.) 156 Fed. 90, this court laid down the rule:

"If facts in respect to the debtor's financial condition are brought home to the creditor, or such information is brought home to him as would put an ordinarily prudent man upon his inquiry, then the creditor is chargeable with knowledge of the facts which such inquiry would reasonably be expected to disclose."

Collier says (11th Ed.) 815:

"If a creditor accepts a transfer under circumstances which would lead a man of ordinary prudence and sagacity to believe that he was being preferred over other creditors of the same class, without making investigation, he would be chargeable with all the knowledge which he would have acquired had he performed his duty in this regard."

The proofs show that close family relations existed between the defendants and the bankrupts; that the Courys knew the Hobarts were doing a losing business; that they were not attending to their trade; that they were increasing their indebtedness all the time; that on December 2, 1915, they were conveying away all their real estate. Simon Hobart admitted that he knew of his insolvency, and that the effect of the transfer would be that creditors, other than the Courys, would not get their pay. He must then have known that the effect of the transfer would be to hinder, delay, and defraud creditors. His brother must have known it. The proofs convince me, too, that Amos and Selim Coury had such facts brought home to them as would put reasonably prudent men on inquiry, and that inquiry would inevitably have revealed insolvency. They must be held then to have known that this transfer would effect a preference, and would hinder, delay, and defraud other creditors. I am satisfied that the transaction in question was voidable in its entirety as a transfer made with intent to hinder, delay, and defraud creditors under section 67(e).

[8] In reference to the Shur mortgage, to which I have already referred, the learned counsel for the plaintiff urges that in this proceeding the court may pass upon the question whether this mortgage was a valid claim against the Hobart real estate, covered by the deed of December 2d. I think not. In this proceeding all the necessary parties are not before the court to enable it to found a decree that the Shur mortgage shall be enforced to any extent as an incumbrance against the store building. This question must be considered in some further proceeding.

[9] 2. The plaintiff says that the conspiracy between the bankrupts and these defendants involved a further fraudulent transfer. It is alleged, as a part of the conspiracy, that in the autumn of 1915 the Hobarts owed the Courys about $4,200 on direct loans, indorsements, and guaranties; that the Hobarts had been doing an unsuccessful business, and that they, together with the Courys, arranged a scheme of going through the form of a failure for the purpose of securing the Courys; that with this in view they bought an unusually large quantity of goods during the autumn of 1915; that they openly transferred the real estate to the Courys, thus hoping to make it appear to the public that this was their only transfer of property, and that they also turned over secretly to the Courys enough goods to entirely secure them for all their indebtedness, and that they did this from the new stock which had just been put into their store, leaving the old stock in trade to be divided among the other creditors.

Here we have an important question of fact, a question presenting some difficulty. It appears in evidence that Simon Hobart went to New York in September, 1915, accompanied by Amos Coury, and that he there began to make extended purchases of goods for his store; that during three months after September 1, 1915, over $6,000 worth of goods were purchased and went into the store of the Hobarts; that the greater part of these goods went into the store between September 10th and November 1st. No testimony has been offered tending to show any great diminution of these goods by the ordinary store sales; it does

not appear that creditors were receiving much pay; although the learned counsel for the defense urges, by way of explanation, that during this period creditors were paid out of the product of sales of new goods. No receipted bills are shown to account for payments at this time. It is contended, also, that living expenses accounted for the deficiency; but it is impossible to believe that in three months between five and six thousand dollars could have been expended by the bankrupts in their little town for ordinary expenses of living. Talk is made also that gambling and sporting accounted for money expended, but no proofs give weight to this suggestion. It appears from competent testimony that almost all the goods remaining in the store at the time of the bankruptcy were old goods; very few of the new goods, which had unquestionably come into the store, were found at the time of the bankruptcy. It appears, then, from competent proofs, that nearly $5,000 worth of new goods, which came into the store between October 1st and November 1st, had disappeared 30 days later. No proofs are presented to account for the bodily disappearance of all these goods.

Upon this point there is some direct evidence. Kalil Ziter testifies as follows:

"Q. After you returned home on December 12th, state whether or not you had any talk with Mr. Selim Coury about the circumstances of the Hobart failure? A. I had. Q. Kindly tell us what took place? A. Yes, sir. On December about the 15th, 1915, I was invited to Amos Coury's house for supper, and, during our talk that evening, Selim Coury came alongside of me and he says: 'Ziter, I suppose you heard something about Hobart's failure.' I says: 'Yes; I have heard something, but I don't know nothing about it.' 'Well,' he says, 'I will tell you the whole story.' He says: 'Hobart doesn't fail to make any money at all.' He says: 'They was obliged to do it.' I says: 'How is that and why is that?' He says: 'Simon came to my store one day and asked me to loan him some money. And I said: "Simon, we have trusted you quite a little; I like to know something about your business."' Q. Did he say when this was? A. That was during November; Mr. Coury came up to Hobart's store— Q. Which Coury? A. Selim Coury. Q. Is that what he told you? A. Yes. That was his story that same evening; and examined Hobart's books, and took account of their stock and found that they cannot pay their bill very well. He said: 'Boys, I don't want to trust you any more.' He says: 'Your standing isn't very good. I am afraid you will have to do something. Either you will have to have a settlement with your creditors or fail.' 'And,' he says, 'I will try very hard and get a settlement for you through your creditors; if you will take my advice you will have to do that to get along.' He says: 'But, before you have made an assignment or any failure you will have to pay us what you owe us.' Simon says: 'How could we do that; we haven't got money?' 'Well,' he says, 'I will take merchandise for our account.' Two or three days after that they pack up some goods and take it down to Frenchville. He had a store then in Frenchville. Q. Who did he say packed up the goods? A. He and Simon. Q. Did he state how the goods were taken to Frenchville? A. Yes; they have a great big cart or wagon. Q. Whose cart was it? A. Simon's. Q. What kind of a cart? A. Great big red cart; peddler's cart. By the Court: Horsecart? A. Yes, sir; double horsecart. Q. Did he tell you any of the conversation; whether anything was said between him and the Hobarts regarding the real estate? A. Yes; and he also said: 'You will have to transfer the property to our name.' Q. What property? A. The real estate. The two houses and land which they have there. And he says: 'We will hold it for you fellows until you get settlement with the creditors; and then, after you get settled, we will return the property to your name.' Q. Did he state whether the Hobarts agreed to that or not? A. Yes, sir; they had agreed to it at that

time. They said: 'All right; we will do as you say.' Q. Now, later on, some time in the summer of 1916, did you have any other talk with Selim about this matter? A. Yes, sir; about the last of June, 1916, I was in to Amos's house also, and I had an argument with Selim in regard to Hobart's failure. I says: 'Selim, I can't believe that Hobarts failed and lost everything they had in such a short time as this.' He says: 'Believe me, Ziter, the boys they haven't got one cent to-day. They have lost everything they have got, and still they owe us a little balance.' I says: 'I cannot believe it; you couldn't put that through my head, that Hobarts have lost everything they have got and still owe you some money.' He says: 'You come along with me and I will prove it to you.' So I went down with him to his store, and went right in and he opened the safe and pulled out a statement which was written in Assyrian language—in our language—and he showed me where their indorsed note to the Ft. Kent Trust Company and to some of the creditors. He showed me where they owed his sister Annie Coury some money and his wife—his brother's wife. Also he showed me where all that he received on account from them. It was by merchandise—two or three items—it was. The total amount was $4,280, and there was a little balance of $200 and some odd dollars. Q. If I understand you, on this Assyrian statement that Selim showed you, there were credits of merchandise received— A. Received on account. Q. From the Hobarts by the Courys? A. Yes, sir. Q. Of $4,280? A. Yes, sir. Q. Did it state during what month that was received? A. Yes; during November. Q. Now, Mr. Ziter, did you, at some time during this period, ask Amos Coury or Selim Coury—I have forgotten which—for the loan of some packing boxes—empty crates or boxes? A. No; he asked me to let him have a few empty boxes, Selim did. To loan him some empty boxes to move some goods from Eagle Lake to Ft. Kent—at one time. So I did. I loaned him five empty boxes. It went along three or four weeks, and I commenced to ask him to return me those five boxes. I didn't really need them, but I wanted them. He kept on saying: 'I will send them to you; I will send them to you.' One day I says: 'I want them.' He went and sent me five boxes from his store, by a truckman, at that time, by the name of Fred Roberts. The five boxes was kind of smaller than the ones I loaned him. I went and examined the boxes, and there was the name 'K. Hobart' on some of them, and 'Simon Hobart' on some of them—some of the boxes."

Kalil Ziter is corroborated to some extent by his brother Michael, who gives a more general account of facts which he learned from conversations with Simon Hobart and Amos Coury. His memory is that the statements made to him were to the effect that about $3,000 worth of goods was turned over by the Hobarts to the Courys. He testifies also to seeing goods which came from the Hobarts being hauled by his store to the Courys. He says, too, that about two or three weeks after the Hobart failure, Amos told him that he took the real estate to hold it for Kenin Hobart and brother, and later to give it back after the failure was settled. He gives other testimony somewhat corroborative. Michael was of uncouth appearance; but he did not seem capable of getting up an elaborate falsehood. After hearing the testimony of Kalil, and personally seeing him and questioning him, I cannot believe that his whole testimony is false. It is urged with much force that, if Kalil and Michael had been conferring with reference to getting up a story, each would have given a different kind of testimony; for in details they do not agree, and, on the whole, Michael's testimony has some corroborative force. Kalil testified positively that an account exhibited to him by Amos Coury shows a credit of merchandise delivered by the Hobarts to the Courys of $4,280, and that there was still an unpaid balance of about $200. Learned counsel for the defendants urge that Kalil Ziter was not on such terms with Amos as

to make it probable that Amos would have made any such disclosure to him. About this there is much conflict in the proofs. I do not find that there is anything conclusive offered either way. On the whole, I think the testimony fails to show any such ill feeling between the parties as to render the conversation improbable. It must be remembered that from Selim Coury's point of view he was making no confession; he apparently saw no moral wrong in what he was doing, in securing payment of the Coury account by taking over the Hobart stock. He apparently saw nothing to be ashamed of in receiving some preference from his relatives, and in holding real estate, through bankruptcy proceedings, as a security to both himself and to his relatives, and in making sure that the account of himself and family was paid, while other creditors were not so fortunate. I can find no adequate motive for the Ziters testifying falsely in regard to the admissions which they say were made to them by Selim Coury. It is urged that the Ziters did not make these disclosures until about a year after the circumstances occurred which they undertook to relate; but it is worthy of consideration that at first they made these disclosures to an attorney acting for the trustee, after this attorney had approached them, and, as is said, 'dug it out of them.' There is force in the suggestion of the plaintiff that, if the Ziters had ill will against the Courys, they would not have waited a year, while bankruptcy proceedings were going on, saying nothing to anybody about the story during that time, but would have hastened to tell their story at an early stage of the bankruptcy proceedings. They did not volunteer, but admitted the story, only after being closely questioned by the attorney for the trustee; they then made a full disclosure. The question is not entirely free from doubt; but, on all the proofs, I am constrained to come to the conclusion that, during the autumn of 1915, the Hobarts bodily transferred goods and merchandise to the value of $4,280 from their store to the store of the Courys; that they did this for the purpose of paying the Courys that amount of money for an old debt; and that they thereby effected a fraudulent transfer within the meaning of section 67(e) of the Bankrupt Act.

The plaintiff is entitled to a decree—First, for a conveyance to himself, as trustee in bankruptcy, of the real estate described as having been conveyed to Amos and Selim Coury by deed of December 2, 1915; second, the plaintiff is also entitled to a decree that Amos and Selim Coury pay to himself, as trustee in bankruptcy, the sum of $4,280, as the value of merchandise fraudulently transferred to the said Courys by the bankrupts, and credited by them on their account against the bankrupts. I will not allow interest upon this sum. A decree may be presented not inconsistent with this opinion. The plaintiff recovers costs against the defendants Amos and Selim Coury; but no costs against the other defendants.

WM. A. ROGERS, Limited, v. ROGERS SILVERWARE REDEMPTION BUREAU, Inc.

(District Court, S. D. New York. December 20, 1917.)

1. TRADE-MARKS AND TRADE-NAMES ⟸73(2)—RIGHT TO USE OF NAME.
Complainant, a manufacturer of silver-plated ware doing business under the name of "William A. Rogers, Limited," had the exclusive right to the name "William A. Rogers," and also a qualified right to use the name "Rogers," with its own trade-marks as registered. Defendant began the use of the name "Rogers" in its corporate title, and complainant protested. After negotiations the parties entered into a contract reciting that whereas, defendant desired to continue the use of the name "Rogers" as a part of its corporate name under which it should do business, and to make use of such name in connection with its business of the redemption of silver-plated ware, complainant consented solely for itself to the use of such name on condition of strict performance by defendant of all its covenants. Defendant was engaged in a trading stamp business and redeeming silverware given for trading stamps. Complainant, contending that defendant's canvassers made misrepresentations as to defendant's business, in saying that they represented complainant, sought to enjoin defendant from further using the name "Rogers." *Held* that, as the contract between the parties provided for sale only of complainant's silverware by defendant, and as there were contractual relations between the parties, such misrepresentations by defendant's solicitors and agents do not, it appearing that they were not consented to by defendant, warrant enjoining defendant from continuing to use the name "Rogers" on the ground of its breach of contract; this being particularly true as the testimony as to misrepresentations might in a way have resulted in part from hearsay.

2. TRADE-MARKS AND TRADE-NAMES ⟸93(1)—KNOWLEDGE—PRESUMPTION.
In such case, as complainant was charged with full knowledge of defendant's business, it must have known that it was necessary for defendant to send agents as representatives through the country soliciting trade.

3. TRADE-MARKS AND TRADE-NAMES ⟸73(2)—RIGHT TO USE OF NAME.
In such case, though another was also entitled to a qualified use of the name "Rogers," defendant is not, the parties having contracted at arm's length, and complainant having consented merely to defendant's use of the name of "Rogers," in which it had a valuable right, entitled to use the name "William A. Rogers" in its corporate title.

In Equity. Bill by William A. Rogers, Limited, against the Rogers Silverware Redemption Bureau, Incorporated, which sought affirmative relief. Bill dismissed, and affirmative relief denied.

Duell, Warfield & Duell, of New York City (R. W. France and J. Boyce Smith, Jr., both of New York City, of counsel), for plaintiff.
Nathan Burkan, of New York City, for defendant.

MANTON, District Judge. The complainant is a manufacturer of silver-plated ware. The defendant is engaged in a trading stamp business. On January 26 and May 5, 1916, plaintiff and defendant contracted, among other things, that the defendant might use the name "Rogers" in its corporate name in accordance with the terms of said agreement, and the defendant contracted to purchase the silver-plated ware of the plaintiff, and no other, in redeeming the trading stamps

which it contracted to redeem for its various customers throughout the country. The defendant further agreed to carefully avoid misleading representations, and promised "strict performance" of the contract on its part. The plaintiff sues, claiming that the defendant violated the terms of the contract in failing to carefully avoid misleading representations and in carrying on its business in a way to violate this provision of the contract. Defendant alleges that the plaintiff did not have the right to use or license others to use the name "Rogers" in connection with marketing or selling silver-plated ware, and that the exclusive right to use the name "Rogers" in connection with silver-plated ware belongs solely to the International Silverware Company, and it asks, as affirmative relief, that the plaintiff specifically perform the agreements, and that the defendant be decreed the right to use the prefix "Wm. A." in conjunction with the name "Rogers" in its corporate title and in its business of redeeming silver-plated ware of the plaintiff's manufacture in the operation and prosecution of its business.

[1, 2] Prior to the date of these contracts, the defendant began the use of the name "Rogers" in its corporate name, and this resulted in a notice of protest sent to it by the plaintiff. Negotiations followed, and resulted in the contracts in question. The contract recites that:

"Whereas, the party of the second part desires to continue to make use of the name 'Rogers' as a part of its corporate name under which it does business, and to make certain defined use of the name of the party of the first part in connection with its business of the redemption of silver-plated ware;" and whereas, "the party of the first part is, for itself and *solely* for the parties hereto, willing to consent to such use, subject to the strict performance by the party of the second part of each and all of its covenants and agreements as heretofore set forth," etc.

In view of these negotiations and the phraseology of the contract, I think that the claim of the defendant that the plaintiff undertook to confer the right to use the name "Rogers" upon the defendant is unfounded. All the contracts of January 26 and May 5, 1916, provided was that the defendant consented for itself alone to the use of the name "Rogers" so long as the defendant made no misleading representations, and maintained the standard of business conduct promised by it. The defendant's attack upon the plaintiff's right to the name "Rogers" and the validity of its various trade-marks need not be passed upon on this application, for it is not necessary to this decision. Plaintiff's right, however, to its trade-mark, and to use the name "Rogers" has been the subject of much prior litigation, and the attack made upon it is without merit. The plaintiff has a valuable property right in its name and trade-marks, and this has been fully determined heretofore by judicial authority. Rogers v. Wm. Rogers Mfg. Co., 70 Fed. 1019, 17 C. C. A. 575; Wm. Rogers Mfg. Co. v. Rogers (C. C.) 84 Fed. 639, affirmed 95 Fed. 1007, 37 C. C. A. 358; William A. Rogers, Limited, v. Cohannet Silver Co. (C. C.) 186 Fed. 241; William A. Rogers, Limited, v. H. O. Rogers Silver Co. (D. C.) 237 Fed. 887; Wm. A. Rogers, Limited, v. International Silver Co., 30 App. D. C. 97; Wm. A. Rogers, Limited, v. International Silver Co., 34 App. D. C. 410; Wm. A. Rogers, Limited, v. International

Silver Co., 34 App. D. C. 413; Wm. A. Rogers, Limited, v. International Silver Co., 34 App. D. C. 484.

The plaintiff does not contend that it has an exclusive right to the use of the name "Rogers," but claims the exclusive right to the name "William A. Rogers," and to the use of its own trade-mark as registered, with the name "Rogers" and particular symbols, and it also has a qualified right in the use of the name "Rogers" standing alone, which, while not permitting it to enjoin the use of the name by any other legitimate Rogers Company, whose rights have been established, does permit it to enjoin the unauthorized use of the name "Rogers" by persons having no rights therein. It appears that the International Silver Company also has a right to the use of the name "Rogers," and that it has protested against the use of the name "Rogers" by the defendant. There is nothing in the contract, nor can it be read in the contract, that the plaintiff has guaranteed the defendant the use of the name "Rogers" as against any other who may have a qualified use of the name "Rogers." The plaintiff has not contracted nor obligated itself in any such terms. Neither the plaintiff nor the International Silver Company has the right to the name "Rogers" per se, unaccompanied by their own particular initials or trade-mark, but both the International Silver Company and the plaintiff have the right to restrain the unauthorized use of the name "Rogers" by persons without rights therein. Their mutual rights were considered in the cases of Wm. A. Rogers, Limited, v. International Silver Co., 30 App. D. C. 97, and Id., 34 App. D. C. 410. There it was said:

"The sole use of his name for the time prescribed was enough, we think, to constitute an exclusive use of the mark within the meaning of the proviso. The opposer did not show any right to use the mark or name 'Wm. A. Rogers,' but only those of 'Wm. Rogers Mfg. Co.' and 'Wm. Rogers & Son.' In view of what has been heretofore said, it is unnecessary to consider whether, if these were all technical trade-marks, the applicant's mark so closely resembles the others as to constitute an infringement. Each party is entitled to use his own name, actually or legally acquired, without regard to the confusion that may result from similarity. No right of property will be concluded by the registration of appellant's mark."

Therefore, the defendant having begun an unlawful use of the name "Rogers," and after protest having contracted with the protestor, and having obtained a consent from the plaintiff alone that it might use the name "Rogers" on condition of the defendant's living up to its promises, it remains to be determined whether or not there has been a breach of the agreement on the part of the defendant.

The plaintiff must be charged with full knowledge of the kind of business the defendant was engaged in, and with the fact that it was necessary to send selling agents or canvassers about the country in the furtherance of its business. It is claimed by the plaintiff that in at least 13 cases statements were made by canvassers which were misleading, and which were not truthful, and that such misleading representations were violations of the "strict performance" provision of the contract. I am asked to accept the claim of the defendant, for the reason that the 13 different instances of misstatements or misrepresentations are found in widely scattered parts of the country, and that this constitutes strong evidential proof of its truthfulness. The

testimony of the 13 witnesses was taken by deposition, and has resulted in the use of most general language, the substance of which is that the agents of the defendant stated that in some instances they represented Wm. A. Rogers, Limited, and that this was a new medium of advertising by the plaintiff; that it was found much cheaper than extensive advertising in the Saturday Evening Post and other magazines. The language used by each witness, however, is given with some hesitancy as to recollection, and lacks probative force. Then, too, each of the 13 witnesses received a communication from the plaintiff or its attorney, which to some extent indicated about what they testified to.

I do not say that this was improper, for, indeed, it was the least costly way for the plaintiff to secure information, in view of the distance the witnesses lived from the plaintiff's place of business; but, on the other hand, it can readily be seen that distant merchants, whose suspicions were aroused as to the legitimacy of the defendant's business, might well add to their suspicion by such an inquiry from the plaintiff, and let it cumulate in the belief that the defendant and its agents were perpetrating a fraud. It is possible to conceive of a visit in search of business and explanation of its scheme by the defendant's agents, without some coloring of their proposition in the hope of obtaining business. Unless this reached the stages of fraudulent misrepresentations, and such were made with knowledge by the officers of the company, it does not reach the standards of such conduct as should result in a cancellation of this contract under its provisions. The defendant's officers have testified and disclaimed any such knowledge of misrepresentations, and have stated that each agent was instructed to guard against making misrepresentations; each agent was told to state the proposition as an advertising medium for the merchant, with profit to the customers and with profit to the defendant.

The defendant was trying for success in its business, and could only reach this goal by legitimate business methods; for otherwise it would soon not only be discovered, but fail. Its scheme of business is ingenious. It is illustrative of the magnitude of small profits with large volume of business. Where, as here, there may have been some misrepresentation—for I am inclined to believe that there was—I am satisfied that it was not with the consent or knowledge of the officers of the company, and I do not think that, under those circumstances, the plaintiff should be relieved from the terms of the contract.

Then, too, it must be remembered that a statement, made by an agent, that he represented the Wm. A. Rogers Company, is to some extent true; for he did indirectly, in the sense that the contract provided for the sale only of the Wm. A. Rogers silver-plated ware, and the use therefore of the name of the plaintiff was not forbidden. In the Puckett Case, where a card was used improperly, it was satisfactorily explained that the card was printed through error, and this error was at once corrected, and immediate steps taken to prevent its recurrence. In the case of the Hygenic Baking Company, the dissatisfaction there expressed seems to be pivoted about a dissatisfaction with the terms of the contract. One can well conceive how, in informing the merchant of the source of the goods, by whom manufactured, that

the curiosity or imagination of the visited merchant would lead him to believe the agent represented the plaintiff. Indeed, I think the plaintiff should be charged with the expectation that this would flow as the consequence of such a contract as it has made.

This confusion is illustrated by statements of the witnesses, on the one hand, that they have seen advertisements for Rogers' silver-plated ware in the Saturday Evening Post, when it is conceded that the plaintiff did not advertise in the Saturday Evening Post, but the International Silver Company did so advertise, using its trade-mark "Rogers" and symbols. This is simply illustrative of the error into which the witnesses may have fallen. There were many thousands of contracts made throughout the country, and the only alleged misrepresentations or false statements are charged in 13 instances alone, and these are denied by defendant's agents, and knowledge thereof is denied by the defendant's officers.

In Jos. Schlitz v. Houston Ice Co., 241 Fed. at page 824, 154 C. C. A. at page 519, it was said:

"There is evidence in the record that agents of the defendants advised purchasers of defendants' bottled beer in brown bottles with brown labels that it might be sold as plaintiff's beer to their customers. The defendants deny any knowledge of any such representations by their agents, and deny that any authority was given their agents to make such representations. The District Court found the facts against the plaintiff on this issue, and dismissed the bill, either because not satisfied that the representations were made by the agents, or, if made, that they were authorized by the defendants, or known to them. Occasional misrepresentation of soliciting agents, not shown to have been known to or authorized by defendants, would afford no ground of relief on the ground of unfair competition, apart from an improper dress for their goods."

The evidence here does not warrant my finding that there was a breach of the provision which says:

"The party of the second part further agrees at all times to maintain and conform to the high standards and business conduct, and careful to avoid making misleading representations of any kind and particularly as to the source of manufacture or character of silver-plated ware in which it deals or in respect to its business."

[3] As affirmative relief, the defendant asks that the contract be reformed, so as to allow the defendant to use the name "William A. Rogers" as part of its corporate name. The contract recites that the defendant "desires to continue the use of the name 'Rogers' as a part of its corporate name," and, further, that the parties are willing to consent to such use, and then it is agreed that, upon the performance of the conditions of the contract, such consent is given. Since the plaintiff had but a qualified use in the name "Rogers" in connection with Rogers silver-plated ware, the question is presented whether the contract should be so reformed that, in addition to the permission thus qualifiedly given to the use of the name "Rogers," the plaintiff should be obliged to consent to the use of the prefix "William A." in connection with the name "Rogers." The defendant in its brief says:

"The meaning conveyed (by the contract) was that as far as the plaintiff could give the right to use the name 'Rogers,' the defendant should have that right."

And it is argued that the defendant had no right to the use of the name "Rogers," except only in connection with the prefix "William A."; that is, in combination, "Wm. A. Rogers."

Above I pointed out that the plaintiff had a qualified use in the name "Rogers." It is only this qualified use that the plaintiff consented the defendant might have. In other words, it has but conferred the right of toleration in the use of the name "Rogers" upon the defendant; this is the contract the parties made. The plaintiff parted with consideration when it consented to such use, and it is not for the court to impose a further consideration by reforming the contract. The evidence satisfies me that the defendant was fully informed at the time it made the contract; if not, it should have made inquiry, and now, when it is confronted with the objection of the International Silver Company, it is too late to ask the plaintiff to give something more.

A decree may be entered, dismissing the complaint and denying the affirmative relief sought by the defendant.

DE PAUW UNIVERSITY et al. v. PUBLIC SERVICE COMMISSION OF OREGON et al.

(District Court, D. Oregon. December 17, 1917.)

1. WATERS AND WATER COURSES ⊂⊃217—COMPANIES SUBJECT TO REGULATION AS PRIVATE CORPORATIONS—"PUBLIC UTILITY."

A corporation and its predecessor, engaged in the sale of irrigable land, which acquired a source of water supply and installed an irrigation system, entering into contracts with the purchasers to furnish water for irrigation, is not subject to regulation under the Oregon Public Utilities Act (Laws Or. 1911, p. 483), for section 1, defining a "public utility" as including corporations which shall own, operate, manage, and control any plant or equipment for the delivery or furnishing of water or power directly or indirectly to the public, does not extend the act to mere private corporations.

[Ed. Note.—For other definitions, see Words and Phrases, Public Utility.]

2. PUBLIC SERVICE COMMISSIONS ⊂⊃21—INJUNCTION PROCEEDINGS—INDIVIDUALS.

Where members of a state public service commission were without authority proceeding to regulate the rates of a private corporation, which under contract with purchasers of land sold water for irrigation, the members as individuals could be enjoined from so proceeding.

3. PUBLIC SERVICE COMMISSIONS ⊂⊃21—INJUNCTION PROCEEDINGS—PARTIES.

In a suit by nonresident trustees, named in a mortgage given by a local corporation to secure bondholders, against a state public utilities commission and its members to enjoin it and them from regulating rates for water charged by the corporation under contracts with purchasers of land, the mortgagor corporation is not an indispensable party, and hence the suit can be maintained in the federal court on the ground of diversity of citizenship.

In Equity. Bill by the De Pauw University, a corporation, the Luse Land & Development Company, Limited, a corporation, and others, against the Public Service Commission of Oregon and Frank J. Mil-

ler and others, as members of the Public Service Commission of Oregon and as individuals. On motion to dismiss. Motion overruled.

Carey & Kerr and Charles A. Hart, all of Portland, Or., for plaintiffs.

George M. Brown, Atty. Gen., and J. O. Bailey, Asst. Atty. Gen., for defendants.

BEAN, District Judge. This is a suit against the Public Service Commission of Oregon and the individual members thereof, brought by the trustees named in, and the holders of substantially all the bonds secured by, a mortgage or trust deed given by the J. F. Luse Company on its irrigation plant in Douglas county, to secure a bond issue of $100,000. The relief sought is an injunction restraining the enforcement of an order of the Commission fixing the rates to be charged by the Luse Company for water furnished its customers, on the ground that such order is void for want of jurisdiction. The suit is for hearing on a motion to dismiss the bill.

[1] The facts appearing in the complaint and essential to the questions for decision are that in September, 1908, the Sutherlin Land & Water Company acquired by purchase approximately 38,000 acres of irrigable land in Douglas county, with the intention of subdividing and selling the same. In order to irrigate the land, it acquired about the same time, by purchase, appropriation, and otherwise, the right to divert sufficient water from the Calipooia river and other sources. It thereupon, and during the years 1908, 1909, 1910, 1911, and 1912, constructed and completed an irrigation system, by which the water so appropriated and acquired was carried to and upon the lands, at a cost exceeding $100,000. From time to time, and as the work progressed on the irrigation system, the Land Company sold or contracted to sell to sundry persons various parcels of land and by the contract of sale undertook and agreed that in consideration of the payment of the purchase price and the performance of other stipulations by the purchasers that it would provide or cause to be provided in perpetuity water for domestic use by the purchasers and for the irrigation of the particular land covered by the contract during the irrigating season, upon the payment in advance by such purchasers of a certain stipulated rate therefor.

In November, 1912, the Sutherlin Land & Water Company conveyed to the J. F. Luse Company all of the land then remaining unsold and also its interest in uncompleted contracts of sale previously made, and the water rights and irrigation system, and the Luse Company agreed to and did assume all the debts of the Sutherlin Company and all obligations imposed upon it with respect to providing water for the parcels of land theretofore sold. The Luse Company thereupon entered into possession of the irrigation system so conveyed, since which time it has maintained such system and expended large sums of money in the installation and maintenance thereof, and has made contracts of sale for a large number of tracts of land similar to those made by its predecessor, and has in all respects complied with the terms and provisions of the contracts and conveyances

executed by it or its predecessor with respect to providing water to purchasers.

It is alleged in the complaint that at no time has the Sutherlin Land & Water Company or the J. F. Luse Company "sold or furnished or offered to sell or furnish, or held itself out as ready to furnish water to any person whatsoever other than the owners of land purchased from one or the other of such corporations," except that for a short time the Luse Company permitted the city of Sutherlin to use certain of the surplus waters while the city was engaged in securing a permanent supply for itself; but such arrangement was temporary and at all times subject to the demands and rights of the irrigation company and its purchasers.

In July, 1916, certain purchasers of land filed a petition with the Public Service Commission in which they alleged that the Luse Company was a public utility and that the amounts specified in their contracts of purchase, to be paid by them as a condition precedent to the right to use water was exorbitant, unreasonable, and discriminatory, and praying that the Commission enter an order setting aside and annulling such contracts and fixing and establishing rates to be paid by them.

The Land Company and the trustees named in the mortgage given by it to secure the bond issue appeared and denied that the Commission had jurisdiction over the matter of annulling or modifying the contracts between the irrigation company and the purchasers of land, or to fix or establish the rates to be paid by them. The Commission, however, assumed jurisdiction, and attempted to fix and establish the rates to be collected by the company at practically one-third of the amount named in the contracts previously made with the purchasers, without, as the bill alleges, any evidence being "produced or received by such commission showing or tending to show that such rates were sufficient to provide a fund requisite to enable the irrigation company to operate the system and continue to furnish water to the purchasers of the land, as required by their contracts and conveyances."

Laying aside many reasons urged in support of the bill and assuming that the Public Utilities Act applies to irrigation companies, it is clear to my mind that it can only apply to such companies as are engaged in the general sale or rental of water to all who may apply for it within a given area, and not to a private corporation that has no dealings with the public, but which merely undertakes to furnish water in fulfillment of private contracts made with certain individuals selected by it. That is all the Luse Company or its predecessor was doing or offering to do. They were not selling or offering to sell water to all who might apply therefor, and who could be served by their system, and did not hold themselves out as ready or willing to do so. They were engaged in selling certain lands owned by them, and incident thereto agreeing to furnish water to their purchasers and no others. This did not make them a public service corporation and subject to the jurisdiction of the Public Service Commission. A public utility is defined, by the act under which the right is claimed to fix the rates to be charged by the Luse Company, to include corporations, etc., who shall own, operate, manage, and control any plant or equip-

ment for the delivering or furnishing of water or power directly or indirectly to or for the public. Section 1, c. 279, Laws 1911. Now, neither the Luse Company nor its predecessor in interest come within this definition, for they were not engaged in furnishing or selling water to or for the public, but only to such parties as they might select.

The distinction between a public service irrigation company and a private concern is so fully covered by the Supreme Court of California in Thayer v. California Development Co., 164 Cal. 117, 128 Pac. 21, and Del Mar Water, Light & Power Co., v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948, that it would be useless for me to attempt to add anything thereto. Nor does the Eastern Oregon Land Co. v. Willow River Co., 204 Fed. 516, 122 C. C. A. 636, or Van Dyke v. Geary, 244 U. S. 39, 37 Sup. Ct. 483, 61 L. Ed. 973, lend any support to defendants' position. The former was an action by an irrigation company to condemn land for its ditches and canals. The controlling question was whether its purpose was to serve the public within the meaning of section 6525, Lord's Oregon Laws, or a purely private undertaking. The trial court and a majority of the Court of Appeals held from the evidence that the land sought to be condemned was for the establishing of an irrigation system to serve the public by furnishing water to persons owning lands adjacent to the plaintiff's canals and ditches; and in the latter case the court says there was nothing in the record to indicate that the plaintiff was engaged in furnishing water only to the particular individuals, but rather to all residents and inhabitants within a given area.

[2] It is urged that the suit is not maintainable against the members of the Public Service Commission as individuals. If the Commission was without jurisdiction to do what it attempted to do, then the acts of its members and the subsequent steps likely to be taken, as outlined in the bill, are acts of individuals. It is therefore proper to join the Commission as a body and also its individual members. This seems to be the practice sanctioned in similar cases. Reagan v. Farmers' L. & T., 154 U. S. 363, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

[3] It is also contended that the J. F. Luse Company is an indispensable party, and should be aligned on the side of the plaintiffs, thus destroying the diversity of citizenship. This is not a suit to revise the order of the Public Service Commission, or to have determined what would be a fair and reasonable rate to be charged by such company; nor is it sought to enforce the performance of some contract or obligation of the company, or inquire into the conduct or management of its affairs. But it is a suit by the mortgagee or bondholders to enjoin threatened injury to their security. That such a suit can be maintained without the presence of the mortgagor seems settled by the authorities. Mercantile Trust Co. v. Tex. Pac. Ry. (C. C.) 51 Fed. 529; Reagan v. Farmers' L. & T., supra; Knickerbocker Trust v. Kalamazoo (C. C.) 182 Fed. 865; Carey v. Brown, 92 U. S. 171, 23 L. Ed. 469; Illinois Central v. Adams, 93 Fed. 852, 35 C. C. A. 635.

Motion to dismiss is therefore overruled.

In re HUTCHCRAFT.

(District Court, E. D. Kentucky, at Covington. October 10, 1917.)

No. 1055.

1. BANKRUPTCY ⊂=320—PROVABLE DEBTS—CONTINGENT DEMANDS.
Bankrupt was a director in a bank which had been placed in the hands of the state banking commissioner for liquidation, who had brought two suits against bankrupt and the other directors to charge them jointly and severally for misuse of funds of the bank. These suits were pending at the time of the proceedings in bankruptcy; the defendants denying liability. *Held*, that the claims of the commissioner were not provable debts against the bankrupt's estate, either by him or by the bankrupt's codirectors, because they were not fixed liabilities, absolutely owing, but were not only contingent, but the amount of the liability, if any, could not be ascertained until final distribution of the assets of the bank.

2. BANKRUPTCY ⊂=320—PROVABLE DEBTS—UNLIQUIDATED CLAIMS.
Bankruptcy Act July 1, 1898, c. 541, § 63b, 30 Stat. 562 (Comp. St. 1916, § 9647), authorizing the liquidation of unliquidated claims, applies only to claims provable under subdivision "a."

3. BANKRUPTCY ⊂=320—PROVABLE DEBTS.
The provision of Bankruptcy Act, § 63a (1), that a debt, to be provable, must be a "fixed liability * * * absolutely owing at the time of the filing of the petition," must be also read into subdivision (4), and applies to debts on open account or contract provable thereunder.

In Bankruptcy. In the matter of R. B. Hutchcraft, bankrupt. On review of orders of referee. Affirmed and remanded for further proceedings.

Dennis Dundon, of Paris, Ky., Geo. C. Webb, of Lexington, Ky., E. L. Worthington, of Maysville, Ky., and D. D. Cline, of Baton Rouge, La., for petitioners.

Robert C. Talbott, of Paris, Ky. (Geo. R. Hunt and D. Gray Falconer, both of Lexington, Ky., of counsel), for trustee.

COCHRAN, District Judge. This cause is before me on two petitions for review. One is filed by W. W. Mitchel, John Brennan, E. P. Claybrook, J. W. Bacon, and H. B. Clay. They complain of an order of the referee sustaining certain exceptions filed by the trustee to what is treated as proof of claims filed by them. The other is filed by the trustee. He complains of the refusal of the referee to sustain certain other exceptions filed by him. The adjudication was had on February 5, 1915. What is so treated consists of two papers. One is an affidavit of the petitioner Mitchel. The other is a petition by all the petitioners here. They were both filed February 4, 1916; i. e., within one year of the adjudication.

The bankrupt and the petitioners were directors of the George Alexander & Co. State Bank, located at Paris, Bourbon county, in this district. On May 19, 1914, the bank was placed in the hands of the banking commissioner of this state for the purpose of liquidating and settling its affairs. On July 8, 1914, the banking commissioner, for the benefit of the creditors of the bank, brought suit in the Bourbon cir-

cuit court against the directors thereof—i. e., the petitioners and the bankrupt—to recover $44,800 and interest on account of dividends declared and paid before the failure; and on February 25, 1915, he, for like benefit, brought suit against them to recover $71,844.64 and interest on account of divers and sundry loans made by the bank to its president with their knowledge and consent. The ground upon which it was sought therein to recover the sums so paid and loaned from the directors was that the payments and loans were made in violation of the provisions of the laws of this state relating to banks, and by section 598, Kentucky Statutes, it is provided that:

"If any director or directors of any bank shall knowingly violate * * * any of the provisions of the laws relating to banks, the directors so offending shall be jointly and severally individually liable to the creditors and stockholders for any loss or damage resulting from such violation."

[1] The claims of which the two papers referred to are treated as constituting the proof are these two claims of the banking commissioner against the bankrupt, asserted in these two suits. The petitioners assert the right to prove these claims because they are jointly liable with the bankrupt, and, if there is any recovery thereon, they will have a claim against the bankrupt for contribution. They do not admit any liability on account thereof. Indeed, they deny liability, and state that they are defending these suits. In their petition they seek a stay of further distribution of the bankrupt's estate until these claims are litigated and determined. Exceptions were not filed by the trustee to the claims until February, 1917. They may be reduced to two: That these claims were not provable debts; and that they were unliquidated, and that no application had been made for direction as to the manner of their liquidation, and it was too late for such an application. Thereafter—i. e., March 5, 1917, more than two years after the adjudication—the banking commissioner filed his affidavit setting forth these claims. He states therein the pendency of these two suits, that they are being resisted by the defendants therein, and that it cannot then be ascertained or stated for what amount, if any, he would be given judgment against them for the benefit of the creditors, for whose benefit the suits were being prosecuted.

The referee sustained the second and overruled the first exception. Thereupon the petitioners filed an application for a direction as to the manner of liquidation. The petitioners urge that the papers originally filed by them should have been treated as such an application, and that at any rate no limitation is prescribed by the Bankruptcy Act in which such an application may be made in order to the proof of debts. I do not find it necessary to determine the soundness of either of these positions, as I am clear that the first exception was well taken. The claims in question were not provable debts. They were not provable by the banking commissioner, and hence not by the petitioners. For a debt to be provable, it must come within section 63a of the bankrupt act.

[2] Section 63b does not cover debts not covered by section 63a. It simply covers debts so covered which are not liquidated, and provides for their liquidation. If the claims in question are within section

63a, it is because they are covered by clause (4); i. e., are debts founded "upon a contract express or implied." It is not claimed that they are otherwise within it. Possibly as, if they are valid claims, it is because of the statute, it cannot be truly said that they are founded upon contract. I do not find it necessary to determine this question. It is sufficient to say that, conceding that they were so founded, they were not "absolutely owing at the time of the filing of the petition in bankruptcy." They were contingent debts.

[3] It is expressly provided in clause (1) that the fixed liability to come therein must be so owing. And in the case of Colman Co. v. Withoft, 195 Fed. 250, 251, 115 C. C. A. 222, 223, it was said:

"It is held by the decided weight of authority that subdivisions 1 and 4 of section 63a of the Bankruptcy Act are in pari materia, and that the words 'absolutely owing at the time of the filing of the petition against him' are to be read into subdivision 4."

That contingent debts are not provable under the present act is an inference from the fact that provision was made in the act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) for the proof of "uncertain and contingent demands," and in the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) for the proof of "contingent debts and contingent liabilities," "if the contingency shall happen before the order for the final dividend," and "at any time" of the "present value" thereof "ascertained and liquidated" "in such manner as the court shall order," and that there is no such provision therein. Possibly, however, as under the act of 1841 the "uncertain and contingent demands" provable thereunder were limited to demands whose present value could be determined as held in Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232, and under the act of 1867 "the contingent debts and contingent liabilities" provable thereunder were limited to such debts and liabilities whose present value could be determined, to be inferred from the provision as to the proof of present value thereof, the provision in section 63b for the liquidation of unliquidated demands should be taken as evidence of an intent that contingent debts whose present value is capable of ascertainment are provable under the present act. But clearly contingent debts whose present value is not so capable are not provable thereunder. Section 57i (Comp. St. 1916, § 9641), and General Order 21, subdivision 4, which provides for the proof of claims by sureties or "persons contingently liable," lend no sanction to the position that contingent debts whose present value is not capable of ascertainment are provable thereunder. Those provisions have application to absolute claims against the bankrupt in favor of one person for which another may be contingently liable. They provide merely for the proof of such claims by such other person. In such cases the amount of the claim is known or ascertainable. Such was the case of Williams v. U. S. F. & G. Co., 236 U. S. 549, 35 Sup. Ct. 289, 59 L. Ed. 713. These provisions have no application to a case where the claim is contingent as to the creditor; i. e., where the amount due him is not capable of ascertainment because of a contingency. One who is contingently liable on such a claim can no more prove it than the creditor. 1 Remington on Bankruptcy, § 646, says:

"Where the principal debtor's liability is not a provable claim in favor of the creditor at the time of the principal debtor's bankruptcy, of course, it is not a provable claim in favor of the surety."

It remains, then, to make good that the claims of the creditors of the bankrupt or of the banking commissioner for their benefit are contingent claims, and not provable debts by them or him, and hence not provable by the petitioners on the ground that they are contingently liable therefor. In case of contingent claims, the contingency may go so far as to affect the possibility of any liability whatever. Such was the case of Riggin v. Magwire, supra. The question in that case was whether a grantee had a provable debt against the grantor in a deed containing a covenant that he had an indefeasible estate in fee, because the wife of an antecedent grantor had potential dower therein; she not having united in his deed and he being still alive. It was held that he had not, though the act of 1841, under which the case arose, made express provision for the proof of "uncertain and contingent demands." Whether the grantee would ever have any claim against his grantor depended on the question whether the wife of the antecedent grantor would survive him. It was there said:

"It is argued that, under the right" here given "to prove 'uncertain and contingent demands,' the claim * * * could have been proven. * * * But the better opinion is that, as long as it remains wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the act of 1841."

But in case of contingent claims the contingency may go no further than affect the amount of liability, and yet they will not be provable if the amount of the liability is not capable of ascertainment. Such was the case of Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. It was there held that an agreement by the bankrupt to pay an annuity to his wife "during her life or until she remarries" was not provable in bankruptcy, because the amount of the liability under the agreement was not capable of ascertainment. And it was there said:

"We do not think that by the use of the language in section 63a it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove."

The cases where it has been held that rent to accrue under a lease after bankruptcy is not provable are of this character. Such are these: Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; Colman v. Withoft, supra. Particularly in point here are two decisions of Judge Lowell. They were rendered in the cases of In re Ells (D. C.) 98 Fed. 967, and In re Pettingill & Co. (D. C.) 137 Fed. 143. In the Ells Case the bankrupt was tenant under a lease which gave the landlord the right to re-enter and resume possession if the lessee should be "declared bankrupt or insolvent according to law," and the lessee covenanted that in case of such a termination of the lease he would "indemnify the lessor against all loss of rent or other payments which he may incur by reason of such termination during the residue of the term," and the lessor re-en-

tered upon the bankruptcy of the tenant. It was held that the landlord could not prove against the estate for the difference between the letting value of the premises for the remainder of the term and the stipulated rent for that period. In the Pettingill & Co. Case it was held that the liability of a bankrupt on a guaranty executed by him of the payment by a corporation of dividends at a certain rate on its stock, owned by another, as to dividends not due or payable at the time of the filing of the petition in bankruptcy, was not provable because the amount of liability was contingent. In referring therein to the nonprovability of claims for rent to accrue after bankruptcy he said:

"These claims are disallowed, not because they are not founded upon contract, but because at the filing of the petition, the time when the status of a claim is fixed, the damages arising from the breach of contract are so far contingent that they cannot be computed by any process known to the law."

As to the case in hand he said:

"Where A. guarantees to B. the payment of dividends by a corporation at a certain rate, and then repudiates the contract and disenables himself from performing it, B. cannot recover as to future dividends, as for a breach of an anticipatory contract, even under the broad rule laid down in Roehen v. Horst. The case is nearer to Dunbar v. Dunbar, and a computation of damages is deemed too difficult by reason of the doubt of the corporation's action."

We come, then, to the case in hand. The liability here is disputed by the bankrupt, and the petitioners, and it is a question whether there will ever be any recovery on account of it. But this is not such a contingency as is had in view by the rule that a contingent debt is not provable in bankruptcy. There is such a contingency in the case of every disputed debt asserted against a bankrupt. The contingency there is whether, under facts existing at the time of the filing of the petition in bankruptcy, it will be held that the bankrupt is liable. The contingency had in view by the rule is one due to facts that may or may not happen after the filing thereof. Here the liability of the bankrupt and petitioners, if it should be held in the suit against them that there is a liability at all, is not for the whole amounts paid out and loaned, of which complaint is made, but only for any such loss or damage as results to the creditors from the making of those payments and loans. Now, the extent of such loss or damage is dependent on facts which were in the future at the time of the filing of the petition herein, and which are still in the future. It is dependent on how much will be realized from the assets of the bank for the creditors. This depends on the extent of the indebtedness, the amount which will be realized from the assets of the bank, and the expenses of administration. It is now impossible to form an estimation as to how much each creditor of the bank will receive from the assets of the bank and when he will receive it, and hence how much loss or damage will be sustained by reason of the payments and loans complained of. This counsel for petitioners concede. They have this to say in their brief:

"In his written opinion filed herein, the referee dwells much upon the delay of the applicants to ask him, in so many words, to designate a tribunal to liquidate the claim under consideration, until after he had ruled on the

exceptions to the claim, and on the hardship to the other creditors of the bankrupt in further holding up a distribution of the bankrupt's assets. As before stated, applicants did, in substance, in their original petition ask that the claim should be liquidated and its validity determined in the Bourbon circuit court, where suits were then pending for that purpose. There is nothing in this record to indicate that the applicants are responsible in any way for any delay in the Bourbon circuit court, or that the delay was either unnecessary or improper. So far as appears the delay may have been caused by the banking commissioner, or the creditors of the bank, in order to ascertain and be able to prove, in that court, the amount of their loss or damage. It is difficult to see how any tribunal that might have been designated by the referee could have ascertained the amount of this loss or damage (i. e. liquidated this claim) until the assets of the bank had been converted into money and distributed to the creditors. No judicial tribunal would have allowed a jury to guess at the amount of this loss, until it could be ascertained after a settlement of the bank's affairs."

It therefore follows that the claims asserted by the petitioners are not provable debts herein. Though the referee ruled otherwise, it is not necessary to reverse his action on the trustee's petition for review. His action was not limited to so doing and to sustaining the other exception. He disallowed the claims because of the exception which he sustained. This action is affirmed, but it is placed upon the ground that the claims were not provable debts.

It should be noted, however, that what the petitioners really want is not an allowance now of these claims. They do not contend that they are entitled to an allowance thereof until the amount of them is ascertained. It is not until then that they can be really proven, so as to be allowed. What they really want is a stay of further distribution of the assets of the estate until their amount can be ascertained and proven as prayed for in their petition. A dividend has been declared and paid, and further funds are ready for distribution. It is likely that the entire estate will be ready for distribution long before the amount of these claims can be ascertained. Now I find nothing in the Bankruptcy Act authorizing the holding up of the distribution of the estate to await the proof of debts.

I have not found it necessary to give this question consideration. But the following cases would seem to be against the right so to do; In re Stein (D. C.) 94 Fed. 124; Matter of Bell Piano Co. (D. C.) 155 Fed. 272; Matter of Eldred (D. C.) 155 Fed. 686.

The cause is remanded for further proceedings pursuant hereto.

DUPLEX PRINTING PRESS CO. v. DEERING et al.

(District Court, S. D. New York. April 23, 1917.)

No. 74.

INJUNCTION ⊂=101(2)—FEDERAL COURTS—UNION LABOR ORGANIZATIONS.

Defendants were officers of a labor organization, some of whose members were employed by complainant as machinists in the building of printing presses, for whom defendants endeavored to obtain shorter hours and better wages, which being refused, a strike resulted. There was picketing and efforts made by persuasion to prevent others from work-

ing for complainant, but there was no evidence that violence was used or threatened by defendants. Defendants also tried with more or less success to prevent the sale and the installation by purchasers of complainant's presses, but without violence or threats of violence. *Held*, that the object of such action by defendants was lawful, and that, in the absence of evidence that unlawful means were resorted to for its accomplishment, the fact that defendants' acts resulted in injury to complainant's business did not authorize the granting of an injunction by a federal court under Clayton Act Oct. 15, 1914, c. 323, § 20, 38 Stat. 738 (Comp. St. 1916, § 1243d).

In Equity. Suit by the Duplex Printing Press Company against Emil J. Deering and others. Decree for defendants.

Austin, McLanahan & Merritt, of New York City, for complainant.

Frank X. Sullivan, of New York City, and Frank L. Mulholland, of Toledo, Ohio, for defendants.

MANTON, District Judge. The complainant, a manufacturer of printing presses, has its principal place of business at Battle Creek, Mich., and sells its products throughout the United States. The defendants are officers of the International Association of Machinists, and are named as parties defendant individually and in their representative capacities as business agents of the International Association of Machinists and the Riggers' Protective Union, in which they respectively hold offices. They have appeared and answered as individuals, and, it appears, process has not been served upon the associations of which they are the representatives. The relief sought is an injunction restraining and enjoining them from interfering with the complainant's trade and good will, and in preventing the complainant from securing skilled mechanics to carry on its business of producing, hauling, and erecting printing presses for customers in New York state and other states, and in preventing the complainant from securing orders and contracts for the sale and installation of printing presses, and from interfering with the sale, carting, installation, use, or operation of printing presses made by the complainant, and to generally restrain the defendants from doing any and all acts whatsoever in furtherance of a combination or conspiracy charged in the complaint, said to exist for the purpose of accomplishing the acts charged against the defendants. Relief is further asked—

"restraining the defendants from publishing, circulating, or otherwise communicating, either directly or indirectly, in writing or orally, to any person or corporation, any statement or notice of any kind or character whatsoever, calling attention to the fact that the complainant or its business or its products are or were or have been declared unfair, or are on any unfair list, or that the complainant should not be patronized or dealt with, or its printing presses purchased, used, handled, hauled, operated, worked upon, or dealt in, because made in an open or nonunion shop, and from publishing, circulating, or communicating, either orally or in writing, any representation or statement of like effect or import, in any manner that will injure or interfere with the complainant's business, or with the free and unrestricted right of the complainant to dispose of its printing presses and to obtain contracts and orders for printing presses to be manufactured and installed by the complainant; from giving notices verbally or in writing to any person, firm, or corporation to refrain from soliciting, making, or carrying out contracts with complainant for the purchase, carting, installation, operation, exhibition,

advertisement, or display of printing presses made by the complainant, or to refrain from purchasing, hauling, installing, using, handling, or operating printing presses of any kind made by complainant, under threats that if such contracts or purchases are made or carried out, or such work is done, they will cause the person so notified loss, trouble, or inconvenience, or that they will interfere with and prevent the complainant from carrying out said contracts, or that they will cause persons employed by others to do work in connection with said presses, or upon buildings or in connection with exhibitions where said presses are to be displayed, used, or installed, to withdraw from work upon said building or in connection with said exhibitions, or that they will cause persons not to exhibit at said exhibition; and from attempting to prevent the sale, carting, installation, use, operation, exhibition, or display of printing presses manufactured by complainant, or the performance of contracts made by the complainant, by inducing or attempting to induce any person or persons whomsoever to decline employment, or cease employment, or not to seek employment, under any persons, firms, or corporations, or representatives of the complainant engaged in the work of hauling, carting, installing, handling, using, or operating said printing presses for customers, because the complainant does not observe union regulations in Battle Creek, Michigan; and from preventing or attempting to prevent the complainant from exhibiting its said presses at any exhibition or exposition, or advertising said presses, by threatening any persons or corporations having charge of such exposition or advertising, or any person or corporation doing business with them, with labor difficulties or loss of patronage, if your complainant is allowed to exhibit or advertise, and from inducing any person or persons employed by said exposition company or advertising agency, or any person or corporation doing business with them, to cease employment, or to decline employment, or to remain out of employment, of said exhibitors or exposition company as long as the complainant is allowed to take part in said exhibition; and from inducing any person or corporation not to do business with or work for any person or corporation because such person or corporation may have, or purposes to have, or formerly had, business relations with complainant; and from inciting or intentionally causing strikes or labor troubles among men employed by customers, representatives, or agents of the complainant outside of Battle Creek, Mich., where no grievances exist against the complainant or its agents or customers, other than the alleged grievance that the complainant does not operate its factory at Battle Creek, Mich., in accordance with the rules and regulations prescribed by the International Association of Machinists or any of its officers or subdivisions; and from threatening, intimidating, or assaulting persons in the employ of your complainant, or those engaged in hauling, installing, using, handling, or operating machinery manufactured by the complainant, and from making misrepresentations or false statements concerning the labor conditions existing in the complainant's factory, for the purpose of interfering with the complainant in securing skilled mechanics to enter or remain in its employ, or in securing orders and contracts from customers for the sale, installation, and use of printing presses; and from using any and all ways, means, and methods of doing any of the aforesaid forbidden acts, and from doing any of the forbidden acts either directly or indirectly, or through by-laws, orders, directions, or suggestions to committees, associations, officers, agents, or otherwise."

The complaint generally states that the defendants, individually and as officers of the respective labor unions, are attempting to carry on an illegal combination or conspiracy to monopolize the machinists' trade throughout the United States, and to compel employers to operate union shops (where none other than employés of labor unions are engaged), and that by so doing they are interfering with the complainant's business of producing, selling, and installing printing presses. In furtherance of this illegal combination or conspiracy, union men at

work for the complainant have been withdrawn from the work of installing or erecting the complainant's products. Picketing has been resorted to, thus preventing the complainant from employing skilled machinists to take the place of men who have gone out on strike in the complainant's employ, and that misrepresentations and intimidations have been resorted to in furtherance of this plan or conspiracy. It is further alleged that, by circulation of circulars and other means of persuasion, the defendants have directly and indirectly, and through officers and their unions, prevented the hauling or carting and erecting of the printing presses manufactured by complainant, and further that the defendants have prevailed upon prospective customers from purchasing the complainant's printing presses, using in their effort threats to such customers, and with labor difficulties such as strikes, boycotts, and misrepresentations, all of which it has alleged has interfered with the complainant's interstate trade or commerce, as a result of which complainant has been damaged.

There was a strike at complainant's plant in August, 1913. At the trial, there was no dispute as to the three individual defendants representing the respective labor unions or associations, as claimed by the complainant.

There have been many cases before the courts involving for decision the rights claimed by the complainant here. The complainant, following the reasoning of Judge Killits in Stephens v. Ohio State Telephone Co. (D. C.) 240 Fed. 759, decided in February, 1917, in the Northern district of Ohio, urges now that the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209), as amended by Congress on October 15, 1914, is but an enunciation of the then existing law, as to the right of injunction against labor unions, as laid down in the many cases. The sections of the Clayton Act having to do with this subject, are as follows:

Chapter 323, § 6: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." Comp. St. 1916, § 8835f.

Chapter 323, § 20: "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employés, or between employers and employés, or between employés, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from

peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." Comp. St. 1916, § 1243d.

In the above case, Judge Killits, after quoting the above section 20, says:

"It is well to note, and not to lose sight of, the fact that the words 'lawfully,' 'peacefully,' 'lawful,' 'peaceful,' dominate the thought of the second paragraph of the section in question; they control its meaning, as they control both the court and the parties to a labor controversy. The statute but enacts the position which courts have universally taken; there is nothing new in it, for we hold that no case exists where a court has attempted jurisdiction to control lawful and peaceable action by injunction, although it may seem that sometimes judgment may have been faulty as to what particular action was 'unlawful' or provocative of a disturbed peace."

And further this test:

"What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked, 'Would this be lawful if no strike existed?'"

Whatever may have been the reasoning and final determination of the many cases which have been cited by learned counsel for the complainant in a carefully prepared and exhaustive brief on this subject, I am of the opinion that we must now confine our search for light on this subject to the provisions of the Clayton Act, since the provisions of this act are in force and effect and are constitutional.

Under section 20 of the Clayton Act, I cannot grant a restraining order or injunction to the complainant, unless it be necessary to prevent irreparable injury to property or to a property right of the complainant, and for which injury there is no adequate remedy at law. No such restraining order or injunction is permitted which shall prohibit any person or persons from terminating the relation of employment, or from ceasing to perform work or labor, or recommending, advising, or persuading others by peaceful and lawful means so to do, or from paying or giving to, or withholding from, any person engaged in such dispute any strike benefits or other moneys or things of value, or from peacefully assembling in a lawful manner, and for lawful purposes, or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

Upon the trial the defendants offered no proof. The case, therefore, rests upon the testimony offered by the complainant. The defendants take the position that their object was a lawful one, to wit, to secure for the mechanics of this union an eight-hour day at a minimum scale of wages.

It appears that at the complainant's plant in Battle Creek, Mich., some union machinists were employed, as well as nonunion men. In other words, the complainant was running an "open shop." Deering and Neyland, representing the defendants, approached Mr. Stone,

chairman of the board of directors of the complainant, and in very friendly attitude and man-fashion urged him, at several interviews, to accede to the desires of the union, namely, to establish an eight-hour day at a minimum scale of wages. Mr. Stone describes these meetings as friendly. No threats were made use of; but Mr. Stone, for reasons sufficient for himself, refused to accede to their wishes. I can find nothing in the testimony of Mr. Stone which would indicate any unlawful acts, or, indeed, any ungentlemanly acts, that might be complained of so far as the means employed by the defendants in trying to persuade him were concerned. Some reports and minutes of meetings of the union at which there was a discussion as to the complainant's strike (in August, 1913) and attitude on the eight-hour day were published in labor magazines and were offered in evidence. The happenings at these meetings seem to indicate that the International Association of Machinists was endeavoring to improve the condition of its members, both in respect to the hours of labor and of wages paid, and disclosed that a general plan for this purpose was under discussion.

The complainant called its employés, Messrs. Young, Burke, Dowe, and Squier, all of whom had something to do with the erection of the presses which were manufactured, sold, and erected by the complainant. On several occasions during the progress of this work, Deering called upon these men and engaged them in conversation, seeking to persuade them not to work, and to stand with the union; but I can find no threats, or ill-advised language, or offensive or degrading speech, which would in any way provoke a breach of the peace in resentment. There is some statement made by Mr. Young that Deering stated to him that he had reason "to be afraid if he only knew it," and that if he did not cease working his union card would be taken away; but, under the by-laws of the union of which he was a member, the union had the right to take away a card of membership where a member was found working with nonunion employés where a strike was in progress. There is evidence that Young was assaulted while going from his work. However, there is no evidence which connects Deering or the other defendants with this assault. If the assault was committed by one of the defendants, it would be a crime, and I cannot, without proof thereof, reach the conclusion by other than competent evidence of the defendants' connection with the commission thereof.

Britton, a cartman, testified that, while making deliveries of the presses in New York, his men handling the machinery were requested by Mr. Deering to stop work, which they did; but the men employed were members of the Machinists' Helpers' Union. This withdrawing of workmen was obtained though peaceful persuasion. There is no authority which holds that peaceful persuasion, resulting in employés withdrawing their services, is unlawful.

Mr. Cosgrove, connected with the New York Law Journal, and Mr. Zuecca, of the Italian Herold, were informed by Deering that nonunion men were engaged in installing the presses, and that, since each employed union pressmen, they would have considerable trouble. It does not appear that any trouble resulted from this conversation, nor that any injury resulted to either of the gentlemen. I can see nothing wrong in this conduct.

Harry A. Cochrane, who was in charge of an exhibition of the American Newspapers Publishers' Association at the Grand Central Palace, was approached by Deering, asked if he was going to employ union labor, and said that he was. Deering then informed him that, if nonunion machinists were employed in any part of the exposition, the union machinists would withdraw their services; he told him of the strike at the Duplex plant at Battle Creek, and that nonunion machinists would not handle their product in New York. Cochrane tried to persuade Deering otherwise. There was no violence of any kind. Cochrane insisted upon his right to employ nonunion men as well as union men. I can find nothing in this conduct which is objectionable.

Indeed, a careful reading of the entire record leads to the conclusion that, if men have a right to strike and to endeavor to prevail upon others to fail to work for the employer, this is such a case as exemplifies careful, prudent, and lawful conduct on the part of the employés. There is nothing in this record which warrants my granting the injunction sought. Testing the record here by the rule that prevailed in this circuit prior to the Clayton Act, the complainant cannot succeed. In Gill Engraving Co. v. Doerr (C. C.) 214 Fed. 111, Judge Hough said:

"I do not perceive any distinction upon which a legal difference of treatment should be based between a lockout, a strike, and a boycott. They often look very unlike, but this litigation illustrates their basic identity. All are voluntary abstentions from acts which normal persons usually perform for mutual benefit; in all the reason for said abstention is a determination to conquer and attain desire by proving that the endurance of the attack will outlast the resistance of the defense; and for all the law of New York provides the same test, namely, to inquire into the legality (1) of the object in view and (2) of the means of attainment."

In National Fireproofing Co. v. Masons Builders' Association, 169 Fed. 263, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, it was held:

"Laborers * * * may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful nor oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to others."

A peaceful and orderly strike, not to harm others, but to improve conditions, has never been held to be a violation of the law. The object here to establish an eight-hour day with a minimum scale of wages in this particular industry was a lawful purpose, and, unless something was done in violation of the law, the complainant cannot be heard to complain. The language of Judge Hough in the Gill Engraving Co. v. Doerr Case, supra, is appropriate here:

"What motive incited defendants to injure Gill Company? None, except that it hinders the expansion and aggrandizement of the union, and therefore gives rise to the same kind of objection that the soldier has to the man who prevents his onward march. It can rarely be said that the soldier is moved by a desire to kill his opponent, but he will kill him if necessary. * * * In the United States courts for this circuit, National Fireproofing Co. v. Mason Builders Ass'n, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, is controlling. It accepts the New York cases fully, piously regrets the injuries committed, and writes the epitaph of litigation such as this by declaring that, when equal legal rights clash, equity is helpless. This is true; it would have been just as true to point out that the result of legalizing strikes, lockouts, and boycotts under any circumstances must be that those who understand the use of such legal tools can always keep within the law and

accomplish their main purpose while inflicting all necessary 'incidental' injury."

In Iron Molders' Union, No. 125, Milwaukee, v. Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315, this rule was laid down:

"The right to persuade new men to quit or decline employment is of little worth, unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. Prohibitions of persuasion and picketing, as such, should not be included in the decree."

From the above quotations, it is apparent that the right to strike for higher wages and to improve conditions of labor have been firmly established and recognized by the federal courts. The object of this strike, as stated before, was a lawful one, and an examination of this record indicates that it was carried on for no deliberate purpose to interfere with complainant's conduct of its business, nor to injure or destroy its business or property. The purpose being lawful, if lawful means are used to effectuate it, such means cannot be made to reach back and taint the purpose itself with unlawfulness, and thus render unlawful all the acts in its furtherance. In pursuit of a lawful purpose to secure a raise in wages, picketing may be employed to ascertain whom the late employer has persuaded, or attempted to persuade, to accept employment, and persuasion may be used to induce them to refuse or quit the employment. Tri-City Cent. T. Council v. American Steel Foundries, 236 Fed. 732, 151 C. C. A. 578.

Even though picketing and persuasion might interfere with the complainant's conduct of its business, and make it harder to retain old employés and to hire and keep new ones, it would not warrant the granting of an injunction. As was said in Tri-City Cent. T. Council v. American Steel Foundries, supra:

"Indeed, the very act of striking often seriously interferes with that 'free and unrestrained control and operation of the employer's business' which the plaintiff here alleges as an object of the conspiracy charged; but the lawfulness or unlawfulness of the strike is not to be tested by such incidental effect of it. And so it is with persuasion and picketing, properly carried on in the interest of a lawful strike. The laborer may be strictly within his rights, although he obstructs 'the free and unrestrained control and operation of the employer's business.' The right to strike must carry with it by implication the right to interfere with the employer's business to a certain extent. The right to persuade prospective employés by legitimate argument must of necessity interfere with the employer's business. Where labor is essential to the successful conduct of a business, any interference with that labor is an interference with the employer's business. But whether the interference with the business is lawful or unlawful depends upon the facts in each case."

Applying the foregoing principles to the evidence in the case at bar forbids the granting of a decree to the complainant, and accordingly a decree must be entered herein, dismissing the bill, with costs.

CHAMPION SPARK PLUG CO. v. CHAMPION IGNITION CO. et al.

(District Court, E. D. Michigan, N. D. November 22, 1917.)

No. 14.

1. COURTS ⟸268, 276—FEDERAL COURTS—DISTRICT OF SUIT.
   The statutory provisions as to the particular district in which a suit shall be brought do not affect the general jurisdiction of the federal court over the suit, but give to the defendant a personal privilege as to the venue, which he may insist upon or waive.
2. COURTS ⟸263—"COUNTERCLAIM ARISING OUT OF THE TRANSACTION WHICH IS THE SUBJECT-MATTER OF THE SUIT."
   In a suit for infringement of trade-mark and unfair competition, a counterclaim for infringement of patents, alleging that complainant's product, upon which it uses its trade-mark, is an infringement of such patents, is one "arising out of the transaction which is the subject-matter of the suit," which defendant is required to state in its answer by equity rule 30 (198 Fed. xxvii, 115 C. C. A. xxvii).
3. COURTS ⟸263—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT—WAIVER.
   A complainant, who brings a suit in equity in a federal court in a district of which he is not an inhabitant, and in which he has no established place of business, is required to meet in such suit any counterclaim which the defendant may set up under equity rule 30, whether it arises out of the transaction which is the subject-matter of the suit, or is one which might be the subject of an independent suit in equity against him.

In Equity. Suit by the Champion Spark Plug Company against the Champion Ignition Company and Albert Champion. On motion by complainant to dismiss counterclaim. Motion denied.

Owen, Owen & Crampton, of Toledo, Ohio, for plaintiff.

Whittemore, Hulbert & Whittemore, of Detroit, Mich., for defendants.

TUTTLE, District Judge. This cause is before the court on motion of the plaintiff to dismiss a counterclaim, filed by the defendant, on the ground that this court is without jurisdiction to entertain such counterclaim in this suit.

Plaintiff, a Delaware corporation, having its principal office and place of business at Toledo, Ohio, outside of this district, filed its bill against the defendants, residents and inhabitants of this district, alleging that defendants had been guilty of infringement of the trade-mark of the plaintiff, consisting of the word "Champion" as applied to spark plugs for explosion engines, and had also committed acts of unfair competition in connection therewith; that plaintiff and its predecessors in business had been for 10 years last past continuously engaged in the manufacture and sale of spark plugs under the trade-name and trade-mark "Champion," the same having been applied during such period to the spark plugs themselves, to the cartons containing the same, and to circulars and advertising matter relating thereto, and having throughout that time been constantly used by plaintiff and its predecessors, and by jobbers, dealers, and purchasers to distinguish spark plugs made and sold by plaintiff and its predecessors in title and

business from those of other origin; that said trade-mark had been conspicuously printed on the cartons and packages in which said spark plugs were packed for shipment, and had also been permanently burned on the porcelain of the spark plugs themselves, and that said spark plugs so marked were being sold and shipped by plaintiff in interstate commerce; that it had always been the practice of plaintiff to manufacture and sell only the highest quality of spark plugs under its said trade-mark, using therein only the best materials and workmanship, and that said "Champion" spark plugs had throughout enjoyed a high reputation for efficiency and durability among the trade and automobile dealers generally, which reputation, associated with said trade-mark, was of great value to plaintiff and an important asset in its business; that the defendants were manufacturing and selling spark plugs closely imitating those manufactured by plaintiff; that said defendants were using the word "Champion" to indicate said spark plugs, and were advertising and selling their spark plugs as and for plaintiff's aforesaid Champion spark plugs; that plaintiff's and defendants' spark plugs are so similar in design and appearance as not to be readily distinguishable by the ordinary purchaser, so that said misrepresentation and misuse of plaintiff's trade-mark by defendants are especially injurious in that they enable defendants to confuse the purchasing public and to palm off defendants' for plaintiff's spark plugs; and that defendants' acts of unfair competition and infringement of plaintiff's trade-mark have resulted in great and irreparable damage and injury to the plaintiff and its business and in the reputation of its "Champion" spark plugs. The bill prayed for an injunction restraining the defendants from manufacturing, selling, or advertising spark plugs as "Champion" spark plugs, from infringing the said trade-mark, and from using the word "Champion" as a part of the name of defendant corporation on the cartons containing their spark plugs, or on the circulars or advertisements thereof, unless such name be accompanied by a statement, equally prominent as the word "Champion" in such name, to the effect that the plug contained in such cartons, or referred to in such circulars or advertisements, is not the "Champion" spark plug. The bill prayed also for the usual accounting.

The defendants filed an answer denying the allegations of the bill and added a counterclaim by the defendant corporation, Champion Ignition Company, alleging that said corporation was the owner of two certain patents under which it manufactured and sold its spark plugs; that after said defendant corporation had successfully introduced to the trade its said spark plugs, the plaintiff, which had previously been marketing spark plugs of a different character from those of said defendant corporation, wrongfully copied said defendant corporation's said spark plugs in infringement of said patents, and that in manufacturing and selling its spark plugs plaintiff is now infringing said patents; that plaintiff, in order to obtain information concerning the manufacture and construction of such spark plugs, wrongfully hired workmen who were in the employ of said defendant corporation to obtain for plaintiff such information, and that it wrongfully induced workmen and engineers to leave the employ of said defendant corporation

and enter the employ of plaintiff for the same purpose; and that plaintiff is wrongfully palming off its spark plugs on the purchasing public as and for defendant's spark plugs, both deceiving the public and injuring defendant corporation. The defendant corporation prayed for an injunction restraining the plaintiff from the acts of unfair competition alleged, and from infringing said patents, and for an accounting.

Plaintiff has moved for a dismissal of this counterclaim on the ground that it is not an inhabitant of this district and has no regularly established place of business in such district, and that, therefore, this court has no jurisdiction to entertain such counterclaim.

Section 24 of the Judicial Code provides that:

"The District Courts shall have original jurisdiction * * * of all suits at law or in equity arising under the patent, the copyright and the trade-mark laws." Act March 3, 1911, c. 231, 36 Stat. 1092 (Comp. St. 1916, § 991).

Section 48 of the Judicial Code provides that:

"In suits brought for the infringement of letters patent the District Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business." Comp. St. 1916, § 1030.

Section 51 of the Judicial Code provides that:

"Except as provided in the six succeeding sections [none of which applies to patent suits] no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." Comp. St. 1916, § 1033.

Rule 30 of the federal General Equity Rules (198 Fed. xxvii, 115 C. C. A. xxvii) prescribes the requisites of an answer and concludes as follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

It is, of course, clear that suit for the infringement alleged in the counterclaim could not have been maintained against the plaintiff company on a bill filed against it in this district, as such company is not an inhabitant of, and has no regular place of business in, this district. The question presented is whether, in view of the language of rule 30, just quoted, the plaintiff by filing its bill in this district so subjected itself to the jurisdiction of this court in this suit that such counterclaim may be maintained against it.

Rule 30 is a new rule, and the question here presented has not yet been determined by the Supreme Court. The District Courts are in conflict in their construction of the language of such rule here involved. I have found only one decision by a court of appeals in point—that of the Circuit Court of Appeals for the Seventh Circuit in the case of United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co., 234 Fed. 868, 148 C. C. A. 466, to which I shall hereinafter refer.

[1] It seems to be well settled that, as stated by the court in General Electric Co. v. Wagner Electric Manufacturing Co. (C. C.) 123 Fed. 101:

"The limitation as to the district of residence of defendant, or of place of business and acts of infringement, relates merely to the place of suit, and may be waived." General Electric Co. v. Wagner Electric Manufacturing Co., supra; United States Consolidated Seeded Raisin Co. v. Phœnix Raisin Seeding & Packing Co. (C. C.) 124 Fed. 234; Thomson-Houston Electric Co. v. Electrose Manufacturing Co. (C. C.) 155 Fed. 543; United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co., 234 Fed. 868, 148 C. C. A. 466.

As was said by the United States Supreme Court, in referring to certain statutory provisions prescribing the venue of a certain kind of action, in the case of Interior Construction & Improvement Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401:

"The provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election."

Plaintiff concedes that:

"There would be some reason for contending that a plaintiff waives his right to object to the jurisdiction of the court to determine a counterclaim 'arising out of the transaction which is the subject matter of the suit,' inasmuch as he may properly be charged with knowledge of the counterclaim and be held to have assumed that it would be presented in the answer."

It contends, however, that the cause of action set up in the counterclaim has no relation to the cause of action set up in the bill of complaint, that it might properly be made the subject of an independent suit against plaintiff if not set up as a counterclaim, and that therefore plaintiff cannot be said to have waived its right to object to the jurisdiction of the court to entertain such counterclaim.

[2] It will be noted that rule 30 contemplates two different kinds of counterclaim, the one a counterclaim "arising out of the transaction which is the subject-matter of the suit," which counterclaim it requires the defendant to state in the answer, the other a counterclaim "which might be the subject of an independent suit in equity against" the plaintiff, which latter kind of counterclaim it merely permits, without requiring, the defendant to litigate in the same suit. Considering the allegations of the bill, answer, and counterclaim already referred to, it seems clear that this counterclaim does arise out of the transaction which is the subject-matter of the suit. The bill alleges that the defendants, by the acts complained of, are injuring the plaintiff's business. This business consists in the sale of certain spark plugs. If, therefore, the plaintiff has no right to sell these spark plugs, because it thereby infringes the defendant's patents, it cannot justly complain that the defendant has injured it by depriving it of, or decreasing, the sale of such spark plugs. This consideration is perhaps strengthened by the allegations in the bill concerning the similarity in appearance of the spark plugs of plaintiff and defendants respectively, in fact, the questions as to the trade-mark, unfair competition, and patents raised

and involved are so interwoven, and all so connected with the sale by plaintiff of its alleged infringing spark plugs, that the conclusion that they all arise out of the transaction which is the subject-matter of the suit seems to me to be irresistible.

This being so, the defendant corporation was compelled by the rule in question to present its counterclaim in this suit. This the plaintiff must be assumed to have known when it filed its bill in this district. Consequently it must be held to have waived its right to object to the jurisdiction of this court to consider such counterclaim.

This same question was involved in the case of United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co. (D. C.) 216 Fed. 186. That was a patent infringement suit. Defendant by counterclaims charged infringement of certain patents owned by it and also unfair competition by plaintiff in making and illustrating its articles, so as to resemble those of the defendant, with the purpose of deceiving the public and injuring defendant. Plaintiff applied for an order striking out these counterclaims on the ground that it was not an inhabitant of the district in which the suit had been brought, and had no regular and established place of business in such district, and that therefore such court had no jurisdiction over the subject-matter of such counterclaims. In overruling this contention and denying the motion, the District Court said:

"As I understand it, the act of 1897 does not relate primarily to the jurisdiction of the federal court, but is rather a provision affecting the place of the suit or venue. The District Court is given jurisdiction of suits for the infringement of patents, and the act of 1897 has for its object the fixing of the proper place of suit. This statute was passed for the benefit and convenience of defendants in patent suits, and confers the privilege upon them to have the suit tried either in the district of their residence, or where they may have committed acts of infringement and have an established place of business. Not relating strictly to jurisdiction, but rather to the place of suit, this privilege is subject to waiver. * * * Plaintiff, having brought a suit in this district, thereby subjected itself to any counterclaim or set-off which is fairly within the equity rule above quoted. The counterclaims pleaded in the answer grew out of the very same transactions and matters covered by the original bill. The three patents referred to in the answer upon expansion bolts are all along the same line, and the question of unfair competition is intimately connected with the rights of the respective parties under these patents. These matters ought to be all disposed of in one suit, as they relate to questions very closely connected together."

This decision was affirmed by the Circuit Court of Appeals, 234 Fed. 868, 148 C. C. A. 466. In its opinion, that court said:

"While suit could not, in the first instance, have been maintained in Wisconsin by the Diamond Expansion Bolt Company against appellant over its objection upon either the Pleister or the Cook patent, we have no doubt but that appellant waived that objection by its action in bringing the suit in the Wisconsin district as well as by statements of counsel shown on pages 1085 and 1087 of the record in the premises with regard to the patents of the counterclaims. The proceeding was one for infringement of a patent in each case. Of such a case some federal court had jurisdiction. So that no question of federal jurisdiction is involved. Appellant had the right to waive the question of privilege, and did so. We think the District Court proceeded properly to treat those matters as coming within the provisions of new equity rule 30 as pertaining to the matter of jurisdiction in equity, and not to federal jurisdiction."

In the case of Buffalo Specialty Co. v. Vancleef (D. C.) 217 Fed. 91, the court had under consideration the construction of rule 30, and, while the precise question here involved was not there presented, in the course of its opinion the court used the following language:

"It is said in argument that it could not have been the intention of the rule to compel a nonresident plaintiff to submit to cross-suits in districts foreign to his residence, and thus run counter to express statutes, like section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), or Act March 3, 1897, c. 395, 29 Stat. 695 (U. S. Comp. St. 1901, p. 588), relating to place of suit. Section 51 provides that civil suits, other than those of diverse citizenship, shall only be brought in the district where defendant inhabits, the others only in the district of the residence of either party. The act of 1897 applies only to patent cases, and provides that the court shall have jurisdiction only in the district where defendant inhabits, or where he has committed infringement and has an established place of business. But these acts do not relate to the general jurisdiction of the District Court, only to the power of the particular court to proceed. They give defendant a privilege which he may waive."

I have no doubt that the counterclaim arose out of the transaction which is the subject-matter of this suit, and that the plaintiff has waived its right to object to the jurisdiction of this court to entertain such counterclaim.

[3] I think, also, that even if this counterclaim did not arise out of such transaction, but might, under the rule, have been the subject of an independent suit in equity against the plaintiff, the same result would have followed, and the court would have had jurisdiction to consider it in this suit. The obvious purpose of the new equity rules is the simplification of procedure and the elimination of unnecessary and inequitable technicalities. It would seem that there could be no valid reason why a plaintiff, who has voluntarily gone into a district outside that in which he is an inhabitant and begun a suit, should not be required to meet any claim in equity which the defendant in such suit may have against him. There is nothing in the language of the rule which restricts the right of a defendant in filing a counterclaim to any particular district. The language used is quite plain, and clearly authorizes such defendant to "set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." The subject-matter of the present counterclaim certainly might have been the subject of such independent suit. If, therefore, the plaintiff must be held to have known that the defendant was compelled, and therefore permitted, to litigate in this suit any counterclaim arising out of the transaction which is the subject-matter of such suit, and that consequently by filing its bill in this district it waived its right to object to the jurisdiction of this court over such counterclaim, why should it not also be held that, in view of the right granted by this rule to a defendant to set out any set-off or counterclaim which might be the subject of an independent suit in equity against the plaintiff, the plaintiff must have known that such right existed, that such set-off or counterclaim might be presented against it if it filed its bill, and that, therefore, by filing such bill in this district, it waived its privilege of objecting to such jurisdiction? It seems to me that plaintiff, having selected this court as the forum of

a suit against the defendants must, in view of this rule, be considered to have known that it was submitting to this court in this suit any disputes or issues between it and the defendants cognizable in a federal court of equity, and that it should not now be permitted to split up such disputes and issues and withdraw a part thereof from this court and claim the benefit of its own demands while denying to defendants the right to try out all of the equitable controversies between these parties. It is clear that it was the purpose of this rule to give to defendants this very right.

I am aware that a few District Courts have held that this rule does not permit the filing of a set-off or counterclaim in a suit unless the subject-matter of such counterclaim might, under the previous practice, have been pleaded by a cross-bill, and that the only effect of this rule is to allow a defendant to use its answer as a substitute for a cross-bill, by setting out in such answer, as a counterclaim, any matter which theretofore might have been alleged by its cross-bill, but only if it be so germane to the issues in suit that it might previously have been pleaded by a cross-bill. I cannot, however, agree with this view, which, it seems to me, disregards both the purpose and the clearly expressed language of the rule. If this language means anything, it means that in such answer a defendant may set out any counterclaim, which might be the subject of an independent suit in equity, and that the subject-matter of such counterclaim is not limited to matters which might, under the old practice, have been the subject-matter of a cross-bill. Marconi Wireless Telegraph Co. of America v. National Electric Signaling Co. (D. C.) 206 Fed. 295; Electric Boat Co. v. Lake Torpedo Boat Co. (D. C.) 215 Fed. 377; Goodno v. Hotchkiss (D. C.) 230 Fed. 514; Harper Brothers v. Klaw (D. C.) 232 Fed. 609. As was said in Electric Boat Co. v. Lake Torpedo Boat Co., supra:

"To so confine the right to counterclaim, in my judgment, is to unduly limit the meaning of the term 'cross-bill' as used in such rule, disregard the manifest intent to distinguish between the kinds of counterclaims that must or may be set up in the answer, and to overlook entirely the plain purpose of the new rules to permit the parties to settle their differences in one suit, provided they can be conveniently disposed of together. Under the old system of pleading, a cross-bill was necessary to obtain for the defendant affirmative relief touching the matter of the original bill. A cross-bill, however, was not permitted unless it was based on or grew out of the subject-matter of the original bill. It was treated as a mere auxiliary suit or as a dependency upon the original suit. * * * The 'counterclaim arising out of the transaction which is the subject-matter of the suit,' and which, under the rule, must be set up in the answer, covers, broadly stated, all matters which heretofore could have been pleaded by cross-bill. Therefore to limit the option given to the defendant to 'set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him' to such claims as must be set up is to make the option fruitless. * * * Therefore the limitation upon what counterclaim may be set up is not that it must have arisen out of the transaction which is the basis of the original bill, that character of counterclaim having been already completely covered by the preceding clause, but that the subject-matter thereof be such as 'might be the subject of an independent suit in equity' against the plaintiff."

For the reasons stated, I am of the opinion that the plaintiff has subjected itself to the jurisdiction of this court to entertain and dis-

pose of the counterclaim in question and that it has waived its right to now object to such jurisdiction. The motion to dismiss such counterclaim is therefore denied.

THE CROMWELL.

(District Court, E. D. North Carolina. October 10, 1917.)

No. 143.

1. SHIPPING ⟸86(2)—LIABILITY OF VESSELS—INJURY TO BRIDGE.
   Evidence *held* not to sustain an allegation that a ship in tow was negligent in undertaking to pass up through a bridge over Cape Fear river on a flood tide and in consequence struck a pier, but to show that the tide was at the time high slack, which was the proper condition for the passage. although the water on the surface in the center of the current was still moving upstream.
2. SHIPPING ⟸81(2)—LIABILITY FOR INJURY TO BRIDGE—VESSEL IN TOW.
   The steamship Cromwell, passing up the north branch of Cape Fear river in tow of a tug, which was usual and necessary, struck a pier of the railroad bridge. The master of the tug, as was customary, was on the ship and directed the movements of both vessels; the master and crew of the ship taking no part, except to carry out his orders, which were promptly obeyed. The master of the tug and the pilot in charge of it were both competent and licensed masters and pilots, acquainted with the river, and both tug and tow were seaworthy, in good condition, and properly equipped. The draw of the bridge was near the west shore, and extended diagonally with the channel, making it necessary, in order to enter it from the south, to go so close to the bank that the Cromwell, which was a large vessel, sheered to starboard when 100 feet below the draw. The master of the tug took such measures as in his judgment were proper to prevent the collision, but they were unavailing. *Held*, that the Cromwell was not in fault, nor liable for the injury to the bridge.
3. TOWAGE ⟸19—INJURY CAUSED BY TOW—LIABILITY.
   The relation between a vessel and a towing tug employed in the usual and ordinary course is not that of principal and agent, but of independent contractors, and the master of the tug, who in accordance with general custom assumes control of the navigation of both vessels, remains the servant of the owner of the tug, and the tow is not liable for injury to third persons, caused by his negligence or the fault of the tug.

In Admiralty. Petition by the Franco Ottoman Shipping Company, Limited, owner of the steamship Cromwell, for limitation of liability. Hearing on claims of the Wilmington Railway Bridge Company and others. Decree for petitioner.

John D. Bellamy, Thos. W. Davis, and Herbert McClammy, all of Wilmington, N. C., for claimants.

George Rountree and J. O. Carr, both of Wilmington, N. C., and Kirlin, Woolsey & Hickox, of New York City, for petitioner.

CONNOR, District Judge. The Cromwell is a steel screw steamship, 3,086 tons gross and 1,977 tons net register, built 1894, 312 feet long, 43 feet wide, 21–10 feet depth of hold, owned by Franco Ottoman Shipping Company, Limited, a British corporation; Nathaniel Wicklen, captain. She came to the port of Wilmington, N. C., Janu-

ary 2, 1914, with cargo of pyrites, consigned to Seaboard Air Line Railway. After unloading a portion of her cargo at Wilmington, her agent, Henry Whyte, contracted with the owners of the steam tug Gladiator to tow her up the Cape Fear river to the Swift Company fertilizer factory, for the purpose of delivering the remainder of her cargo.

At about 6:15 o'clock on the morning of January 7, 1914, Capt. Sanders, in control of the steam tug Gladiator, took the Cromwell in tow from the slip, at the dock of the Seaboard Terminal wharves, and started up the Cape Fear river. At some minutes after 7 o'clock, in passing through the draw of the bridge, constructed and maintained by the Wilmington Railway Bridge Company, the Atlantic Coast Line Railroad Company, and the Seaboard Air Line Railway Company, over the northeast branch of the river, she collided with and injured one of the piers of the bridge. Each of the corporations instituted civil actions against the Cromwell in the superior court of New Hanover county for the recovery of damages alleged to have been sustained by reason of the injuries sustained by the collision. Warrants of attachments were issued and levied upon the ship. Bonds were filed and she was released. The amount claimed by the claimant corporations aggregated about $60,000. Thereafter the steamship Cromwell and her owners filed in this court a libel, pursuant to the provisions of sections 4283, 4284, and 4285, Rev. Statutes (Comp. St. 1916, §§ 8021–8023), denying, and claiming limitation of, liability. A stipulation was filed in accordance with the statutes and general admiralty rule 54 (29 Sup. Ct. xlv). Pursuant to the petition, this court took jurisdiction of the cause and issued the usual orders. The cause was brought on for hearing upon the libel and answers, when the bridge company and railroad companies, hereafter referred to as the claimants, conceded the right of the owners, hereafter referred to as petitioners, to limit their liability, to an amount which shall be found by the court to be the value of the ship and pending freight money on the day of the collision. The claimants filed specifications setting forth the grounds of negligence charged against the Cromwell. Eliminating formal language, the claimants charge:

"That the Cromwell, its agents and servants, the master and pilot, permitted and directed the ship to proceed up the Cape Fear river, in tow of the Gladiator, at a time when the current was flowing upstream, and under conditions when it was dangerous to navigate and carry a ship of the size of the Cromwell through the draw at the said bridge."

[1] It is conceded that prudent navigation required that the ship be taken through the draw of the bridge when the tide was slack high water. The reasons given are manifestly sound. A number of witnesses were examined in regard to the condition of the tide at the hour at which the tug, with the Cromwell, reached the bridge, about 20 minutes after 7 o'clock on the morning of January 7, 1914. The tide in the river on that morning, at Wilmington, was high at 6:09 o'clock. The tug, with the ship, left the dock at about 6:15 o'clock. The oral and natural evidence show that the tide, at the bridge, an hour thereafter, was high slack. The evidence to the contrary is that of several

men standing on the bridge, who say that the tide was running up the river when the tug and Cromwell reached the bridge. They further say that cross-ties knocked from the bridge, by the ship, floated up the river, and continued to do so, until nearly 8 o'clock. This may be true, because of the fact that, after the lower current slacks or ebbs, the water upon the surface continues for awhile to move upward. Judge Clifford notices this condition in Sturgis v. Boyer, 24 How. at page 120, 16 L. Ed. 591, saying:

"It was then about slack highwater, the current still running up a little out in the stream; but the tide had commenced to ebb close in shore."

Several witnesses testify that the same condition is found in the Cape Fear river. The Bangor, 212 Fed. 706, 129 C. C. A. 316. I am of the opinion, upon a careful examination of the evidence, that the charge of negligence, in respect to the condition of the tide, is not sustained. The captain in charge of the tug was fully cognizant of the necessity of reaching the bridge when the water was high slack, and carefully timed his movement to conform to such well-known necessity.

[2] The next specified act of negligence is that:

"The ship was, by its master and those in charge of her, negligently and carelessly permitted to sheer to starboard, at about 500 or 600 feet below the bridge, at which time nothing was done by the master and those in charge of the ship to correct the said sheer, but, to the contrary, what was done aided and facilitated a greater sheer, without the engines of the said ship being operated, and without any command or order given, or any operation of the ship to straighten the ship's course."

The evidence is contradictory as to the distance from the bridge at which the ship sheered. Claimants charge that the sheer was caused by negligent navigation. Petitioners charge that it was caused by the necessity imposed upon the tug and ship in getting in position to go through the bridge, by reason of the location of the draw, or that the sheer was the result of an inevitable accident. It may be assumed pro hac vice that the law imposes upon the petitioners, denying liability, the duty of going forward with proof, or that the fact that the ship sheered imposes upon her owners the duty of showing that it was not the result of negligence in her navigation. Captain Sanders was in control of the tug Gladiator. He holds a United States license as master, mate, and pilot of steamships on Cape Fear river and tributaries; has had 30 years' experience. Capt. Sellars, also a pilot, was on the tug, subject to Sanders' orders. Sanders says that, leaving Wilmington at about 6:15, he consumed about an hour in reaching the bridge, about three-fourths or seven-eighths of a mile, going very slowly; not half a mile an hour. He says:

"We necessarily have to get against the west bank; it is a difficult matter to get those ships just in the right position because the draw was so narrow, and to the west side of the river; the difficulty is due to the fact that you have to swing your vessel into the channel, that takes you through the draw, on the west side of the river; the draw is 60 feet wide and is not located straight across the channel."

He was in the center of the ship, watching the center of the draw; just a little down the river from the shingle mill the vessel took a slight

sheer; she was going very slowly. He says that the vessel was proceeding on her own steam; the tug was steering, assisting her.

Capt. Wicklen was standing by the side of Sanders, as the ship, with the tug, went up the river. He says the ship was going apparently straight for the center of the draw of the bridge, when she took a sudden sheer to starboard. She was drawing, after unloading a portion of the cargo at Wilmington, 15 feet 11 inches aft, and 15 feet 4½ inches forward; that the vessel began to sheer about 50 or 60 feet from the bridge. He knew nothing about the river; he had no knowledge of the place; he was not controlling the ship. Capt. Sanders was in control. She was going very slowly, being towed by the tug; knows nothing whatever about the channel; that is why he engaged a pilot; does not know where the channel of the river is; when the ship was straightened up (at Wilmington) the engines were stopped; took Capt. Sanders because witness had no local knowledge; has been a seafaring man 30 years; captain of vessels of this class about 13 years. None of the Cromwell's officers had any knowledge of the channel or other conditions of the river.

Capt. Sellars had license as pilot on Cape Fear and tributaries about 20 years; was on tug Gladiator, towing the Cromwell; was steering the ship. She was moving on her own power; very slow; hawser 12 or 15 fathoms.

"She was headed into the draw, not direct into the draw, because we can't; we had to get her between the shingle mill and the bridge before we could head straight into the draw; have to make a turn right at the shingle mill. After we passed the mill, the ship was headed straight for the draw. After the ship's stern passed it, she was then lying straight with the draw, in the position to go through. I had entered the draw with the tug, was into the drawbridge, and an order was given from the ship to stop towing. I took it to be Capt. Sanders' voice, and I stopped the tug and stepped out of the pilot house, and I noticed the ship had sheered to the east going to the bridge. She took a sheer after she was straight. I don't know just how far that was [from the bridge]. I think her bow was down about the end of the compress then; the end next to the bridge. I am not positive about it. I was noticing the tugboat, and not the ship. The draw is located at the western end, right next to the western bank. It opened in a bias direction from the channel. When you go through this draw, you have to make a turn; there is a sand shoal north of the bridge, out in the middle of the river, and when you get through the draw you have to pull the ship around in order to get straight up the channel again. On the lower side of the draw, as you approach it, the vessel has to straighten itself to proceed through the draw, after passing the shingle mill. At the time it straightens itself to enter the draw, her stern would be between the southern end of the compress and the shingle mill. When a ship of the size of the Cromwell is straightened to pass through the bridge, her bilge would be right close to the western bank of the river, but not up against it; so close that it would cause the ship to sheer from the bank. The worst danger is that the draw is placed so that the current does not run straight with it; it runs kinder across it; you have got to get your ship so close to the western bank that it causes it to sheer from it. And the other difficulty is a shoal on the north side; and it is just simply close work taking a vessel through, that is all."

The tug was used to help steer the Cromwell. Saw nothing after the ship passed the shingle mill to indicate that she was not pursuing the proper course until the sheer, just at the draw.

Watkins, claimants' witness, says that he saw the ship coming up, opposite the shingle mill.

The tug was in the channel trying to hold the ship in the main channel, "which she did, and approached in the draw straight." The ship was bearing out to the east. The first thing he saw was throwing out the anchor, about 60 feet below the bridge; it did not stop her. He says that the ship "began to sheer 70 or 100 yards down the river." The tug was approaching the draw in the proper way.

Coker places the ship about the same place when she began to sheer. He says that the channel is very close to the west side of the river at the shingle mill; does not know the depth. Merritt's evidence in regard to position of ship when she sheered is to about the same effect.

The foregoing constitutes the substance of the evidence regarding the condition under which, and the place at which, the ship took the sheer.

Capt. P. T. Dicksey, 67 years of age, has unlimited license to manage steamships up and down Cape Fear and North East river; has held license since 1880, unlimited 10 years; is familiar with navigation of the rivers and the location of the bridge. He corroborates the other witnesses regarding the condition of the tide, at which a ship should go through the bridge.

"The reason we use slack water for taking vessels up there, when they are drawing any water at all, is because the bridge was not parallel with the tide, and it was very narrow, and in going up there, if ebb tide, the tide running diagonal across it in such a way that it would sheer off into the channel above, that is going north; of course, you couldn't go very far up there on account of the shoal above. * * * The bridge was put there when there were small vessels going through; it was intended for smaller vessels than the class of vessels we have been carrying through there lately. You have to make a slight bend about the shingle mill. Before entering the draw, I always keep the middle of the river. I headed ship direct for the middle of the draw when I would land her; it would throw me crosswise, or diagonally across, but I would have to kinder make a turn at the bridge on account of the shoal water below it. The bridge is situated in such a way, if you get the vessel, so you can look through the draw, you would pass so close to the shoal water that she would naturally take a sheer; that is, when you would straighten the vessel after you had left the center of the river to go through the draw. The draw was not parallel with the current; when you straighten the vessel the stern is near the shore; this makes her sheer off, what we term 'smelling bottom'; always sheers from the bank for deep water, if going ahead at all. The draw is in such a place that you can't get in there without getting the ship alongside of the bank."

During the year 1910, the Association of Masters, Mates and Pilots, of which Capt. Dicksey was then president, filed a protest with the United States engineers in regard to the location and width of the draw, etc. On August 24, 1910, the Secretary of War ordered the bridge company to "modify the present fender system, and construct additional fenders on the eastern side of the draw space of said bridge; all as indicated on the attached blueprint, so as to provide an additional width of four feet in the draw opening and a better draw entrance." The company was given six months within which to comply with the order. Thereafter the Secretary of War modified the order in certain respects, and extended the time for compliance. There was much evidence

regarding compliance with these orders, and conditions at the time of the accident. It is sufficient to say that the width of the draw and its location, at the time of the collision, had not been condemned by the Secretary of War; the bridge was not, at that time, an unlawful obstruction to navigation. The location and width of the draw is relevant only as explaining the necessity for navigating ships passing through, to go close to the western bank, as testified to by all of the witnesses. Since the bridge was built (1880) several large fertilizer factories have been built on the northeast branch of the Cape Fear, above the bridge. The size of the ships going up the river, carrying supplies to the factories, has increased within the last few years. Ships of the size of the Cromwell frequently pass through the draw going up the river to these factories. The Cromwell, in tow of the tug, was entitled to navigate the river, and in doing so, to deliver her cargo, to pass through the draw. The owners of the Cromwell, and their representative, Capt. Wicklen, were entitled to assume that, when the draw was opened, the ship, by the exercise of the degree of care imposed upon them in navigating the river, could pass through the draw with safety to both the ship and the bridge.

The law imposed upon those in charge of the ship and the tug, the duty of careful navigation, in view of such conditions as were known, or by the exercise of the degree of care imposed upon them, could have been ascertained. Wicklen says, and is not contradicted, that he was ignorant of the condition of the river and the channel. He says that the engines of the ship were not working; that she was being moved by the tug. Sanders and Sellars say that she was moving upon her own steam; the tug only assisting, steering her. She was moving very slowly, and the tug stopped towing, the hawser slacked. It is probable that all of the witnesses honestly thought the fact to be as they testified, and that at the time the ship took the sheer her engines were not working. There was no negligence in her speed, nor does it appear that she took the sheer by reason of any defect in her equipment. If the draw in the bridge was so located, with reference to the channel, and was of such width, as to render it necessary for the ship to go near to the western bank of the river, and subject her to the danger of taking a sheer, in straightening for approaching the bridge, claimants should not be permitted to impute to her, as negligence, the course pursued, for the purpose of meeting the condition created by the location of the draw. In other words, the fact that, for the purpose of getting into position to pass through the draw, she went close to the western bank, should not be charged as negligence per se, although in doing so she incurred danger of taking a sheer. The claimants say that the Cromwell, by going near to the western bank of the river, was permitted to take a sheer, and that this was negligence. The petitioners say, conceding that, by going close to the western bank of the river for the purpose of straightening, to pass through the draw, the ship was in danger of taking a sheer, the location of the draw, and its width, rendered it necessary to go near the western bank. This is not upon the theory that the bridge company negligently located the draw, but because, in doing so, it created a condition which rendered it necessary for the ship, in going up the river, in the exercise of its right of navigation, to go

nearer to the bank than good navigation, under other conditions, justified.

The evidence does not disclose that the sheer, to which ships of the size of the Cromwell were liable, in going near to the west bank, necessarily or usually resulted in injury to the bridge. It appears that ships of the same, or larger, size had pursued the same course and passed through the draw safely. I am of the opinion that the ship was not negligent in pursuing the usual, and, as testified to by all of the witnesses, necessary, course in getting into position to go through the draw. It does not appear that, in exercising the right to approach the bridge, in the usual manner, those in control of the ship negligently navigated the ship; she was moving slowly, whether under her own steam, or with the assistance of the tug, does not very clearly appear; the witnesses differ in that respect, but all say that she had but little speed. Her engines, as appears, were in condition to respond promptly to a call upon them. None of her officers or crew failed in the performance of any duty imposed upon them at that time.

But claimants say the master of the ship and of the tug negligently failed to correct the sheer in time to prevent the collision. Upon seeing that she had sheered, Sanders gave the order to Capt. Wicklen, who stood by the indicator, to starboard the wheel, to go to port. He says:

"I saw she was not going to come; the only thing to do was to go full speed on the engine astern, and drop anchor, and the tug to cease pulling, which we did."

Each of these orders were communicated promptly to those who were required to execute them, and promptly obeyed. Knute Anderson says that he got the order to keep the wheel hard over starboard, which he did; the wheel was all right. Tiltz says that he promptly let go the anchor; it had 15 fathoms chain; it sunk; the chain tightened. The engine was put astern. Sellars says that he heard the order to stop towing, and at once stopped the tug, and the hawser slackened. There is no evidence to the contrary. Capt. Wicklen's statement is reasonable. It was the purpose of Sanders to carry her to, and through, the draw very slowly. When Sellars got the order to stop towing, the tug was in the draw. Sanders says that his orders were given to Capt. Wicklen; "they were to go through the captain, in every instance;" that he (Sanders) was in control of the ship. Wicklen was asked if he was controlling the ship himself, under orders from the pilot, to which he answered:

"No, I was not." "Who was?" "The pilot, Capt. Sanders."

As corroborating this testimony, and showing the custom prevailing on the river, when ships are being towed, J. S. Williams, who has had much experience in towing ships up the river and through the bridge, says that the custom was for the captain of the tug to go on the ship—place a pilot on the tug; the captain of the tug to be in command of the tow. He says:

"We have refused to navigate the tow whenever anybody else tried to assume the authority."

The captain of the tug goes on the ship and takes command of the movement, leaving a properly licensed pilot on the tug, who obeys the

orders of the man on the ship, who is in command of the whole movement. Capt. Edgar Williams, harbor master, who has had license since 1866, long experience in towing ships up the river and through the bridge, large ships, says:

"When I went on board the ship, I would notify the captain that I was in charge of the ship and also in charge of the tugboat, which would be at my command and subject to the orders that I gave. That is the proper place for the master of the tug. The ship has no pilot on board; the master being a stranger, it is necessary for the master of the tug, or pilot, to go aboard and take charge, and, when he goes, then they are subject to his orders, and also the towboat; that is the custom of every port."

Capt. Dicksey, who has had many years' experience in towing ships up the river, through the bridge, says that as captain of the tug he always went on board the tow—ship—and commanded the movement; orders were given the tug from the ship.

"In every case—I don't think you will find a single instance where it is different—the man who has charge of the tow is on the ship, and he controls the movement of the tug, by waving his hand, or some signal they have."

There is no evidence indicating that the Cromwell was not in good condition, her engines or other equipment, nor that the tug was not in good condition and properly equipped for the service undertaken. The claimant insists that the order given, to "starboard the wheel," was not the proper order. A number of witnesses were examined in regard to this contention. Capt. Dicksey says that was the only order that a careful man would give, after he found that she had taken a sheer. J. S. Williams is of the same opinion. Capt. Edgar Williams, a witness for claimant, gives the same opinion, although he thinks, under the conditions, "the wheel is no good."

Two witnesses for claimants, Rice and Burriss, are of the opinion that the order to starboard the wheel was not the proper one to give. Each of the witnesses gives reasons for the opinions which they express. Criticism is made of the fact that only one anchor was dropped. It is strongly urged that two anchors would have brought her to a stop, and that the engines should have gone forward, and not astern.

[3] If, as contended by claimants, Capt. Sanders was negligent in failing to take prompt and proper steps to break the sheer, or to stop the Cromwell, the question arises whether such negligence is to be imputed to the ship and her owners. The answer to this question depends upon the relation which Sanders bore to the ship and the extent to which he was in control of her navigation. It is held in The China, 7 Wall. 53, 19 L. Ed. 67, that where there is compulsory pilotage the ship is liable for a tort, although it be wholly the result of the pilot's negligence. The Merrimac, 14 Wall. 199, 20 L. Ed. 873; Sherlock v. Alling, 93 U. S. 107, 23 L. Ed. 819. The principle upon which the liability of the ship is based is that the pilot is the agent or servant of the owner of the ship. Petitioners, conceding this to be true, insist that this case comes within the principle announced in Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591, in which Judge Clifford, after stating cases in which both the tow and the tug, and those in which the tow alone, is liable, says:

"But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor [his] crew on board, from one point to another, over water where such accessory motive power is necessary, or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master, or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. * * * Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight, and it is not perceived that it can make any difference in that behalf that a part, or even the whole, of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and in the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation."

After stating the general principle upon which vessels, and their owners, are liable for injuries sustained by the negligence of their agents, he says:

"No such consequences follow, however, when the person committing the fault does not in fact, or by implication of law, stand in the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessels from one point to another, the owners of the tow do not necessarily constitute the master and crew their agents in performing the service. They neither appoint the master of the tug or ship the crew; nor can they displace either the one or the other."

The tow, in that case, was relieved of liability for the collision because, as said by Judge Clifford:

"It clearly appears that those in charge of the steam tug had the exclusive control, direction, and management of both vessels, and that there was no evidence that the tug was not a suitable vessel to perform the service for which it was employed, that any one belonging to the ship participated in the navigation, or was negligent in any degree whatever in the premises."

In Dutton v. The Express, 3 Clif. 462, Fed. Cas. No. 4,209, Judge Clifford says:

"Masters of vessels in tow * * * are bound to obey all the proper orders of the master of the steam tug, as the chief responsibility for the navigation of both vessels rests upon that officer, and if the master of the tow refuses such obedience, or is guilty of negligence and carelessness, or want of due skill and judgment in the performance of his duties, the owners of the steam tug are not liable for the consequences to the owners of the tow. Somewhat different rules apply in cases where the rights of third persons are involved."

See The Margaret, 94 U. S. 494, 24 L. Ed. 146; Towing Co. v. Shenango, etc., 238 Fed. 480, 151 C. C. A. 416.

In The John Fraser, 21 How. (62 U. S.) 184, 16 L. Ed. 106, it appeared that the James Gray was at anchor in the port of Charleston, S. C., and the John Fraser was being towed into the harbor by the

General Clinch, when a collision occurred between the John Fraser and the James Gray. The owners of the latter libeled both the John Fraser and the General Clinch. The James Gray and General Clinch were found guilty of negligence. In regard to The John Fraser, Judge Taney says:

"According to the usage of trade at that port, she engaged a steamboat, well acquainted with the harbor and its usages, to bring her in. When fastened to the hawser, and in tow, she was controlled entirely by the steam tug, both as to her course and speed. The steamboat was not subject to the orders of the commander of the John Fraser, but was altogether under the control and direction of her own commander for the time. * * * And as this collision was forced upon the John Fraser by the controlling power and mismanagement of the steam tug, and not by any fault or mismanagement on her part, she ought not to be answerable for the consequences."

In The Clarita, 23 Wall. 1, 23 L. Ed. 146, after stating the general rule fixing liability upon the ship, the same judge says:

"Consequences of the kind, however, do not follow when the person committing the fault does not in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owners, and the person or persons in charge of the vessel, sustain in some way towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one place to another the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service, as they neither appoint the master of the tug, nor employ the crew, nor can they displace either one or the other. Their contract for the service, even though it was negotiated with the master of the tug, is, in legal contemplation, made with the owners of the vessel employed, and the master of the tug continues to be the agent of the owners of his own vessel, and they are responsible for his acts in navigation and management."

In The Civilita, 103 U. S. 699, 26 L. Ed. 599, both the ship and the tug were held liable for a collision. The reason given for holding the ship liable was:

"Because her pilot, who was in charge both of ship and tug, neglected to give the necessary directions to the tug," etc.

In The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600, both tow and tug were found to be in fault. Judge Holmes, referring to Sturgis v. Boyer, supra, says:

"In that case it was held that a tug, having control of a vessel in tow, was solely responsible to a lighter upset by the vessel, through the fault of the tug alone. * * * We see no reason why the decision should not stand. No doubt the fiction that a vessel may be a wrongdoer, and may be held, although the owners are not personally responsible, on principles of agency, or otherwise, is carried further here than in England. * * * Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it was desirable to have some one who was able to pay. * * * But, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line, and a difference in degree, between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate, but innocent, instrument of harm is attached."

In The Maria Martin, 12 Wall. 31, 32, 20 L. Ed. 251, Judge Clifford after stating the principle announced in Sturgis v. Boyer, supra, says:

"Where the officers and crew of the tow, as well as the officers and crew of the tug, participate in the navigation of the vessels, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly, may be liable for the consequences, according to the circumstances, as the one or the other, or both jointly, were either deficient in skill or were culpably inattentive or negligent in the performance of their duties."

In that case it was conceded that the tug was not in fault. The controversy was between the two ships.

In The Gallia (D. C.) 196 Fed. 509, it appeared that there was a pilot on the ship, but he gave no orders. The captain of the tug came on the ship and remained until the maneuver was completed. Judge Hough said that:

"The mere presence of the pilot makes no difference. * * * Responsibility and liability must depend upon matters of substance, and not on mere form. If the pilot had really been in command, the ship would have been primarily responsible, even though the proximate cause of the damage had been the disobedience or incompetence of tug masters who were furnishing the motive power. But this pilot was not in command and he was guilty of no personal negligence. Therefore, the ship with which he is identified is absolved."

The principle is applied by Judge Morris in The Margaret Thomas (D. C.) 183 Fed. 336. The schooner, in tow, was absolved, because the fault, resulting in damage to the libelant, was imputed to the tug.

In the Ft. George, 183 Fed. 731, 106 C. C. A. 169 (C. C. A. 2d Cir.), the tug Smith, and the bark in tow, Ft. George, were libeled for damages sustained by the Vim, caused by a collision with the bark. The tug had the bark in tow on the Delaware river. Because of taking her into shallow water, she sheered and refused to answer to her helm, thus colliding with the Vim, anchored near the center of the river. Judge Coxe says:

"It is obvious that the expedition down the river could not have been taken under the joint command of the master of the tug, and the pilot of the bark. There can be no divided responsibility in such cases. Conference, discussion and agreement as to what course to pursue, when danger threatens, between two vessels, separated by a 70-fathom hawser, is out of the question. Some one must be in command. We understand the rule to be, in the absence of any agreement to the contrary, that, when the tug supplies the motive power, she becomes the dominant mind and the tow is required to follow directions from the tug. * * * It is probable that no sane tug master would accept a service so commanded; but, if he had done so, it is more than likely that disaster would have occurred much sooner than it did. * * * There was nothing to indicate to those on the bark that there was any special danger to be encountered in passing the ridges. * * * For aught that appeared to the contrary, the bark was justified in thinking that the tug felt herself fully able to cope with the situation, even if the bark 'sucked the bottom.' * * * Those on the bark had a right to assume that the tug knew her own business and would pass the dredges safely."

In The De Gama (D. C.) 140 Fed. 755, Judge Toulmin says:

"The relation between the tug and tow, under the American decisions, under ordinary circumstances, is that of independent contractor, not that of principal and agent. In other words, the tug is not the servant or em-

ployé of the tow, and therefore the tow is not responsible for the acts of the tug. If the tow collides with some vessel during the voyage, it is not liable for the damage caused thereby, unless some negligence contributing to the collision is proved against the tow, or unless the officers of the tow were directing the navigation." Hughes Admiralty, 58, 59.

The judgment was reversed on appeal because the court differed with the District Judge about the facts.

In The Chicago (D. C.) 78 Fed. 819, Judge Brown says:

"It does not appear that the captain, who was on the bridge of the Alvena, took any part in the responsibility for her navigation. Though the navigation was procured for the Alvena, and was for her benefit, and was with the acquiescence of her master, and though the damage was done by her, yet, under the existing decisions of the appellate courts in this country, as I understand them, I am not at liberty to hold the Alvena responsible."

In The Express (D. C.) 46 Fed. 860, the Niagara was found to be in fault, together with the tug. Judge Brown says that her negligent fault consisted in (1) unnecessarily going to the left-hand side of the East River channel; (2) in not giving signals; (3) for turning shortly before the collision; and in two of these negligent acts "the officers of the Niagara were active participants."

Claimants insist that those in charge of the Cromwell were negligent in failing to take prompt and proper steps to correct the sheer and avoid the collision. There is some difference in the testimony in regard to the distance of the ship from the bridge at the time she took the sheer. E. A. Frink, principal assistant engineer of the Seaboard Air Line Railway Company, testifies that from the center of the bridge to the north end of the Cooper compress is 300 feet, and from the same point to the shingle mill dock is 750 feet. Sanders puts the shingle mill at 600 feet from the bridge. The evidence tends to show that the ship took the sheer after her stern passed the shingle mill. Sellars says that when he got the order to stop towing he was in the draw; the hawser was 12 fathoms. Wicklen says that the ship was 50 or 60 feet from the bridge, when the order was given to let go the anchor and put the wheel astern. Claimants' witnesses, on the bridge, give the same distance. Sellars says that he thinks that when she took the sheer her bow was about the end next to the bridge of Cooper's compress; he is not certain—was attending to the tug. Sanders says that he gave the order to starboard the wheel—

"and we saw she was not going to come back again to take us on our port. We had shouted to him to go to port. We saw she was not going to come, and saw the only thing to do was to go full speed ahead on the engines astern, and drop the anchor and the tug cease pulling, which we did."

This indicates that the order to starboard the wheel was given before the other orders; that some short time elapsed before the last orders were given. Claimants insist (1) that the order to starboard the wheel was wrong; (2) that two anchors should have been let go; and (3) that the engines should have been put full speed forward, instead of astern. Evidence was heard upon each of these contentions, disclosing, as usual, differences of opinion; it is impossible to reconcile them.

I am of the opinion that the weight of the evidence sustains the propriety of the course pursued, under the conditions existing at the time

the orders were given and obeyed. The weight of the evidence tends to show that the bow of the ship was, at the time, within 60 or 70 feet of the bridge. It is necessarily conjectural whether, if the engines had been put full speed ahead, she would have gone through the bridge safely. It is the same problem which is always presented, under such conditions—whether it is the part of wisdom to apply the brakes, or open the throttle; to tighten the rein, or drive ahead; to cross the track or stop. Men will, in each case, honestly hold different opinions. The rule of law, prescribing the duty, and fixing the liability, upon those upon whom the duty to act upon the "occasion sudden" or "in extremis" is settled; its application in given cases is not always easy. The rule of conduct is thus stated:

"When a collision is all at once seen to be suddenly impending, a vessel may, in the confusion and excitement of the moment, do something which contributes to the collision, or omit to do something by which the collision might be avoided, and unless the emergency has been produced by her own fault, or the act of omission amounts to gross negligence, it is excusable. At such time, the highest possible degree of skill is not required, but only such caution and skill as every one would be expected to exercise who took upon himself the command and navigation of a vessel." 7 Cyc. 307.

I am of the opinion that, in the course pursued in this respect, Sanders was not negligent. He exercised his best judgment; there is no reason to think that, by going ahead, he would have gone through safely. Claimants say that, if this be true, the steps to correct the sheer should have been taken before the ship was so near the bridge as to render them ineffectual. Sellars is asked:

"Under the circumstances that you saw at that time, when the vessel had sheered to starboard, just as you and the tug were in the draw, was that the proper order to give? A. Yes, sir."

Capt. Dicksey is asked:

"Suppose a ship you had taken up there had taken a sheer somewhere between 50 and 100 feet from the bridge, and the bow gone to starboard, and you wanted to stop her, would it not be good navigation to order let go the anchor, order the wheel to starboard, and order engines reversed? A. Yes, sir. I think that is about the only order that a careful man would give after he found she took a sheer, because you can't break a sheer in that short distance. I suppose that is the only proper thing to do."

J. S. Williams says that, assuming that in approaching this draw, when the ship got within 100 feet of the draw, she took a sudden sheer to the starboard, he does not know of any other order that could be given; it was the proper order. When he came back upon the stand to make his testimony clear, he said:

"I don't think that anything else could have been done after the ship was within 100 feet of the bridge; I want to go on record on that."

Capt. Edgar Williams is asked, by claimants:

"Assuming that the ship had steered to starboard, and that the anchor was not dropped until within 100 feet of the bridge, would that have been the proper place to have thrown the starboard anchor overboard, and could it have swung the ship to port? A. That being the case, no more than 100 feet, you couldn't give the ship sufficient chain to deaden her headway."

It will be noted that the assumption is made the ship took the sheer 100 feet below the bridge, and the answers are, with some care, confined to that hypothesis. Capt. Edgar Williams says that the anchor, let go at 100 feet below the bridge, after the sheer, would not deaden her speed. He is then asked whether, if the ship had taken the sheer at the shingle mill, 750 feet below the bridge, and the orders were given and obeyed, they would have "righted the ship." He answers: "Yes; that would have canted your ship to port." Upon cross-examination he is asked whether, assuming that the sheer to starboard was taken at Cooper's wharf, within 100 feet of the bridge, what was the proper order to give? He answered:

"That was rather close, but I would have said let go both anchors." "The wheel is no good."

The value of this testimony, as exculpating Sanders from the charge of negligence, is dependent upon the position of the ship, with reference to the bridge, at the time she took the sheer. I am constrained to think that she was more than 100 feet from the bridge when she took the sheer. She was between the shingle mill and the wharf.

I am unable to find that the tug, or those in charge of her, or the master of the ship, or any of her crew, were incompetent to discharge the duties imposed upon them. The questions which have given me most concern are whether Capt. Sanders took prompt and timely action to correct the sheer and bring the ship under control and thereby prevent the collision, and, if he did not, whether the Cromwell and her owners are liable for such failure and the results proximately flowing from it. The decisions uniformly recognize and follow as binding authority Sturgis v. Boyer, supra. Such apparent departure as an examination of the cases discloses may be explained by reference to the variant facts. The principle upon which the decisions are founded is that the owner of the tug is not the agent of the ship, but an independent contractor. The Cromwell was compelled to employ a tug to tow up the river. The owners of the tug were engaged in the business of towing ships up the river; in doing so the tug, under the direction and control of Capt. Sanders, was engaged in her usual and ordinary course of employment; there was a necessity for such accessory motive power. It was usually employed. The agent of the Cromwell, who was also the agent of the claimant Seaboard Railway Company, at Wilmington, employed the tug, agreeing to pay a fixed sum for the service. The owners of the tug, for the purpose of performing the service, selected the master and his assistants. The tug was a suitable vessel, properly equipped, and her master and assistant were competent persons, licensed pilots and masters, with long experience in the discharge of such duties, on the Cape Fear river and its northeast branch. They were familiar with the current, channel, depth, and location of the draw. The master, in accordance with the custom and well-recognized rules for towing ships of the size of the Cromwell, went upon her navigating bridge and took control of her navigation, leaving Captain Sellars a licensed pilot on the tug. All of them understood that he was in control of the ship, and that she and the tug were to be navigated in obedi-

ence to his orders. His was the dominating mind; he was, in the language of one of the witnesses, "in control of the movement."

Claimants insist that the Cromwell was, at the time she took the sheer and of the collision, moving on her own steam, and therefore not a "dead ship" in tow of the tug; that the tug was only assisting—steering—the ship, and that her master and crew were in control of her navigation; that, if not entirely responsible for the collision, she participated in the negligent conduct of the master of the tug and is jointly liable. It is well settled that the immunity from liability for the negligence of the tug is limited to cases where the ship, her master and crew, are free from fault, either in respect to any duty imposed upon them or participation with those in control of the ship and the tug. The Galatea, 92 U. S. 439, 23 L. Ed. 727, in which Judge Clifford says that owners of ships—

"are under obligation to employ a seaworthy steam tug as the accessory motive power to their own ship or craft; and they continue to be responsible for the negligence, omission of duty, or unskillfulness of the master and crew of their own vessel."

It is further insisted that the captain of the Cromwell and his crew were on board the ship and participated in her navigation. In regard to the controverted question whether the Cromwell was moving on her own steam, and not being towed, I think that, upon the weight of the evidence and the reason of the thing, her engines, as they should have been, were fired; that they were used in moving out of the slip at Wilmington and starting up the river; that as she approached the bridge they were not working. She was being towed, for the purpose of being kept under the control of the tug, as she passed through the bridge. All of the witnesses, and the natural evidence, indicate that she was moving on the hawser of the tug. The tug and the ship were manifestly under the control of Capt. Sanders; all persons connected with her, and with the tug, recognized their duty to obey his orders, and did so. It will be noted that, in the Civilita, supra, relied upon by claimants, "the ship had on board a pilot, and the tug was subject to his orders," and "it is expressly found, as a fact, that the tug actually received no orders from him." It was his failure to give orders which caused the collision. The tug was found to be also at fault, "and the ship, because her pilot, who was in charge both of ship and tug, neglected to give the necessary directions to the tug."

In The Express, supra, the tow was held to be at fault with the tug, because her officers "actively participated in the specific acts of negligence." In The Clarita, supra, it is found that the master of the tug was in control; the tow was exonerated. The conditions found in a very recent case, Great Lake Towing Co. v. Shenango, S. & S. Transp. Co., 238 Fed. 480, 151 C. C. A. 416 (C. C. A. 6th Cir.), present the question in respect to the relative duties of the tow and the tug under conditions somewhat similar to those found here. Judge Hollister says:

"The Shenango was in charge of the tugs, ready to assist with her steam, if called on * * * to do so. It was her duty to conform to, and promptly obey, the signals given her [citing cases]. Admitting that the Shenango would not be relieved of all the responsibility attending a * * * prudent

master, conscious of a danger he might avert, even while being towed, yet there is nothing in the record to even suggest a fear on the part of those in her charge that her stern was in danger of a collision with the breakwater."

A decree exonerating the Shenango and fixing the liability for the collision was affirmed. I am unable to find that the fact that the master and crew were on board the Cromwell and at the positions where their duty required that they could promptly respond to the order of Capt. Sanders was, of itself, such a participation in her navigation as to make them liable for his negligence, either in respect to the time or manner of giving such orders. The condition in which they were brings them within the language of Judge Clifford in Sturgis v. Boyer, supra:

"It is not perceived that it can make any difference in that behalf that a part, or even the whole, of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew * * * were not expected to participate in the navigation of the vessel and were not guilty of any negligence or omission of duty, by refraining from such participation."

Measured by this standard, I am not able to find that the master, or any of the crew of the Cromwell were at fault. They promptly and correctly responded to the orders of Capt. Sanders, as it was their duty to do so. They were ignorant of the condition of the river, the depth of the water, or the current of the channel, as related to the location of the draw. Certainly they could not be called upon, under the circumstances, to anticipate danger, and take control of the ship and the tug out of the hands of Sanders; any attempt on their part to have a divided control would have been wrong, fixing upon them liability for the result. The language of Judge Morris in The Margaret Thomas, supra, appropriately describes the situation here and the measure of duty imposed upon the master of the Cromwell. He says:

"It is possible that something of that kind might have been done, but it is not fair, in considering a case of this kind, to imagine what might have been done if everything could have been foreseen. This schooner was in charge of her captain and a licensed pilot. * * * If they saw a danger which they could avoid by putting the schooner's helm to port, they should have done so; but they must have a little time to see the danger and consider it and act."

After careful consideration of the evidence and excellent briefs filed, I am brought to the conclusion that the Cromwell, and its owners, are not liable for the injury sustained by the collision with the bridge. A decree will be drawn in accordance with this conclusion.

MATHIESON et al. v. CRAVEN et al.

(District Court, D. Delaware. June 16, 1917.)

No. 271.

1. EQUITY ⟸114—SUITS—INTERVENTION.

Intervenor and complainant, entitled under the will of their grandfather to separable, though precisely similar, claims charged on real estate, joined in a bill in the federal court for enforcement of their claims. In order that the bill might not fail for want of requisite diversity of citizenship, it was amended by omitting intervenor. After the District Court had rendered an opinion that complainant was entitled to enforcement of her lien, and it appeared that those of the defendants who were residents of the state of which intervenor was a resident were unnecessary parties, intervenor applied for leave to intervene; the bill having been dismissed as to such unnecessary defendants. *Held* that, as complainant and intervenor were entitled to precisely the same relief, the intervention should be allowed, as separate suits by them would have been consolidated, and particularly as a sale of the lands for the enforcement of complainant's lien only would have placed the purchaser in so difficult a position that an advantageous sale would have been practically impossible; it being questionable whether a sale would not have been subject to the lien of intervenor.

2. EQUITY ⟸82—LACHES—PENDENCY OF LEGAL PROCEEDINGS.

In such case, where intervenor consented to proceedings by complainant after the original bill was amended by omitting her as a complainant, though the evidence introduced at trial would necessarily affect her rights, intervenor's failure to file a bill in the state court, or by other means seek to establish her claim before termination of complainant's suit, did not amount to laches, in view of the fact that she would be put to great and unnecessary expense; evidence for and against her claim being offered and objected to by the parties as though she had been a complainant.

3. EQUITY ⟸114—PRACTICE—INTERVENTION.

Where, after decree for complainant, another was allowed to intervene as co-complainant, an order, directing that all evidence adduced in the cause prior to intervention should stand and be read as evidence bearing on the existence and enforceability of the claim of intervenor so far as pertinent, is warranted; defendants having had full opportunity to examine and cross-examine witnesses, and adduce or oppose the introduction of documentary evidence, and it being immaterial that some of the witnesses, whose depositions or testimony would be read under the order, are no longer living.

4. EQUITY ⟸114—PRACTICE—INTERVENTION.

Where, after decree for complainant, another was allowed to intervene as co-complainant, the evidence, oral and documentary, touching points common to the claims of complainant and intervenor, cannot be added to or affected by the introduction of further evidence after the intervention, for that would amount practically to a rehearing, would create confusion, lead to contradictory findings on the same subject, and encourage perjury.

5. EQUITY ⟸114—SUPPRESSION OF TESTIMONY—RIGHT TO.

Evidence relating to common claims of complainant and intervenor, who was allowed to intervene as co-complainant after decree for complainant, which was taken under improper insistence of counsel for defendant, when the case was referred to an examiner for the taking of evidence, may on return be suppressed.

In Equity. Bill by Catharine P. Mathieson and another against Thomas J. Craven, executor and trustee under the will of Thomas Jami-

son, deceased, and others. After decree for complainants and dismissal of the bill as to defendants Oliver V. Jamison and others, Vesta L. Bastian and another petition to intervene. Petition granted, and decree for intervenors.

See, also, 164 Fed. 471, 228 Fed. 345.

Walter J. Willis, David T. Marvel, and Josiah Marvel, all of Wilmington, Del., for complainants.

Alexander B. Cooper, of Wilmington, Del., for defendant Green.

John F. Biggs and Armon D. Chaytor, Jr., both of Wilmington, Del., for defendant Biggs.

Josiah O. Wolcott, of Wilmington, Del., for defendants Lofland.

Thomas F. Bayard, John P. Nields, and Herbert H. Ward, all of Wilmington, Del., for defendant Craven.

BRADFORD, District Judge. [1] After this court reached the conclusion and rendered an opinion that under the amended bill and pleadings and the evidence Mrs. Mathieson was entitled to one-half of the sum of $16,000 charged upon the Capelle farm, the Jamison Corner farm and the Homestead farm, on due application to the court the bill was dismissed as to nine of the defendants named therein, including Oliver V. Jamison, Laura Jamison, Clarence Jamison, Florence Jamison and Helen Grebb, citizens of Pennsylvania, whose presence as parties in the suit defeated the jurisdiction of the court so far as granting relief under the original bill to Mrs. Bastian was concerned, she and her husband being citizens of Pennsylvania. After the bill had been dismissed as to the parties defendant above referred to, on due application leave was granted to Mrs. Bastian and her husband to intervene as co-complainants with the Mathiesons. There were cogent reasons for the intervention. If it had not been allowed and the defendants should have failed voluntarily to pay the several amounts due to Mrs. Mathieson, and the three farms had been exposed to public sale under the decree of this court, bidders at the sale would have occupied a position so difficult and embarrassing as to render an advantageous sale of the property practically impossible. For in the case supposed, this suit not being a proceeding strictly in rem, it would have been gravely questionable whether the sale of the farms would not have been subject to whatever right, title or interest therein Mrs. Bastian possessed prior to such sale. A cloud on the title of the purchaser would have been created. The sale of the farms would necessarily have been either subject to the lien claim of Mrs. Bastian or free and discharged from it. In the former case, if the proceeds of sale of any one of the farms would not have sufficed to pay and satisfy the lien claim of Mrs. Mathieson against it, discrimination, contrary to the fundamental equitable principle of equality, would have resulted against her and in favor of Mrs. Bastian, as the farm so sold would have remained subject to the lien claim of the latter. And in order that Mrs. Mathieson and Mrs. Bastian should be placed on the plane of equality it would have been necessary that the latter should in some mode have been brought into the suit as a party and made subject to the order and decree of the court. If, on the other hand, the

sale of the farms would have been free and discharged from the lien claim of Mrs. Bastian, there would have been serious embarrassment in case the lien claim of Mrs. Mathieson against any one of the farms amounted to more than one-half of the net proceeds of sale of that farm. For in order to determine how much of such proceeds of sale should be applied to the lien claim of Mrs. Mathieson it would be necessary to ascertain the existence and extent of the lien claim of Mrs. Bastian, and to that end that the latter should in some mode appear in or be brought before the court. In any aspect of the case it was desirable that Mrs. Bastian should intervene in the cause, not only for the protection of her own interests but that justice might be done to Mrs. Mathieson. A resort by Mrs. Bastian to a suit in a state court or a new suit in this court for the enforcement of her rights would have been dilatory, burdensome and embarrassing both for Mrs. Mathieson and herself. Indeed, had the original bill in this case been filed by the Mathiesons alone, and had Mrs. Bastian at that time brought suit in this court, and had the necessary diversity of citizenship existed, it is highly probable that an order of consolidation would have been made and the two cases tried together. In Brinckerhoff v. Holland Trust Co. (C. C.) 146 Fed. 203, it was held by the circuit court for the southern district of New York that where a petitioner for leave to intervene alleges rights in the subject-matter of the suit which make him a proper party, and his intervention will not prejudice the rights of other parties but rather tend to facilitate the final determination of the rights of all of the parties, his petition should be granted. Judge Coxe said:

"That he [the petitioner] is a necessary party is not apparent but that he is a proper party is sufficiently clear. With the petitioner on the record all the interested parties are before the court and a decree can be entered determinative of the entire controversy. It is for the interest of all concerned that the questions still in dispute between the parties shall be decided in the pending suit: to commence a new suit will only protract litigation and increase expense."

A fortiori it was proper to allow an intervention in the cause before this court. In disposing of the demurrer to the amended bill in this case the court used language (164 Fed. 471, 479, 481) not without application in this connection:

"It appears from the amended bill that Mrs. Bastian, as one of the children of Edgar Jamison, is entitled, if entitled at all, to precisely the same measure and kind of relief as Mrs. Mathieson. * * *. It is true that the ascertainment of what is due to Mrs. Mathieson involves primarily an ascertainment of what is due to both Mrs. Bastian and Mrs. Mathieson; and it is also true, that, other things being equal, Mrs. Bastian should be a party in order that the defendants should not be compelled to account to her separately from Mrs. Bastian. * * * It is proper, also, to add that certain questions may or may not arise in this suit or certain proceedings hereafter be resorted to therein, the solution or effect of which may or may not tend to obviate the trouble to which it has been suggested the executor, trustee or purchaser may be put, if the bill in its present shape be maintained. It appears that Mrs. Bastian 'consents to the relief sought in this bill and to all proceedings had and to all orders or decrees made or that may be made by the court in this cause,' and further, that Mrs. Bastian originally joined as a co-complainant in this case to recover the separable claim made by her. Under these circumstances it is possible, if not probable, that she may apply

so to intervene in the suit as to result in a sale of the real estate discharged from any lien in her favor and free from cloud or incumbrance on the title."

[2] It has been strenuously contended on the part of the defendants that notwithstanding the intervention of Mrs. Bastian and her husband as parties complainant in this cause, no decree properly can be made in her favor by reason of alleged laches on her part. This position is untenable. On the subject of laches, this court has said in this cause on a former occasion (228 Fed. 345, 378):

"Laches with respect to the bringing of suit is unreasonable and inequitable delay in proceeding for the enforcement of a demand or right viewed in the light of the circumstances of the particular case. No rigid rule as to lapse of time is applicable. It is essentially an equitable defense, and does not depend, like the operation of a statute of limitations, upon the mere passage of time, but upon the equity or inequity of permitting the asserted claim or demand to be enforced."

Tested by the above definition of laches in connection with the bringing of suit I am unable to perceive that it attaches to Mrs. Bastian in the slightest degree. She and her husband were co-complainants in the bill as originally filed, and this court has held that there was no laches on the part of the complainants prior to the institution of the suit. By amendment the Bastians were omitted from the bill, they being citizens of Pennsylvania, of which state some of the defendants were also citizens, in order that this court might retain jurisdiction of the cause by reason of diversity of citizenship. The amended bill stated that:

"The said Vesta L. Bastian consents to the relief sought in this bill and to all proceedings had and to all orders or decrees made or that may be made by the court in this cause."

And on this point she testified:

"Q. Mrs. Bastian, do you consent to the proceedings taken in this cause by your sister and her husband and without yourself being a party? A. Yes, sir. Q. Do you consent to the further proceedings that may be taken in this cause, including such action, or decree, as the court may make thereon? A. Yes, sir."

It is unquestionably true, as stated by the court in disposing of the demurrer:

"Mrs. Mathieson certainly had a right to sue in this court for the relief sought by her. It is equally certain that Mrs. Bastian did not have a right to sue as co-complainant for the relief sought by her, as jurisdiction would thereby be ousted. Mrs. Bastian, therefore, was dropped as a party," etc.

Mrs. Bastian could not compel Mrs. Mathieson to consent to a dismissal of the bill as against those defendants between whom and Mrs. Bastian there was no diversity of citizenship, and indeed, until after the opinion of this court had been rendered on final hearing, when for the first time it became plain that those defendants were not necessary parties to the cause, it did not appear to Mrs. Mathieson or her counsel that the bill could with safety be dismissed as to such defendants. Mrs. Bastian having been dropped as a party in order that jurisdiction of the cause might not be defeated, did not display any negligent disregard of her rights and interest in the subject-matter of the controversy. She did not become indifferent to

or abandon the assertion of such rights and interest. She was placed in a position of difficulty. It is true she might on being dropped as a party to this cause have brought suit in the court of chancery of Delaware for the enforcement of her lien claim against the farms, or have proceeded in an independent suit in this court for the same purpose. But the conduct of such suit, whether in the court of chancery or in this court, would have involved either great and unnecessary expense, or as much delay in reaching a conclusion as does the intervention of Mrs. Bastian and her husband now under consideration. Had Mrs. Bastian in such independent suit delayed or caused to be delayed the final hearing until she could take advantage in her suit of the evidence adduced in this cause on points common to the claims of Mrs. Bastian and Mrs. Mathieson respectively, she would have incurred the peril of being charged with laches in proceeding for the enforcement of her rights, and in the same degree as she is now charged with in the matter of her intervention. On the other hand, if without so waiting to take advantage of evidence adduced in this cause on points common to both lien claims, Mrs. Bastian had proceeded to establish her claim in an independent suit, she would have incurred much, and, I think, unnecessary expense in the production of proofs similar to and substantially the same as those now before this court. It is clear to a moral demonstration that Mrs. Bastian after being dropped as a party did not intend to abandon her rights under the will of Thomas Jamison. And it is equally clear that she did nothing calculated to induce the defendants, or any of them, to believe that she had such intention, or in any manner to prejudice them in the presentation of their defense. Not only did she disclose the fact that she felt an interest in the controversy before this court by consenting to and agreeing to be bound by the proceedings and decree therein, but Mrs. Mathieson's counsel who were equally her counsel in the bill as originally filed, and are now her counsel, examined witnesses and adduced evidence as well in her favor as in favor of Mrs. Mathieson, and in the same manner and to the same extent as if Mrs. Bastian had not been dropped as a party to the record. And equally the defendants examined witnesses and adduced evidence against her in the same manner and to the same extent as if she had continued a party of record. In view of the foregoing circumstances I do not perceive how Mrs. Bastian could have adopted a wiser course or one better calculated to exclude any suspicion of laches on her part with respect to the enforcement of her rights.

[3] Mr. and Mrs. Bastian having been allowed to intervene in this cause as co-complainants, the court subsequently, on the application of their counsel, made an order providing as follows:

"That all the evidence adduced in said cause prior to the intervention of the said intervenors shall stand and be read as evidence bearing upon the existence and enforceability of the alleged rights and claim of the intervenors, so far as pertinent thereto, and shall be considered by the court in the determination of said rights and claim, subject to such objections to said evidence as were made during the presentation thereof."

One effect of this order was that all evidence adduced in this cause prior to the intervention in proof or disproof of points common to the

alleged claims of Mrs. Mathieson and Mrs. Bastian should stand as evidence and the only evidence to be considered by the court on such common points. The defendants having had full opportunity to examine and cross-examine witnesses and to adduce or object to the introduction of documentary evidence on such common points, and having taken advantage of that opportunity, such evidence, oral and documentary, is admissible against them; and the intervenors having made application to the court that all the evidence adduced in this cause by the complainants and defendants prior to the intervention should be read and considered by the court it has the same force as against the intervenors as it had against Mrs. Mathieson prior to the intervention. The propriety of a special order in a court of equity for the reading and consideration of such evidence in favor of subsequent intervenors as against those who have had full opportunity to examine and cross-examine witnesses and adduce or oppose the introduction of documentary evidence is well settled; and it is immaterial that witnesses whose depositions or testimony it is proposed to read are no longer living. 1 Greenl. on Ev. § 553; 3 Greenl. on Ev. § 341; 1 Dan. Ch. Pl. & Pr. *869, *870; Dawson v. Smith's Will, 3 Houst. (Del.) 335; Wade v. King, 19 Ill. 301, 308; Evans v. Evans, 23 N. J. Eq. 180; 2 Wig. on Ev. §§ 1386, 1387; Leary v. United States, 224 U. S. 567, 576, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029; Nevil v. Johnson, 2 Vern. 447; Williams v. Broadhead, 1 Sim. *151.

[4] And it is sound doctrine that the evidence, oral and documentary, touching points common to the claims of the complainants and subsequent intervenors cannot be added to or affected by the introduction of further evidence after the intervention, for the reason that the introduction of such further evidence would practically amount to a rehearing of the case on such points, already determined on full consideration, and the further reason that its introduction would tend to create confusion, lead to contradictory findings on the same points, encourage perjury and defeat the due administration of justice. To permit the defendants after intervention to go into evidence touching points common to the claims of Mrs. Bastian and Mrs. Mathieson respectively and covered by the evidence in this case adduced before the intervention would be as objectionable, and for the same reasons, as to permit the plaintiff in a cross-bill, filed after publication in the original cause, to go into evidence touching points covered by the evidence so published. According to the settled chancery practice, subject to certain exceptions not pertinent here, this can not be done. In Field v. Schieffelin, 7 Johns. Ch. (N. Y.) *251, 11 Am. Dec. 441, Chancellor Kent said:

"It is a well established rule, that a cross bill must be brought before publication has passed in the first cause, unless the plaintiff in the cross bill go to a hearing on the depositions already published. Rep. temp. Finch, 103; Wyat's P. R. 85; Cooper's Pl. 87; 1 Johns. Ch. Rep. *64. The object of the rule is to prevent the danger of perjury. It is founded in sound policy, and in a just sense and deep knowledge of the seductions of interest, and the force and influence of the passions. * * * The court will sometimes at the hearing, and in its discretion, direct a cross bill; but this is when it appears that the suit is insufficient to bring before the court the

rights of all the parties, and the matters necessary to a full and just determination of the cause. Mitf. Pl. 77. And these instances which I have mentioned, are the utmost length to which the court has gone in the admission of cross bills; they must be brought before publication, and testimony taken in them afterwards cannot be used, unless where some new matter of defense, as a release, arises after the cause is at issue, or the case appears, at the hearing, too imperfect to reach and settle the rights of all the parties. It is too late, after publication, to introduce new and further testimony to the matter in issue, by the contrivance of a cross bill. It would be doing, in an indirect way, per obliquum, what is forbidden to be done directly. * * * It is infinitely important to the due administration of justice, that the rules of evidence should be stable, and not made to yield to the convenience, or even hardship, of a particular case. If a cross bill could be filed in such a stage of the cause as is presented in this case, and to enable the party to make a fuller defence, 'by putting in issue and establishing the matters aforesaid, (and which were the matters in issue in the original cause,) and such other matters as he might be advised to establish,' the practice of the court would be broken up; litigation would become oppressive, vexatious, and interminable; the door would be opened for fabricated testimony to supply defects, and remove the pressure upon the case; and arbitrary discretion would be substituted for established rules."

In the above case there was an application for a rehearing, as there was in the case now pending, and also for leave to file a cross bill, and both were denied. Touching the rehearing sought the court said:

"If the Chancellor is satisfied that the cause has been exhausted by argument, and if he has given to the case the best examination in his power, and has arrived to a conclusion which satisfies his judgment, I see no propriety, nor use, nor justice, in granting a rehearing. Lord Thurlow once refused to grant it; and I think that this case, under all its circumstances, is one in which the discussion should be closed in this court, and the defendant put to his regular constitutional remedy, by appeal."

To allow the defendants to go into further evidence as to matters in issue common to both claims, and testified to before the intervention, would essentially involve a rehearing of this cause, which, under the circumstances, would be both improper and unjustifiable.

The order above quoted, however, does not have the effect of precluding either the intervenors or the defendants from adducing evidence not touching points common to the claims of the intervenors and their co-complainants but relating to points personal to the intervenors and not affecting their co-complainants.

[5] After the intervention the issue raised by the intervening petition and pleadings were referred to an examiner for the taking of evidence germane thereto, who took and returned certain evidence adduced by the intervenors and defendants respectively. Some of the evidence so returned was on objection suppressed by this court as having been taken under improper insistence of the counsel for the defendants. See Scott v. Paschall, 12 Sim. *550; Paschall v. Scott, 1 Phillips, *110. The evidence so suppressed related to points strictly common to the claims of Mrs. Mathieson and Mrs. Bastian respectively, touching which the defendants had prior to the intervention made an exhaustive examination of witnesses and documentary evidence. This cause came to a final hearing on the evidence taken therein prior to the intervention and on the evidence taken and returned by the examiner other than that suppressed by the court as above men-

tioned. The lien claim of Mrs. Bastian is in all respects as strongly supported as was the lien claim of Mrs. Mathieson, and consequently there must be a decree in favor of both of them, declaring that they are each entitled in equal shares to the sum of $16,000 which, under the will of Thomas Jamison and by virtue of proceedings had pursuant to it became chargeable against and a lien upon the said three farms in the shares and proportions set forth in the opinion of this court filed in this cause November 8, 1915 (228 Fed. 345, 387), together with interest thereon at the rate of six per cent. per annum from May 1, 1886, the date of the death of their father, Edgar Jamison; and further, that one equal third part of the total costs in this cause to be taxed by the clerk shall be paid by the defendant Eliza C. Green, one other equal third part thereof by the defendants Lawrence Lofland and Martha Lofland, and the remaining equal third part thereof by the defendant John F. Biggs; and further, that unless within sixty days next following the date of the decree to be entered pursuant to this opinion the defendants Eliza C. Green, Lawrence Lofland and Martha Lofland, and John F. Biggs, respectively, owning or claiming to own the said three farms, shall pay or cause to be paid to Mrs. Mathieson and Mrs. Bastian, respectively, in equal shares the aggregate sums of money including principal and interest, chargeable against and a lien upon the said farms respectively, together with interest upon said aggregate sums at the rate aforesaid from and after the date of said decree until payment, and shall pay to the clerk costs accrued up to the time of such payment, in the parts and proportions aforesaid, the three farms or such of them with respect to which the defendants or defendant so owning or claiming to own the same shall have omitted to make or cause to be made such payment or payments, shall be exposed to sale and sold after such notice, by such person, in such manner and on such terms and conditions as shall be provided in the said decree, for the purpose of paying and satisfying all or any part of the aggregate sum or sums hereby declared to be chargeable against and a lien upon the said farms and due and payable to the said Mrs. Mathieson and Mrs. Bastian, or either of them, remaining unpaid, together with costs as aforesaid, and interest at the rate of six per cent. per annum from and after the date of said decree; and further, that the proceeds of sale shall be applied and distributed as shall be directed in the said decree; and further, that the court shall retain jurisdiction of this cause and the right to make from time to time such further orders and decrees therein as may be necessary to effectuate its object and as to justice shall appertain.

A decree will be entered in accordance with this opinion.

FOX FILM CORP. v. CITY OF CHICAGO et al.

(District Court, N. D. Illinois. August 31, 1917.)

1. INJUNCTION ⊜77(1)—AUTHORITY OF COURT OF EQUITY—ISSUANCE OF INJUNCTION.
   Where the refusal of a municipal officer to grant the permit, required as a prerequisite for the exhibition of a moving picture, amounts in law to an abuse of discretion, whereby property rights are or will be injuriously affected, a court of equity has jurisdiction to enjoin such officer from refusing the permit.
2. THEATERS AND SHOWS ⊜1—MOVING PICTURES—RIGHT OF EXHIBITION.
   The natural right of every man who has a moving picture film is to exhibit it; but for the good of society the right of exhibition may be denied, where it would be violative of laws or ordinances.
3. THEATERS AND SHOWS ⊜1—MOVING PICTURES—EXHIBITION—REFUSAL OF PERMIT.
   Under a municipal ordinance, providing that permits for the exhibition of moving pictures shall not be granted, if the picture be immoral or obscene, or portrays any riotous, disorderly, or other unlawful scenes, or has a tendency to disturb the public peace, a permit to exhibit a moving picture film, which contains scenes of torture that may be terrifying and horrifying, cannot be denied; the picture not being one falling within those prohibited by the ordinance.
4. WORDS AND PHRASES—"ABUSE OF DISCRETION."
   "Abuse of discretion" does not necessarily mean willful intent to do harm, or actual exercise of the discretion with willful intent to violate the law; and such abuse is presumed where an officer, having discretion, acts wholly outside of the law, notwithstanding there is no evidence of an intent to so act.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abuse of Discretion.]

In Equity. Suit by the Fox Film Corporation, a corporation, against the City of Chicago and others. Preliminary injunction issued.

Charles P. Schwartz, of Chicago, Ill., for plaintiff.
Leon Hornstein, of Chicago, Ill., for defendants.

ALSCHULER, Circuit Judge. [1, 4] I conclude from this presentation that this court has jurisdiction in a case where the refusal of the permit amounts in law to an abuse of discretion of the officer with whom discretion is vested, and whereby property rights are or will be injuriously affected. In this case of diversity of citizenship of the parties, this court would have jurisdiction generally. By an abuse of discretion is not necessarily meant a willful intent to do harm, or an actual exercise of the discretion with willful intent to violate the law, which in this case is the ordinance. Where the officer, having the discretion, appears from what is before the court to have acted wholly outside of the law, the abuse of discretion would be presumed, notwithstanding there may be nothing before the court from which to infer any deliberate intent to act outside of the law; and here, beyond the general assertion of conclusions made in the bill, there is utterly no showing that would impeach the motives of the chief of police and his assistant in the refusal to grant this permit, and I will assume for

the purposes of this case that there has been in the regular and usual way a refusal to grant this permit, that is, the general permit which was refused.

[2] It seems to me that this entire matter must be determined from the ordinances, which require the permit as a prerequisite for the exhibiting of a picture. I need not repeat the ordinance, but section 1627 undertakes to lay down the conditions under which a permit may be refused. The natural right of every man who has a picture film is to exhibit it. But, for the good of society, we recognize the right to require that an inspection and examination be made, and to refuse the exhibition where the tendency would be violative of laws or ordinances.

[3] Now, section 1627 of the ordinance undertakes to specify those conditions under which the officer, to whom the film is by ordinance required to be exhibited for the purpose of obtaining a permit, may refuse it. The officer would have no discretion to refuse a permit for causes which are not set out in section 1627, which is in fact the source of his power to refuse such permit. The ordinance provides that permits shall not be granted, if the picture is immoral or obscene, or portrays any riotous, disorderly, or other unlawful scenes, or has a tendency to disturb the public peace.

The second deputy, Mr. Funkhouser, has very frankly, fully, and presumably fairly stated in his affidavit, which has been filed, what he found with reference to this film. If he had found that it was immoral, that it was obscene or otherwise objectionable under the ordinance, I should be very slow to disturb his conclusion upon that proposition. I would not feel that it was the function of the court to substitute its judgment for the judgment of the functionary created by law to pass thereon; but yet I may, in making that statement, be according to him a larger power and a greater conclusiveness of his finding than is warranted by law; but, if he had so found, I would, as at present advised, be very slow to disturb this finding, in the absence of evidence that arbitrarily, fraudulently, or corruptly, or with absolute want of reason, he had refused a permit. But he frankly says that the motion picture film is not of a character which would be regarded as immoral or obscene or otherwise objectionable under said ordinance, if exhibited to adults only. That conclusion he supplements by stating more fully in his affidavit the nature of the picture. While he concludes that it would be objectionable under the ordinance if it were exhibited to children under the age of 21 years, yet he does not stop with that. He states wherein the impropriety exists, and very frankly points out what are the facts from which he concludes that as to children it does violate the ordinance.

From a perusal of his affidavit I find and conclude there is nothing that he stated there which, under the ordinance, would be considered immoral, obscene, or unlawful, or otherwise objectionable, but that the objection consists wholly in the horrifying nature of the tortures which are portrayed as inflicted upon the hero of the play, and his ultimate shooting by a firing squad. Now, I do not believe that from his own portrayal of the play, on his own depicting in his affidavit of the facts, upon which he bases his conclusion, his action is within the authority of the ordinance.

The amendatory ordinance of July 2, 1914, is peculiar. It proceeds upon the assumption that the picture has been found to be immoral, obscene, or otherwise objectionable, as described in section 1627; but, notwithstanding that, it empowers the chief of police to issue the permit for the exhibition of that picture, however immoral or objectionable it may be, provided only that those under 21 years of age are excluded from plays of the exhibition. Now, this finding, therefore, that it is not immoral or obscene, or otherwise objectionable under the ordinance as to adults, seems to me of itself would place the picture in the category of those which do not come within the prohibition of section 1627; but it is not here necessary, and I do not undertake to construe the amendatory ordinance. The mere fact that scenes of torture as described in Mr. Funkhouser's affidavit may be terrifying and horrifying does not bring the film within the purview of section 1627, which authorizes a permit to be refused only under the enumerated conditions of that section. In this view I need say nothing of the 20-odd affidavits of persons, some of whom happen to be known to the court, and some of them not known to the court, to the effect that the picture is not objectionable, that it is moral, and does not come within the objections enumerated in section 1627, aside from the statements of something over 100 persons who give it approval.

I do not know how far the court, in passing upon a preliminary motion of this kind, can rely on a mere statement, not made in the form of affidavits, and I do not consider them in passing upon this motion for preliminary injunction. I am satisfied, from the showing here, that the statement made in the affidavit is a truthful and sincere statement of Mr. Funkhouser, and on the facts of which as there stated he recommended refusal of the permit, and that accordingly the chief of police refused the permit upon grounds wholly outside of those enumerated in the ordinance, as grounds on which alone there is any power or right to refuse the permit.

Under these circumstances, I believe the preliminary injunction prayed for should be granted.

GIVENS v. WIGHT et al.

(District Court, N. D. Texas, Ft. Worth Division. January 4, 1918.)

No. 770.

1. REMOVAL OF CAUSES ⟸3—DIVERSITY OF CITIZENSHIP—FEDERAL EMPLOYERS' LIABILITY ACT.

Employers' Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 (Comp. St. 1916, § 8662), declares that no case arising under the act and brought in any state court of competent jurisdiction shall be removed to any court of the United States, while Judicial Code Act March 3, 1911, c. 231, § 28, 36 Stat. 1094 (Comp. St. 1916, § 1010), after providing for removal of causes, declares that no case arising under the federal Employers' Liability Act shall be removed to any court of the United States. *Held*, that cases arising under the Employers' Liability Act are not removable, even though there be diversity of citizenship between the parties.

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

2. REMOVAL OF CAUSES ⟸3—GROUND OF REMOVAL—PETITION.
In determining whether plaintiff's cause was one arising under the Employers' Liability Act, and hence not subject to removal on ground of diversity of citizenship, the federal court can look only to plaintiff's petition.

3. REMOVAL OF CAUSES ⟸3—GROUND OF REMOVAL—ACTIONS ARISING UNDER FEDERAL EMPLOYERS' LIABILITY ACT.
The administratrix of a railroad employé sued to recover damages for his death, praying recovery of damages under the Employers' Liability Act in case it should be determined that defendants and deceased were engaged in interstate commerce at the time of the injury, but under the state statutes of Texas in case the evidence failed to show that fact. *Held*, that as the petition, which was in the alternative, set forth two grounds of recovery, one under the state statutes which was removable, and the other under the federal Employers' Liability Act, which was not removable, the joinder of the cause of action which was removable waived the prohibition against removal in the Liability Act; both causes of action being cognizable in the federal courts.

Action by Mrs. Nora Givens, administratrix, against Pearl Wight and J. L. Lancaster, as receivers of the Texas & Pacific Railway Company, begun in state court and removed by defendants to the federal court. On motion to remand. Motion overruled.

Randell & Randell, of Sherman, Tex., for plaintiff.
H. C. Shropshire, of Weatherford, Tex., for defendants.

SMITH, District Judge. This action was commenced in the district court of Palo Pinto county, Tex. By timely petition and bond filed by defendants it was removed to this court, and plaintiff now moves to remand, "on the ground and for the cause that this cause was improperly removed from said state court to this court, and that this court is without jurisdiction to hear and determine the same." The defendants base their right of removal on an allegation of diversity of citizenship, which allegation is not controverted.

[1] The suit is against the defendants, as receivers of the Texas & Pacific Railway Company, to recover damages for the death of plaintiff's intestate, W. W. Givens, whose death is alleged to have resulted from personal injuries received by him through the negligence of the defendants and their servants, while he was in the employ of the defendants, and while he was operating a train on said railway as a locomotive engineer; and plaintiff contends that, notwithstanding diversity of citizenship, the case is not removable, because it arose under the Employers' Liability Act (as amended by Act April 5, 1910, 36 Stat. 291, c. 143). Section 6 of said act, as amended, provides:

"No case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

And section 28 (chapter 3, "District Court, Removal of Causes") of the Judicial Code of the United States (Act March 3, 1911, c. 231, 36 Stat. 1094), after providing for removal of causes, says:

"Provided, that no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight, or any

amendment thereto, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States."

Construing these statutory provisions, it has been held in a number of cases that, as they are all-embracing in their language and specify no exceptions, cases arising under said Employers' Liability Act are not removable, even though they be cases of diverse citizenship. St. J. & G. I. Ry. Co. v. Moore, 243 U. S. 311, 37 Sup. Ct. 278, 61 L. Ed. 741; Southern Ry. Co. v. Lloyd, 239 U. S. 496, 36 Sup. Ct. 210, 60 L. Ed. 402; Southern Ry. Co. v. Leslie, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. Ed. 1478; Teel v. C. & O. Ry., 204 Fed. 918, 123 C. C. A. 240, 47 L. R. A. (N. S.) 21; McChesney v. Illinois Central Ry. Co. (D. C.) 197 Fed. 85; Ullrich v. New York, N. H. & H. R. Co. (D. C.) 193 Fed. 768; Lee v. Toledo, St. L. & W. Ry. Co. (D. C.) 193 Fed. 685; Strauser v. Chicago, B. & Q. Ry. Co. (D. C.) 193 Fed. 293; Symond v. St. L. & S. E. Ry. Co. (C. C.) 192 Fed. 353; Hulac v. Chicago & N. W. Ry. Co. (D. C.) 194 Fed. 747. Now, if this case falls within the foregoing well-settled rule—that is, if it is one arising exclusively under the Employers' Liability Act—it should be remanded.

[2, 3] We must look alone to the plaintiff's petition to determine this question. That pleading, after describing the manner of the intestate's death and imputing same to the negligence of defendants and their servants, makes the following allegations:

"Plaintiff charges that the running of said train, and especially train No. 4, upon which deceased was engineer, was then and there for the transportation of passengers and goods in interstate commerce, in which defendants and deceased were then and there engaged at the time of deceased's injuries and death; and plaintiff sues under an act of the United States Congress entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April 22, 1908, and the amendments thereto, for the exclusive benefit of the wife of the deceased, Nora Givens; and if plaintiff is mistaken as to defendants and deceased being engaged in interstate commerce at the time of his injuries and death, then plaintiff sues under the laws of the state of Texas for the sole and exclusive benefit of the surviving wife of deceased, the said Nora Givens, and Mrs. Bettie Givens, the surviving mother of deceased."

Thus it will be seen that plaintiff bases her right to recover upon the Employers' Liability Act if the evidence shall disclose that defendants and deceased were engaged in interstate commerce at the time of the injury, but upon the statute of the state of Texas if the evidence fails to so show. The petition is double in its nature—sets forth in the alternative two different grounds of recovery, one based upon a federal statute, and not removable, and the other based upon a statute of the state of Texas, and removable. In other words, the plaintiff's petition substantially contains two counts, and, although they relate to the same transaction, they nevertheless set up two different causes of action, and, had they been set up in two separate cases, one would have been removable and the other not.

Therefore the question arises: Does the joining of a nonremovable cause of action in a state court with one that is removable prevent the removal of the latter? This question is answered in the negative in the following cases: Flas v. Illinois Central Ry. Co. (D. C.) 229 Fed. 319; Strother v. Union Pacific Ry. Co. (D. C.) 220 Fed. 731;

Sharkey v. Port Blakely Mill Co. (C. C.) 92 Fed. 425. In the case of Strother v. Union Pacific Ry. Co. Judge Van Valkenburgh uses the following reasoning, in which I fully concur:

"It rests with the plaintiff to determine whether he shall state a cause of action solely under the Employers' Liability Act, and therefore incapable of being removed, or whether he may unite with it, in the alternative, a cause of action that may be removed. If he adopts the latter course, does he not subject himself to the exercise of all the rights which a defendant may legitimately claim? Beyond question both causes of action are cognizable in the federal court, whether originally brought there or removed by consent. The provision against removal is a privilege granted to the plaintiff, which he may waive. If a cause of action containing all the elements of removability be joined with a count stating a cause of action not originally cognizable in the federal court, nevertheless the defendant may remove the former cause of action, and this will carry the entire case with it. Sharkey v. Port Blakely Mill Co. [C. C.] 92 Fed. 425. The defendant cannot be shorn of his right to remove the former action because of such a joinder, and inasmuch as the plaintiff should and has joined in one petition all causes of action arising out of the same transaction, the removal should not, and does not, have the effect of splitting such causes, retaining one in the federal court, and remitting the other to the state court. I do not think the prohibition against removal contained in the federal act is of greater force than the denial in the Judiciary Act of the right to bring a suit, otherwise cognizable in a federal court, in a specific jurisdiction. It is conceded that the latter inhibition may be waived, and so equally may the former."

I am of the opinion that this entire case as presented by the plaintiff's petition is properly removed to this court, and therefore the motion to remand is overruled.

THE ALLANWILDE.

(District Court, D. New Jersey. November 27, 1917.)

SHIPPING ⊂=51—BREACH OF CHARTER—EFFECT OF WAR EMBARGO.

A sailing vessel was chartered to carry a cargo to a French port by a charter party, requiring prepayment of the freight and providing that "freight earned retained and irrevocable, vessel lost or not lost," the voyage was commenced, but the vessel was compelled by stress of weather to seek a port of refuge, and returned to New York, from which she sailed. After such return the Federal Exports Administrative Board placed an embargo on shipments by sailing vessels going through the war zone, which prevented a resumption of the voyage at that time. The owner compelled the charterer to unload the cargo, but refused to refund the freight paid. *Held*, that such action was a breach of the charter; that the rights of the parties were the same as though the voyage had not been commenced; that the freight was not earned, because the cargo was not forwarded, nor had the ship been lost; that under the charter the owner was bound to either forward the cargo or refund the freight money; and that, having elected to abandon the voyage and not to tranship the cargo, it was equitably liable in damages to the amount of the freight paid.

In Admiralty. Suit by the Vacuum Oil Company against the schooner Allanwilde; the Allanwilde Transport Corporation, claimant. Decree for libelant.

Barry, Wainwright, Thatcher & Symmers, of New York City (John C. Prizer, of New York City, of counsel), for libelant.

Duncan & Mount, of New York City (O. D. Duncan and Courtland Palmer, both of New York City, of counsel), for claimant.

RELLSTAB, District Judge. The same reasons—i. e., inability to bond the vessel and the need of putting it into service as soon as possible—that prompted me to hear this case out of its turn impel me now, at the close of the argument, to decide it. I am mindful that whatever decision this court may make, or whatever may be the final decision on review, one, if not both, of the parties will suffer loss. The charter party entered into was a legal contract, and under it the shipowner was obligated to transport the cargo to a port in France, subject to such exceptions and exemptions as the charter mentioned and which the maritime law annexes to such a contract.

The Allanwilde—a sailing vessel—began the voyage, but, under the stress of a heavy gale, was compelled to seek a port of refuge. It returned to New York, the port from which it started. The return was justified, and neither the vessel nor the owner can be charged with fault in that respect. Between the dates of leaving and returning to the port of New York, the Exports Administrative Board—a federal agency—promulgated a rule which, while it continued in force, prevented this vessel from resuming the voyage. This rule is as follows:

"The Exports Administrative Board, in accordance with requests made by the United States Shipping Board and by the Navy Department, has instructed the Director of the Bureau of Export Licenses not to grant licenses for any proposed shipments by sailing vessels going through the war zone. It is, of course, obvious that steamers can navigate the war zone with less danger than slow-sailing craft, and sailing ships, if used in safer waters, would to an extent release steam vessels now used in such waters. The attention of shippers is therefore called to the fact that clearance will be refused sailing vessels destined to proceed through the war zone, regardless of the fact that the goods themselves may have already been licensed. Licenses will be granted in the future for shipments to European countries only on condition that the goods are to be shipped by some vessel other than a sailing vessel. The board will revoke licenses covering goods to be shipped through the war zone, if any shippers attempt to ship them by sailing vessel."

This governmental act did not abrogate the charter party, but it did prevent an immediate execution of it. Under the terms of the charter party the shipper had prepaid the freight. The shipowner, finding itself so restrained, concluded to abandon the voyage. It notified the shipper to unload the cargo, and that upon a failure to do so it would unload and store the same at the shipper's expense. It also refused to return the freight money, claiming that it had earned it under the following provisions of the charter party:

"Freight to be prepaid net on signing bills of lading in U. S. gold or equivalent, free of discount, commission, or insurance. Freight earned retained and irrevocable, vessel lost or not lost."

The libelant, under protest, unloaded the cargo and filed this libel, alleging a breach of the charter party and claiming damages by reason thereof.

The failure to proceed with the carriage of the cargo was not due to any fault of the shipowner, but to vis major. Such an interference

was not guarded against in the contract, and may be said to have been unanticipated. The return of the vessel to the port of departure did not absolve the shipowner from carrying out the charter party. As to that obligation, it was the same as if the vessel had never left its dock. The government's embargo was not directed against cargoes of the kind covered by this charter party, but against sailing vessels entering particular waters known as the "'war zone." In my judgment, the reciprocal rights and obligations of the parties at the time of the government's embargo are to be determined as if the vessel had never started on its voyage. The embargo did not prevent a transhipment of the cargo, or prevent the shipowner retaining the cargo awaiting a lifting of the restriction.

In such circumstances the shipowner, it seems to me, was bound to either so retain or tranship the cargo. It did neither, but, for the purpose of having the use of its vessel in the waters not covered by the government's embargo, it ordered the shipper, as already noted, to remove the goods and retained the freight money as earned.

In my judgment, the shipowner's failure to do either, and its forced return of the cargo, and refusal to give up the freight money, constituted a breach of maritime duty. The clause, "freight earned retained and irrevocable, vessel lost or not lost," cannot mean that prepaid freight is earned the moment it is paid, regardless of any forwarding of the cargo. The vessel was not lost, and no forwarding of the cargo had taken place. It is conceded that, if the embargo had taken effect before the vessel had started on the voyage which proved to be futile, and the shipowner had insisted that the cargo should be retaken by the shipper, the freight money would have had to be returned.

To my mind, the fact that a futile attempt had been made to forward the cargo gave the shipowner no greater rights when its later attempts to make a new start were frustrated by the government's embargo. To absolve itself at that time of all obligations to forward the cargo, mediately or immediately, in order to have the use of the vessel for other purposes, it should at least have returned the freight money which had been paid as compensation for its transportation. Such a return and the sharing of the losses incurred in consequence of the embargo is deemed equitable. In such circumstances, the shipowner loses the expense of loading the vessel, its use until unloaded, and the opportunity to earn the freight money under the charter party, and the shipper loses the expense of unloading and the benefit of the lesser freight rate secured by said contract. To permit the shipowner to retain the freight money, after insisting on the shipper retaking his cargo, would, to my mind, be highly inequitable. Not only would the shipper be denied the benefits which it would have derived, had the shipowner carried out the charter party, but it would also have to pay for services agreed to be performed by the shipowner, but not rendered; while the shipowner would, in addition to retaining the unearned freight money, have the commercial use of its vessel during the very period it was chartered for the shipper's use. The embargo in such a case, instead of being a detriment, would be a decided benefit—a veritable windfall—for the shipowner. So inequitable would this result be that a court controlled by equitable principles should not be a

party to its consummation, unless constrained by strict law. No such law has been brought to my notice.

The libelant, in my judgment, is entitled to a decree for a return of the freight money, but nothing more. The record shows that the libelant was put to some expense in unloading the cargo from the Allanwilde, and that in shipping this cargo in a vessel that may enter the war zone a freight almost double that paid to the shipowner in this case will have to be paid; but these expenses and larger freight rates are such as, in a balancing of the equities and apportioning of the losses incident to the enforcement of the embargo, should be borne by the shipper on a return to it of the freight money.

The record does not disclose that the shipowner, after returning to the port of departure, was put to any expense in caring for the cargo, as distinguished from that resulting to it from caring for the vessel. If there are any such expenses, and counsel cannot agree upon the amount thereof, a reference will be made to ascertain them. Otherwise, a final decree in the usual form may be entered in favor of the libelant for the sum of $49,745.50, the amount of the freight money prepaid as aforesaid.

UNITED STATES v. WELSH.

(District Court, S. D. New York. December 27, 1917.)

1. CRIMINAL LAW ⟸395—FEDERAL OFFICERS—WHO ARE.
   Where a custom house guard requested a private detective to act for him during his temporary absence, and the detective searched accused and found that he was unlawfully bringing into the United States a letter, the detective must, in a prosecution against accused, be treated as a United States officer pro hac vice.
2. CRIMINAL LAW ⟸395—UNLAWFUL SEARCH—EFFECT.
   Though Const. Amends. 4, 5, declare 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 that no person shall be compelled in any criminal case to be a witness against himself, yet where defendant, unlawfully bringing into the United States a letter, was seized and the letter taken from his person by one acting for an officer of the United States, the letter may be used against him in a criminal prosecution therefor; for, the gist of the offense being the bringing of the letter into the United States, defendant does not come within the protection of the constitutional provisions.

Thomas Welsh was indicted for bringing into the United States a letter, and he moves to quash the indictment, and for return of the letter. Motions denied.

Martin Conboy, of New York City, for petitioner.

Francis G. Caffey, U. S. Atty., and James W. Osborne, Second Asst U. S. Atty., both of New York City.

AUGUSTUS N. HAND, District Judge. The defendant, a seaman on board the steamship Celtic, was going ashore when a detective named McGinnis, employed by the steamship company, asked him if he

had any letters on his person. He replied that he had not. Thereupon McGinnis searched him, felt papers in his right hip pocket, and asked him to show the papers. Welsh then took a letter out of his pocket and delivered it to McGinnis, but immediately thereafter seized it, tore it in two, and threw it on the ground. McGinnis picked it up and delivered it to one Martin, the customs guard. It was eventually turned over by the Treasury Department to the District Attorney, and upon it the defendant was indicted for unlawfully bringing in the letter. The defendant moves for the return of the letter on the ground that the seizure was contrary to the Fourth and Fifth Amendments of the Constitution.

[1] His counsel argues that under the cases of Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367, the evidence thus procured could not be used against the defendant. I do not think the government can rest upon the proposition that it was not liable for the acts of McGinnis, because he was a private detective. Martin, the custom house guard, appears to have asked him to act for him while he was temporarily absent, and in the search he must be regarded as a government official pro hac vice.

[2] But, assuming this to be the fact, the cases quoted do not apply to the present situation. They only go so far as to hold that private books and papers cannot be seized and used as incriminating evidence. The corpus delicti itself has not, I think, been held incapable of detention and production to establish the crime. If the defendant is right, testimony of a witness of a murder, though furnishing the only evidence, would be excluded, and the corpse could not be presented before the coroner's jury, if the witness discovered the murder by rushing into a house without a search warrant, where he heard cries of distress. Here the letter is in no real sense the property of the defendant, but is the very unlawful thing imported contrary to the statute.

I think the District Attorney is right in urging that any one could arrest the person carrying it, who was thus committing a felony in his presence. To be sure, the man making the arrest did not know that a felony was being committed. He took the risk of civil and perhaps criminal actions for assault and battery if his suspicions turned out to be without foundation; but in this case it appears on the face of the indictment, and from the evidence adduced, that the suspicions were well founded, and the defendant was engaged in the commission of a felony. The constitutional safeguards against self-incrimination do not prevent the arrest of men engaged in the commission of crimes, or the seizure of property whereby the crime is being effected.

The motion for the return of the letter must be denied.

BANK OF RAGLAND v. HUDSON.

In re RAGLAND BRICK CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1918.)

No. 3155.

1. BANKRUPTCY ⊂⊃461—CONTROVERSIES—APPEAL.
An appeal from an order sustaining the petition for permission to remove brick manufactured in the plant of bankrupt by its lessee, which was opposed by a bank, which made advances under a contract with the bankrupt and its lessee, falls within Bankruptcy Act July 1, 1898, c. 541, § 24a, 30 Stat. 553, allowing appeals in controversies in bankruptcy, the time for perfection of which is six months, instead of section 25a, requiring appeals in bankruptcy proceedings to be taken within ten days after rendition of the judgment or order appealed from; it appearing that the petitioner claimed the brick by bill of sale, and the decision involved the construction of the contract entered into between the bank, the bankrupt, and its lessee.

2. CONTRACTS ⊂⊃194—CONSTRUCTION—LIEN.
The bankrupt, which had owned and operated a brick plant, having demised its plant, entered into a contract with a bank, whereby the bank agreed to make advances to the lessee to enable it to manufacture brick. The contract further provided that the bank should have a lien on all brick manufactured during each month, but authorized the bankrupt to sell the brick manufactured each month, and to make monthly settlements. *Held*, that one who purchased the brick manufactured in the months preceding the month in which the lessee ceased operations is entitled to such brick as against the bank, even though the brick manufactured during the last month in which the lessee abandoned operations was insufficient in value to repay advances made during that month; it being obvious that, as the bank contemplated regular monthly disposal of the product, its lien for advances in any month could not extend back to brick already released.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

In the matter of the bankruptcy of the Ragland Brick Company, in which R. M. Hudson intervened, petitioning for permission to ship certain bricks and for order that the trustee show cause. The Bank of Ragland also intervened, praying dismissal of the petition. An order of the referee in favor of the petitioner having been upheld by the District Court, the Bank of Ragland appeals. Affirmed.

This was an appeal from an order of the District Court for the Southern District of Georgia, affirming an order made by the referee in bankruptcy upon the intervention of appellee, R. M. Hudson, claiming a fund representing the proceeds of the sale of certain brick, which had been delivered to and sold by the appellee under a stipulation between him, the appellant, and the trustee in bankruptcy. The appellant and appellee each claimed title to the brick—the former by virtue of a chattel mortgage agreement, executed on November 11, 1913, by the bankrupt, one N. W. Quillin, its lessee, and the appellant; the latter by virtue of a sale agreement and bills of sale executed to it by the bankrupt. The referee determined appellee's title to be superior, and the District Judge affirmed his conclusion, and from the order of the District Court this appeal is taken.

The facts, so far as necessary to be stated for a proper consideration of the merits of the case, are as follows:

The Ragland Brick Company, a corporation of Bibb county, Ga., was adjudged a bankrupt on April 21, 1915. In due course, W. E. Martin, Jr., was elected trustee. The company owned and had been operating a brick plant at Ragland, in the state of Alabama. In October, 1913, it leased its plant to N. W. Quillin for a period of six months. The lease was subsequently renewed for an additional period of six months. The plant was operated by the lessee until some time in August 1914, when the lessee ceased to manufacture brick. At that time there was on the yard a large number of brick; several kilns of brick in process of manufacture, but had not been burned. This was the situation at the time the trustee took charge in May, 1915. In addition to the brick, the bankrupt company owned considerable real estate and equipment, which after numerous efforts of the trustee have been sold for the sum of $7,500. Contracts were made by the brick company—one with Quillin, who was to manufacture brick and sell the output to the brick company; the second with Quillin and the Bank of Ragland, under which the bank was to advance to Quillin moneys to be used in the payment of pay rolls and other expenses in manufacturing brick, and the brick company was to release its claim on the brick during the process of manufacture, and to pay to the bank a sum sufficient to discharge the indebtedness due the bank by Quillin when the brick had been manufactured and placed on the yard; and the third contract was with R. M. Hudson, by which the brick company sold to Hudson the output of the plant for the sum of $15 a thousand for No. 1 paving brick, payment to be made monthly. At the time of bankruptcy, Hudson had paid for more brick than were stacked on the yard for delivery to him, and Quillin was indebted to the bank in the sum of $3,000, with interest from September 20, 1914. The bank claimed title to the brick in process of manufacture and to 300,000 of the brick on the yards, or a sufficient number thereof to pay its indebtedness. R. M. Hudson was permitted by the referee to take possession of the brick on the yards, upon giving a bond to protect the bank in case the latter's claim should be held to be superior to Hudson's claim. The brick in process of manufacture have been sold, and of the proceeds $417.07 were turned over to the bank, and the proceeds of other brick, amounting to $1,000, have been paid to the bank, leaving a balance now due the bank of $2,034.64.

The contract between the Ragland Brick Company, N. W. Quillin, and the Bank of Ragland, entered into on November 11, 1913, provided in substance that Quillin should proceed at once with the manufacture of paving brick, and manufacture and place on the yards 300,000 No. 1 paving brick; that as soon as 300,000 brick were so placed the Ragland Brick Company should pay to the Bank of Ragland $3,000, to be applied on the indebtedness due by Quillin, lessee, to the bank for moneys advanced to him by the bank to pay labor and other expenses of Quillin in the manufacture of brick; that in the meantime, and until 300,000 brick were manufactured, the brick company released to the bank its claim on the brick in the process of manufacture; that this course of dealing was to be repeated monthly; that Quillin was to keep at all times as near as possible 400,000 brick in process of manufacture, and as near as possible 300,000 No. 1 paving brick stacked on the yards; and that the loan to Quillin should at no time exceed $3,000. On the occasion of each monthly settlement, title to the No. 1 paving brick manufactured during the previous month passed out of Quillin, the lessee, and the brick became the property of the Ragland Brick Company, and thereafter the latter made a bill of sale to Hudson under the contract with Hudson, and they thus became Hudson's property. The Bank of Ragland was dealing with Quillin as lessee, but had knowledge of the fact that the Ragland Brick Company was selling its output of No. 1 brick to some one.

The contract of November 11, 1913, is as follows:

"The State of Alabama, St. Clair County:

"Know all men by these presents, that whereas, the undersigned, Ragland Brick Company, a corporation, by its president, Jesse H. Hall, and by authority of the board of directors, and N. W. Quillin, in his own proper person, and the Bank of Ragland, a corporation, by its president, W. T. Brown, and by authority of its board of directors, have this day and by these presents

entered into this contract, and on the consideration and mutual promises and covenants hereinafter contained and set forth, to wit:

"On October 20, 1913, the Ragland Brick Company leased to N. W. Quillin for a period of six months its brick plant situated and located in the town of Ragland, in said state and county, including all of its real and personal property pertaining to the manufacture and shipments of brick, and placed the said N. W. Quillin in possession of same, with all the rights and privileges connected therewith, except the reservations hereinafter named and set forth. The said N. W. Quillin is to proceed at once with the manufacture of paving brick at said plant, said paving brick to come up and to be subject to the standard specifications and tests of the various Southern cities. The said N. W. Quillin is to manufacture and place on the yard of the brick plant not less than three hundred thousand (300,000) of No. 1 pavers of the quality and such as will stand the test named above. Immediately when three hundred thousand No. 1 paving brick have been placed on the yard, the Ragland Brick Company covenants and agrees to pay to the Bank of Ragland the sum of three thousand ($3,000) dollars for the account of the said N. W. Quillin, this fund to be applied to any indebtedness that may be owing to the said Bank of Ragland by the said N. W. Quillin. Until the manufacturing and placing on the yard of the three hundred thousand brick named above, the Ragland Brick Company hereby transfers to the Bank of Ragland its lien and title in said brick to secure the said Bank of Ragland for any advance made to the said N. W. Quillin, while the brick are being manufactured and placed on the yard.

"During the period covered by said lease, the said Ragland Brick Company releases to the Bank of Ragland its lien and title on all brick in process of manufacture, and on the 20th of each month the said Ragland Brick Company agrees to pay to the said Bank of Ragland nine ($9) dollars per thousand for all No. 1 paving brick shipped or stacked on the yard during the preceding month, and this arrangement to continue and be repeated during the six months covered by said lease, and the Ragland Brick Company binds itself, its successors and assigns, to the faithful performance of their part of the contract.

"In case three hundred thousand (300,000) brick of No. 1 paving quality should not be placed on the yards, the said N. W. Quillin binds himself to deposit with the Bank of Ragland the difference between the value of the No. 1 paving brick so piled, figured at $9 per thousand, and the total amount of money advanced to the said N. W. Quillin by the said Bank of Ragland.

"After the first lot of 300,000 No. 1 paving brick have been manufactured and placed on the yard, the said N. W. Quillin shall continue to carry on the business of making paving brick at said plant during the period covered by the said lease between the said N. W. Quillin and the said Ragland Brick Company, and the title and lien mentioned above shall automatically cover and attach to all brick in the process of manufacture, or that may be manufactured, shipped, or piled on the yard, and the said N. W. Quillin agrees to bind himself to keep as near as possible at all times not less than four hundred thousand (400,000) brick in the process of manufacture, and as near as possible three hundred thousand (300,000) No. 1 pavers on the yard, and the title to all brick in process of manufacture shall be and vest in the said Bank of Ragland to the right of the bank, and in the event that said N. W. Quillin should fail to comply with his contract with the said Bank of Ragland the said Bank of Ragland will have the right to complete the process of manufacture of said brick, and the said Ragland Brick Company agrees to carry out its contract; and in this event the Ragland Brick Company agrees to carry out with the Bank of Ragland its contract with N. W. Quillin, and pay to the Bank of Ragland all moneys earned under said contract between the said N. W. Quillin and the said Ragland Brick Company.

"The subsequent advancements to be made by said bank to the said N. W. Quillin under the terms of this agreement every two weeks for pay day, and then not to exceed at any time the equity of said N. W. Quillin in said brick, viz. $9 per thousand, f. o. b. cars or stacked on the yard; that if the said N. W. Quillin shall fail or refuse to comply with his part of the agreement, or

the renewal thereof, for or on account of any money received by him from said Bank of Ragland, then the said Bank of Ragland shall have the right to take possession and control of the property, and the Ragland Brick Company will pay to the Bank of Ragland, for all brick delivered to them, the same as they have agreed to pay to the said N. W. Quillin, and from the proceeds arising from such sale of brick by the Bank of Ragland to the Ragland Brick Company the Bank of Ragland will apply same to the payment of any and all sums of money which may be due said Bank of Ragland by the said N. W. Quillin; and the remainder, if any, arising from such sale, will be paid to the said N. W. Quillin. The said N. W. Quillin is to make daily reports to the said Ragland Brick Company of brick manufactured and will make weekly reports to the said Ragland Brick Company and to the Bank of Ragland of all paving brick finished and shipped, or placed on the yard ready for shipment, and also the number of brick in process of manufacture or making, and which, under the terms of this agreement, are subject to the lien of said Bank of Ragland.

"The parties to this agreement mutually bind themselves to pay each other any damages which either one of them may sustain by reason of their failure to comply with the terms of this agreement.

"It is further understood and agreed that is [if] at the end of six months from October 20, 1913, the said N. W. Quillin desires to renew this contract with the Bank of Ragland for another six months, he shall have the right to do so, under the terms of this agreement, provided the said N. W. Quillin is not in default under this contract. It is further understood and agreed between the parties hereto that if on the termination of this contract, or on termination of any renewal thereof, the said N. W. Quillin is or shall be indebted in any sum whatever to the said Bank of Ragland on account of any money advanced him or loaned him for pay roll, or used to pay expenses of the manufacture of brick, the Ragland Brick Company guarantees the payment to the bank of any and all amounts due by the said Ragland Brick Company to the said N. W. Quillin, and the said N. W. Quillin hereby assents and directs the said Ragland Brick Company to pay to the said Bank of Ragland any amount which may be due him at the time of such default.

"It is further understood and agreed by all parties that at no time the bank's loan will exceed more than three thousand ($3,000) dollars, and that at all times there must be on yard and in process of manufacture brick of the quality as above described and agreed upon to cover any amount that might be due the Bank of Ragland any time.

"A copy of such lease of date of October 20, 1913, between the Ragland Brick Company and the said N. W. Quillin is hereto attached and made subject to all modifications and changes contained in this contract and agreement.

"In witness whereof, the Ragland Brick Company, by its president, and under its corporate seal, has hereto affixed its corporate name; the Bank of Ragland, by its president, has hereto affixed its corporate name and seal; and the said N. W. Quillin has hereto affixed his name on this 11th day of November, 1913.

Ragland Brick Company,
"[Signed] J. H. Hall, President.
"The Bank of Ragland,
"[Signed] Watt T. Brown, President.
"[Signed] N. W. Quillin."

T. B. Higdon, of Atlanta, Ga., for appellant.

Aldine Chambers, of Atlanta, Ga., Louis G. Smith, of Macon, Ga., and M. F. Goldstein, of Atlanta, Ga., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge (after stating the facts as above). [1] A motion to dismiss the appeal was submitted at the time of the sub-

mission on the merits. It was based upon the fact that the appeal was not taken within ten days from the date of the order appealed from, the contention being that it was an order allowing or rejecting a claim under section 25a of the Bankrupt Act. We hold, in conformity with our decisions in the case of Wuerpel v. Commercial Germania Trust & Savings Company, 238 Fed. 269, 151 C. C. A. 285, following the case of Hewit v. Berlin Machine Works, 194 U. S. 296–299, 24 Sup. Ct. 690, 48 L. Ed. 986, that the appeal was not taken under section 25a, but from an order in a controversy arising in bankruptcy proceedings from a court of bankruptcy under section 24a, and that the time for perfecting the appeal was six months from the date of the order appealed from. In view of the circumstances under which the delay in filing the transcript of the record here is shown to have occurred, we are not disposed to dismiss the appeal for this cause. The motion to dismiss is overruled.

[2] The decision of the case, as we see it, is controlled by the construction of the contract between the bankrupt, the Ragland Brick Company, the Bank of Ragland, the appellant, and N. W. Quillin, the lessee of the bankrupt of the brickyard at which the brick involved were made, and which was executed November 11, 1913, and which is set out in the statement of facts. Appellant contends that this contract gave it a lien on all brick in the possession of the bankrupt or its lessee, and stored on the brickyard, whensoever made. Appellee contends that the bank's lien covered brick in process of manufacture and such as were made and shipped during each month of the lease, only until the amount advanced by the bank to the lessee for the making of each month's output had been repaid it, and then ceased. It was conceded that the part of the fund in controversy arose from the sale of brick made prior to the last month's operation of the plant, for the advances on which the bank had been paid. The bank received the amount representing all brick sold that were made from advances made by it for the last month's operation, but not enough brick were made and sold during the last month's operation to reimburse the bank for the amount advanced the bankrupt's lessee during that month, and it seeks to collect the balance of its advances by going back to brick that had been made in previous months but still remained on the yard when bankruptcy intervened. These brick were covered by appellee's bills of sale, executed under his agreement with the bankrupt to purchase the monthly output of the bankrupt, which it, in turn, had bought from its lessee. The question of the respective priority of right of the appellee under his bills of sale, and of the appellant under its mortgage agreement, depends upon whether appellant retained any lien on brick made and stacked on the bankrupt's yard after the appellant bank had received its current monthly advances to the bankrupt out of the current monthly output of brick.

It appears from the record that the bankrupt and its lessee were unable to finance the current operations of the brickyard and had no security to offer for that purpose, other than the brick made out of the funds advanced for the cost of their making. Each month's expenses must be paid out of each month's output. However, the

monthly expenses had to be met before returns on brick made could be received. It was therefore necessary for some one to finance the operations by advancing during the month the pay roll and expense of making the brick made during that month. This the appellant bank agreed to do, taking as security for such advances a lien by way of chattel mortgage on the brick in process of manufacture, for the making of which the money was advanced, and while stacked on the yard and until sold. In this financial condition of the bankrupt, it was equally necessary for the bankrupt and its lessee to be assured of disposing of its output by sale, as soon as ready for shipment, so that it could currently reimburse the appellant bank its advances. To accomplish this feature, the bankrupt's lessee sold its output for the period of the lease to the bankrupt, which, in turn, resold it to the appellee for the same period, with the understanding conformed to in practice that bills of sale should be executed for each month's output, and paid for by appellee, out of the proceeds of which payments the bank was to be and was monthly reimbursed its advances. While the appellant may not have known with whom the bankrupt had this arrangement, we have no doubt it knew that such an arrangement existed; otherwise, it would have been unwilling to enter into such an agreement with the bankrupt and its lessee, which otherwise would have been impossible of fulfillment by the bankrupt. Looking at the situation of the parties, and the necessity of leaving the current output of the bankrupt free for its disposition after manufacture, in order to make a workable arrangement for the operation and financing of the business of the bankrupt, we conclude that the appellant bank must have contemplated retention of its lien only until each month's production was sold, and until it was reimbursed out of the proceeds of the sale for the advances it had made on the faith of that month's production. Under this arrangement the appellee took the risk arising from a failure on the part of the bankrupt to pay the appellant's monthly advances from the purchase price of the brick appellee paid the bankrupt. If this was done, the lien of the appellant bank on the brick was released. Appellant took the risk of a failure on the part of the bankrupt's lessee to produce enough brick in any one month to repay it the advances it had made during that month. The taking of this risk by appellant was necessary to the conduct of the business, since, if the lien of appellant continued after the brick were made and the advances of appellant repaid, the bankrupt's power to dispose of them would have been taken away by the continuance of the lien, and its ability to repay the bank would have ceased. The arrangement contemplated a contemporaneous payment of the bank's advances from the proceeds of the sale of the brick, and a cessation of the bank's lien. Otherwise, the agreement would have been unworkable, or would have worked a fraud on appellee, if unaware of the existence or continuance of appellant's lien. The contract should not be construed to have such an effect, unless the language imperatively demands it. Its provisions are far from being clear. We think, however, they may fairly be construed as providing for the security of the bank by giving it a lien on each month's output for each month's advances, a lien which

was to be satisfied when those advances were repaid to it, thereby vesting in the appellee as purchaser an unincumbered title under his bill of sale to that month's production, though it remained stacked on the brickyard. This construction is the more reasonable in the view we have taken that the record amply shows that the appellant bank was cognizant that the bankrupt and its lessee had made a sale of its output to some purchaser for the six months period of the lease, and must have acquiesced in such a sale, since it afforded the only feasible plan for the bank to be repaid each month the advances made by it for brick made during the month. If the advances were not repaid as provided, the bank was given the right under its contract to possess itself of the plant and complete the making of the unfinished brick. The security of the appellant was evidently on the brick till disposed of. Provision for immediate payment of its advances made longer security unnecessary, and it would have been fatal to the carrying out of the agreement, since it would have prevented the prompt sale of its output, from which source alone the appellant could expect repayment of its advances.

As the record shows that the bank was paid all advances, except what it contributed to the last month's operation, and that it has received all the proceeds of sales of brick made during the last month's operations, and as we conclude its lien on the production of previous months was released by the payment of the advances made by it for those months, we think the District Court rightly ruled that the appellee's title under his bills of sale was superior to that of the appellant under its chattel mortgage, to the extent the referee disallowed the appellant's claim. The execution of the bills of sale operated as a constructive delivery of the brick covered by them and which were stored on the brickyard.

The loss of the appellant is attributable to the risk, which we think it assumed by the terms of its contract, viz. the failure of the bankrupt's lessee to make enough brick during the last month's operation to pay the appellee the amount he had advanced for that month's operation.

The order of the District Court is affirmed.

PAYNE et ux. v. BEARD et al.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1917. Rehearing Denied January 16, 1918.)

No. 4735.

BROKERS ⇐31—AGENCY FOR SALE OF PROPERTY—PURCHASE BY AGENT.

Defendants were agents for the sale of land owned by complainants in Oklahoma. They made an oral agreement for its sale, and at their suggestion complainants executed a deed to the purchaser and sent it to a bank, to be delivered on payment of the price. By agreement with the grantee therein one of defendants paid the money to the bank. The deed was delivered and the grantee conveyed to such defendant. No writing had been signed as necessary to constitute a valid and binding contract of sale, under Rev. Laws Okl. 1910, § 941. *Held*, that the agency had not

terminated when defendant took the deed, and he could not make a valid purchase without complainants' knowledge and consent, and that they were entitled to have the same set aside and the two deeds canceled.

Sanborn, Circuit Judge, dissenting.

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

Suit in equity by Horace L. Payne and Mima Payne against L. B. Beard and R. B. Beard. Decree for defendants, and complainants appeal. Reversed.

George S. Ramsey, of Muskogee, Okl. (O. H. Hoss, of Nevada, Mo., Edgar A. De Meules, of Tulsa, Okl., and Malcolm E. Rosser, of Muskogee, Okl., on the brief), for appellants.

William Hatch Davis, of Muskogee, Okl. (George W. Leopold, A. G. Cochran, and Ezra Brainerd, Jr., all of Muskogee, Okl., on the brief), for appellees.

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

HOOK, Circuit Judge. This is a suit by Horace L. and Mima Payne, husband and wife, against L. B. and R. B. Beard, to cancel two deeds through which L. B. Beard claims title to 80 acres of land in Muskogee county, Okl. The plaintiffs lived at Nevada, Mo. The defendants were partners in the real estate business at Muskogee, Okl., and were plaintiffs' agents for the sale of the land at the net price of $2,200. They reported having made a sale to one Lambert, a brother-in-law of R. B. Beard, at the price fixed, but before the purchase money was paid, and before plaintiffs' deed to Lambert was delivered, L. B. Beard raised the money and took a deed from Lambert to himself, without plaintiffs' knowledge or consent.

The petition sufficiently presents two grounds of complaint: First, that defendants during their agency fraudulently suppressed information of recent oil developments and transactions in the near vicinity of the land, affecting substantially and favorably its market value; and, second, that irrespective of actual fraud L. B. Beard was at the time disqualified to buy without plaintiffs' knowledge and consent, because when he did so the sale to Lambert was not so far complete that he (Beard) was discharged from his duties and obligations as their agent. On final hearing the trial court held with defendants on both grounds, and the plaintiffs appealed.

The first ground of complaint may be passed without decision. Upon the second the trial court applied Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592, and Hermann v. Hall, 133 C. C. A. 619, 217 Fed. 947. These cases recognize the rule that an agent to sell property cannot become the purchaser without the knowledge and consent of his principal, and that if he does so under the cover of the name of another person he may be compelled, at the election of the principal seasonably exercised, to surrender it, and that this is so regardless of injury to the principal or the agent's actual fraud by suppressing information in his possession or misrepresenting the condition or value of the property. In the two cases mentioned it was held that the facts

did not fall within the general rule above stated. In Robertson v. Chapman it clearly appeared that, before the agent bought from the purchaser, the sale to the latter had been so far consummated that it was not in the power of either party, principal or purchaser, to rescind it, and that the "agency for the sale of the property had, in every material sense, terminated." This and the fact that the subsequent sale to the agent was bona fide, and not the carrying out of a device or prearrangement during the agency, were the ruling features of that decision. And in Hermann v. Hall it appeared that the sale by the agent to a bona fide purchaser had been "so far completed that it could have been enforced by either the vendor or the vendee," and further that "the agency of the defendant [the agent] thereupon, in all material respects, terminated." The reason of these cases is plain. But, on the other hand, if the sale by the agent has not been substantially consummated because of noncompliance with an essential legal requirement, or because of some matter of agreement between him and his customer, the agency and the disqualification of the agent still remain. The agent cannot catch the title while it is in the air. His right to purchase begins when he is as free to deal with his principal as the rest of the world, and there is no longer the temptation between duty and self-interest. Until that time arrives it is his duty faithfully to communicate to his principal every important development affecting the value of the property and the attitude of the prospective purchaser.

What are the controlling facts here? On May 16, 1915, the defendants, as plaintiffs' agents, offered the land to Lambert for $2,200, the net price fixed. Lambert said he would take it, and gave R. B. Beard his check for $200, on which was written "Part payment on Payne 80 in 14—14—16." He also said that when the deed came and the title was approved he would pay the balance. May 17th defendants wrote plaintiffs, saying they had sold the land to Lambert. They inclosed a deed for execution, which they suggested should be sent through a bank for collection. May 18th plaintiffs executed the deed and sent it to a bank in Muskogee, to be delivered to Lambert upon his payment to the bank for them of $2,200, net. On the same day they wrote defendants what they had done. May 19th Lambert was advised of the arrival of the deed. The trial court found from oral testimony that Lambert then said to R. B. Beard that he had probably acted a little hastily in buying, and asked Beard if he could not sell the land for him to somebody else, to let him out even and save the $200, but said, if he could not, he would take it. As we will presently note, this does not fully accord with another explanation given of Lambert's attitude. The next day, May 20th, L. B. Beard decided to buy the land himself. A deed from Lambert to him was prepared May 21st, and on the same day he made a written application to a mortgage loan company for a loan of $1,000 on the land, reciting that he had bought it the day before for $2,200. The money sought was to be used by L. B. Beard in buying the land; the balance of $1,200 was otherwise raised by him. Lambert's deed to L. B. Beard was executed May 24th, and the latter deposited it in the bank, with plaintiffs' deed, until the abstract of title was examined, the title approved, and the purchase price raised and paid. All this was concluded May 25th, and the deeds were delivered

to L. B. Beard. R. B. Beard, who had possession of the $200 check, returned it to Lambert, who destroyed it. In reply to a letter from one of the plaintiffs, L. B. Beard wrote June 11th that he had bought the property; also that, if Lambert "had taken the land, it would have been necessary for me to personally guarantee it to be a good proposition, and I decided to take it and turn it again to some one." In their answer defendants averred that, after plaintiffs' deed arrived at the bank in Muskogee, Lambert, the grantee, "had become uncertain and doubtful in his mind as to the desirability of his purchasing such land, and requested of these defendants certain guaranties respecting the value thereof, which these defendants were unwilling to give, and that said Clarence Lambert desired and requested these defendants to take said property off his hands."

The Oklahoma statute of frauds (section 941, R. L. 1910) provides that an agreement for the sale of real property shall be invalid unless some note or memorandum thereof be in writing and signed by the party to be charged, or his agent. It is clear that when L. B. Beard acted in his own behalf the transaction had not progressed to the point where its completion could have been enforced against Lambert. Aside from his check, not a particle of writing passed between him and the plaintiffs' agents, and even the giving of the check rested at the trial in parol. It cannot be seriously contended that the check was sufficient by itself to bind him. See Halsell v. Renfrow, 14 Okl. 674, 78 Pac. 118, 2 Ann. Cas. 286; Id., 202 U. S. 287, 26 Sup. Ct. 610, 50 L. Ed. 1032, 6 Ann. Cas. 189. A binding obligation of a purchaser to buy is tested by determining what he could be compelled to do when in an adversary, defensive attitude. Until the agent has found and bound a purchaser, it is obvious that his agency has not, "in every material sense, terminated." If the purchaser is at liberty to rescind, as Lambert was, a most important part of the agent's service remains undone. To allow him to cast aside his agency for his personal interest at such a juncture, and to support his conduct by oral evidence of the purchaser's willingness to buy, would open the door to the very evils that the rule of disqualification was designed to prevent. The correspondence between plaintiffs and defendants and the sending of the deed to the bank are not important in this connection. Lambert was not a participant in either; they were not writings or memoranda by him, and they imposed on him no obligation. It should remain in mind that defendants were not Lambert's agents, or mere impartial go-betweens. The correspondence established defendants' agency for the plaintiffs and its terms, as to which there was no issue. The sending of the deed to the bank merely constituted the bank a collection agent of the plaintiffs. It was not an escrow, under a stipulation or agreement to which Lambert was a party. When the facts are placed in their proper categories, and then considered, we think the case is like Moore v. Petty, 68 C. C. A. 306, 135 Fed. 668, in all essential particulars. See, also, Tyler v. Sanborn, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97.

We think the plaintiffs acted seasonably and that there was no ratification. It is true that they made unavailing efforts to secure an interest in the property before rescinding the sale, but they were the nat-

ural result of an uncertainty as to legal rights and caused no prejudice or disadvantage to defendants.

The decree is reversed, and the cause is remanded, for the entry of a decree in favor of the plaintiffs, and for further proceedings accordingly.

SANBORN, Circuit Judge (dissenting). By the 14th of June, 1915, Payne and his wife had received the $2,200, which was the consideration for their sale of their land, had been informed by the purchaser, Mr. Beard, that he had bought the land, and by their friend, Mrs. Ayers, that a large oil well, reported to be producing 600 barrels per day, had just been brought in on a section adjoining the section upon which their land was situated. Nevertheless they kept the $2,200, made no tender or offer to return it, made no demand for a rescission of the contract until after they subsequently learned, some time in September, 1915, that a gusher oil well producing about 600 barrels a day had been brought in on September 12, 1915, on the section upon which the land in controversy is situated, and that a lease of 80 acres adjoining their land had been sold for $16,000. Then for the first time they moved to rescind their sale, and on October 17, 1915, they brought this suit. In my opinion they were estopped from maintaining the suit by their silence and acquiescence for more than three months after they knew that their agent was their purchaser, and they were not excused for their inaction by their ignorance of their right to rescind, because ignorance of the law ordinarily excuses no man, and reasonable diligence, the mere asking the question of any lawyer, would have informed them of their right. "Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." Kennedy v. Green, 3 Myl. & K. 722; Wood v. Carpenter, 101 U. S. 135, 141, 25 L. Ed. 807; Parker v. Kuhn, 21 Neb. 413, 421–426, 32 N. W. 74, 59 Am. Rep. 838; Wright v. Davis, 28 Neb. 479, 483, 44 N. W. 490, 26 Am. St. Rep. 347. If Payne, by merely refusing to inquire whether or not he had the right to rescind, could preserve his option to do so three months, he could by the same inaction preserve it indefinitely.

When Beard, by his letter of June 11, 1915, informed Payne that he was the purchaser of the land, Mr. Payne had the option to return the purchase price and rescind the sale, or to remain silent and thereby to affirm it. But he had not the right to speculate upon his option. He could not lawfully wait until developments, discoveries, and changes in value occurred, and then rescind if the property had increased in value, and affirm the sale if it had not. Delay, vacillation, acquiescence, even for a short period of time, is in itself an irrevocable election to affirm, especially in the case of the sale of such speculative property as that here involved. The Supreme Court early tersely expressed the established rule upon this subject, which seems to me controlling in the case at bar, in these words:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and

adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value." Grymes v. Sanders, 93 U. S. 55, 62, 23 L. Ed. 798; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 591, 593, 23 L. Ed. 328; Hayward v. National Bank, 96 U. S. 611, 618, 24 L. Ed. 855; Ward v. Sherman, 192 U. S. 168, 175, 176, 24 Sup. Ct. 227, 48 L. Ed. 391; McLean v. Clapp, 141 U. S. 429, 432, 12 Sup. Ct. 29, 35 L. Ed. 804.

And this court has stated this rule in the following words and has repeatedly enforced it:

"Upon the discovery of the fraud they could not if they would, avoid an immediate choice of an affirmance or a repudiation of the trade. If one who is induced to make a trade or sale by fraud would rescind it, he must immediately, upon his discovery of the fraud, announce his intention so to do, and return all the consideration he has received, to the end that the parties may be put in statu quo before subsequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration, for any considerable length of time after the discovery of the fraud, constitute a complete and irrevocable ratification of the transaction." Stuart v. Hayden, 72 Fed. 402, 411, 412, 18 C. C. A. 618; Kinne v. Webb, 54 Fed. 34, 38, 4 C. C. A. 170, 174; Rugan v. Sabin, 53 Fed. 415, 418, 3 C. C. A. 578, 580; Scheftel v. Hays, 58 Fed. 457, 461, 7 C. C. A. 308, 312; Wheeler v. McNeil, 101 Fed. 685, 688, 41 C. C. A. 604, 607; Burk v. Johnson, 146 Fed. 209, 217, 218, 76 C. C. A. 567, 575, 576; Richardson v. Lowe, 149 Fed. 625, 627, 628, 79 C. C. A. 317, 319, 320; Roseboom v. Corbitt, 196 Fed. 627, 634–635, 116 C. C. A. 301; International Harvester Co. v. Oliver (C. C.) 192 Fed. 59, 61; Chicago, St. P. & K. C. Ry. Co. v. Pierce, 64 Fed. 293, 296, 12 C. C. A. 110; Sagadahoc Land Co. v. Ewing, 65 Fed. 702, 705, 13 C. C. A. 83; E. Bement & Sons v. La Dow (C. C.) 66 Fed. 185, 194; Kingman & Co. v. Stoddard, 85 Fed. 740, 746, 29 C. C. A. 413, 419; Hein v. Westinghouse Air Brake Co. (C. C.) 172 Fed. 524, 526; Browning v. Boswell, 215 Fed. 826, 836, 132 C. C. A. 168.

The property sold was of the most speculative character. Payne had drilled for oil upon it and failed to find it. Drilling for oil was proceeding on the lands in the vicinity with varying success. After Payne learned that Beard was his purchaser, and before he demanded rescission, a period of more than three months, very profitable oil wells were sunk in the vicinity of this land, and its market value was vastly increased. Then it was that the plaintiffs for the first time demanded rescission. I think they ought not to be permitted thus to speculate upon their option, to refuse to exercise it, if the property failed to rise in value, and to exercise it after three months, when its value was so greatly increased. By their retention of the $2,200, their delay and acquiescence in the sale for three months after they knew that Beard was their purchaser, and until the relative value of the land and the $2,200 had entirely changed, it seems to me that they had, under the rule of law which has been quoted, irrevocably elected to affirm their sale, and had estopped themselves from revoking that election or rescinding their conveyance.

ARMSTRONG et al. v. NORRIS.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1917.)

No. 177.

1. BANKRUPTCY ⊜440—APPELLATE PROCEEDINGS—MODE OF REVIEW.
An order of a court of bankruptcy, denying a motion of a creditor to set aside an order of adjudication, is reviewable on petition to revise.
2. BANKRUPTCY ⊜404(2)—DISCHARGE—JURISDICTION TO GRANT.
The matter of discharge in bankruptcy is essentially a constituent of the proceeding in which the adjudication and the administration of the bankrupt estate are had, and it cannot be detached and taken to a court of another jurisdiction.
3. BANKRUPTCY ⊜404(1)—PARTNERSHIP—DISCHARGE OF PARTNERS.
Although an adjudication in bankruptcy is against a partnership alone, the individual partners and their estates are drawn into the proceeding and are subject to the jurisdiction of the court; and when all the conditions and requirements of Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, have been observed by them jointly and severally the court may in the same proceeding on their application discharge them from further liability for the partnership debts.

Petition to Revise Order of the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

In the matter of the voluntary proceeding in bankruptcy by C. G. Norris. Petition by T. G. Armstrong and others, creditors, to revise an order denying a motion to set aside the adjudication. Petition sustained.

Edwin A. Krauthoff, William S. McClintock, and Arthur L. Quant, all of Kansas City, Mo., and O. M. Slaymaker, of Osceola, Iowa (Krauthoff, McClintock & Quant, of Kansas City, Mo., of counsel), for petitioners.

C. F. Howell, C. H. Elgin, and Max M. Howell, all of Centerville, Iowa, and A. M. Jackley, of Seymour, Iowa (Howell, Elgin & Howell, of Centerville, Iowa, of counsel), for respondent.

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

HOOK, Circuit Judge. This is a petition to revise an order of the District Court for the Southern District of Iowa in a bankruptcy proceeding. Two questions are involved; one of appellate practice, and the other of the scope and efficacy of a prior proceeding in Kansas and the right of Norris, the respondent, to maintain the present one in Iowa.

In July, 1913, partnership creditors instituted an involuntary proceeding in bankruptcy in the district of Kansas against Brown & Norris, a firm composed of I. T. Brown and C. G. Norris. The petition averred that Brown and Norris individually were merchants, and were neither wage-earners nor persons engaged principally in farming or the tillage of the soil, but it did not in definite terms pray an adjudication against them as individuals. Brown and Norris filed an answer as individuals and as a partnership, admitting the ground of bank-

ruptcy charged and submitting themselves to the jurisdiction of the court. On August 16, 1913, an order of adjudication was entered that:

"I. T. Brown and C. C. Norris, copartners trading under the firm name and style of Brown & Norris, is hereby declared and adjudged bankrupt accordingly."

They filed schedules showing only firm creditors and debts. Dividends aggregating about 30 per cent. were paid on the claims of general creditors. August 13, 1914, Norris filed his verified application, reciting that he as a member of his firm had been adjudged bankrupt, that he and his firm had surrendered all his and their property, etc., and praying for a discharge "as an individual bankrupt and as a member of said bankrupt firm." This application was never brought to a hearing, and no other application for a discharge was made in the Kansas proceeding by the firm or a member. On December 7, 1915, Norris filed a voluntary petition in bankruptcy in the court below, Southern district of Iowa, and two days later was adjudged bankrupt. His schedules showed no assets, and only the firm creditors and debts disclosed in the Kansas proceeding. January 15, 1916, the petitioners here, who hold claims that were proved and allowed in the Kansas proceeding, moved the court below that its adjudication of December 9th be vacated, that the proceeding be dismissed, that Norris be enjoined from petitioning for a discharge, and for such other relief as might be equitable. April 24, 1916, the court denied petitioners' motion. It held in substance that Norris had not been individually adjudged bankrupt in Kansas, was therefore not entitled to a discharge there, and consequently his failure to procure one did not bar a subsequent individual proceeding in Iowa. May 19, 1916, the court in Kansas, at the instance of Norris, entered an order that his petition for a discharge there might be withdrawn without prejudice to his right to commence a new bankruptcy proceeding, or to continue one already begun. The petition to revise now before us is directed against the order of April 24, 1916, denying petitioners' motion to vacate, and for an injunction, etc.

[1] It is urged by the respondent that a petition to revise does not lie, but that petitioners' sole remedy was an appeal from the order of adjudication of December 9, 1915, within 10 days thereafter, as provided by section 25a of the Bankruptcy Act (Comp. St. 1916, § 9609). This is answered by Hart-Parr Co. v. Barkley, 146 C. C. A. 109, 231 Fed. 913.

[2] Norris scheduled in Iowa no assets and no liabilities, except those involved in the Kansas proceeding. All the liabilities scheduled were the old partnership debts. Obviously his present and sole purpose is to obtain in Iowa what he did not secure in Kansas—an individual discharge from his liability for the debts of his firm. The matter of discharge in bankruptcy is essentially a constituent of the proceeding in which the adjudication and the administration of the bankrupt estate are had. It cannot be detached and taken to a court of another jurisdiction. The time for applying is limited upon the time of adjudication, and the right is qualified by conduct during the progress of the proceeding. Section 14, Bankruptcy Act (Comp. St.

1916, § 9598). If Norris was a party to the proceeding in Kansas, and the court there had jurisdiction to grant or deny him a discharge from the debts of his firm, that was the tribunal of exclusive cognizance. Furthermore, a discharge must be affirmatively sought, as prescribed in the Bankruptcy Act. It is not granted as of course without application, and a failure to apply has the same effect as a denial of the right. The right is foreclosed by default, and will not thereafter be granted in another proceeding. Kuntz v. Young, 65 C. C. A. 477, 131 Fed. 719; Siebert v. Dahlberg, 134 C. C. A. 460, 218 Fed. 793, and cases cited.

Brown & Norris, as a partnership, were adjudged bankrupt in the Kansas proceeding. The needs of the case before us do not require a decision whether the adjudication was broader, or should have been broader, in terms. The bankruptcy of their firm made Brown and Norris as individuals parties to the proceeding, so far as their rights and liabilities as debtors were necessarily involved in its scope and effect. They were in court jointly and severally. The partnership debts were their debts. Their individual liability therefor was primary and direct, not collateral. The partnership property that was administered was their property, for a deficiency of which to pay the debts their individual estates, if any, were bound, and were subject to the jurisdiction of the court in that proceeding for equitable marshaling and application. Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706. In the case just cited the Supreme Court said:

"On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets so far as needed. Section 5f [Comp. St. 1916, § 9589]. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for, however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted."

[3] Ordinarily it is true that a discharge in bankruptcy implies a prior adjudication of the person discharged, but the rule should not be applied too literally. When a partnership alone has been adjudged bankrupt, the individual partners and their estates are drawn into the proceeding and are subject to the jurisdiction of the court; and when all the conditions and requirements of the Bankruptcy Act have been observed by them, jointly and severally, there is no sound reason why the court should not, upon their application in the same proceeding, discharge them from further liability for the partnership debts. That is a natural and logical outcome of such a proceeding, and is consistent with the long-established practice in equity. An adjudication against the partnership, the necessary relation of the partners thereto, and the jurisdiction of the court over them, empowers the court to award them, if they so desire, the relief which from their standpoint is in the nature of a final decree. To remit

them to another proceeding for relief would be unnecessarily vexatious, and to permit them to resort to another jurisdiction would aid them in avoiding an obstacle to their discharge on account of misconduct in the first. In Kuntz v. Young, supra, this court said:

"A voluntary proceeding in bankruptcy for the sole purpose of obtaining a discharge which a prior involuntary proceeding has conclusively determined that the bankrupt is not lawfully entitled to presents no ground for relief, is vexatious and futile, and should be dismissed."

In that case the dismissal of the second proceeding was after adjudication. The withdrawal without prejudice of Norris' application for a discharge in the Kansas proceeding is not important here. By allowing it the court did not affirmatively confer upon him a right to commence or maintain a second proceeding. It merely relieved him from the embarrassment, if any, of his pending application in the first.

The petition to revise is sustained.

SHERMAN NAT. BANK OF NEW YORK v. SHUBERT THEATRICAL CO.

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

No. 23.

1. COURTS ⟸264(4)—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUIT.
A suit in equity in a federal court, one purpose of which is to enjoin the prosecution of an action at law in the same court, is ancillary to such action, and the jurisdiction of the court therein extends to the ancillary suit, regardless of the citizenship of the parties to the latter.

2. INTERPLEADER ⟸16—RIGHT TO INTERPLEADER—"BILL IN NATURE OF INTERPLEADER."
A suit by a bank holding money on deposit which is claimed wholly or in part by several parties, including complainant itself, adversely to each other, to have the rights in the deposit determined, is in the nature of a bill of interpleader, and within the jurisdiction of a court of equity.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill in the Nature of Interpleader.]

3. COURTS ⟸262(3)—RIGHT TO INTERPLEADER—EXISTENCE OF OTHER REMEDY.
Judicial Code, § 274b, as added by Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, § 1251b), authorizing the pleading of equitable defenses in actions at law and the granting of affirmative relief to the defendant therein contemplates only relief as between the original parties, and is not a bar to an ancillary suit, in the nature of a bill of interpleader, where other parties are necessary.

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

Suit in equity by the Sherman National Bank of New York against the Shubert Theatrical Company, impleaded, and others. From an order granting an injunction pendente lite, the defendant company appeals. Affirmed.

For opinion below, see 238 Fed. 225.

William Klein, of New York City (Simon Fleischmann and Martin Clark, both of Buffalo, N. Y., of counsel), for appellant.

R. B. Miller, of New York City (John Kirkland Clark, of New York City, of counsel), for appellee Sherman Nat. Bank.

Arthur W. Clements, of New York City, for appellee Welden Nat. Bank of St. Albans, Vt.

Rosenberg & Ball, of New York City (James N. Rosenberg and David W. Kahn, both of New York City, of counsel), for appellee Dittenhoefer.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of Learned Hand, J., granting an injunction pendente lite.

August 2, 1915, the Shubert Theatrical Company, a corporation of the state of New Jersey, brought an action at law in the United States District Court for the Southern District of New York against the Sherman National Bank, a corporation created under the laws of the United States engaged in business in the state of New York, to recover $11,938.20, the balance of an account, opened in November, 1911, designated "Blue Bird Special," upon which either Lee Shubert or Jacob J. Shubert was entitled to draw checks and upon which a check for the balance was drawn by Lee Shubert and payment refused July 19, 1915.

The answer of the bank, filed in September, 1915, admitted the existence of the account and of the balance, but denied that it was opened by the plaintiff and set up certain defenses, which were afterwards more fully set out in the bill now to be mentioned. In May, 1916, the bank filed this bill in equity in the same court against the Shubert Theatrical Company of New Jersey, Lee Shubert, and Jacob J. Shubert, Irving M. Dittenhoefer, as trustee in bankruptcy of Liebler & Co., and the Welden National Bank of Vermont.

The bill alleged that the complainant and the defendant the Welden National Bank had each advanced money to Liebler & Co.; that on or about October 17, 1910, Liebler & Co. had entered into an agreement with the Shubert Theatrical Company of New York whereby they were to receive one-half the profits of "The Blue Bird," so long as it proved to be profitable; that in the month of November, 1911, Lee Shubert and Jacob J. Shubert opened an account with the bank, designated "The Blue Bird Company Special" account, to be drawn on by either of them, and they then informed the complainant that the moneys deposited and to be deposited represented profits derived from the presentation of "The Blue Bird" under an agreement made with Liebler & Co.; that on or about May 15, 1912, Liebler & Co. assigned to the complainant and the Welden National Bank as security for the moneys owed to them 50 per cent. of the profits coming to them from the presentation of "The Blue Bird" during the seasons 1912–13 and 1913–14; that prior to their adjudication in bankruptcy both Liebler & Co. and the complainant had demanded of Lee and Jacob J. Shubert and the Shubert Theatrical Company of New York an ac-

counting of the profits of "The Blue Bird," but neither of them nor any one else has ever furnished such an account.

On or about December 7, 1914, the defendant Dittenhoefer, as receiver in bankruptcy of Liebler & Co., served upon the complainant an order of the District Court in bankruptcy restraining it from paying out any funds in its possession in which the alleged bankrupts had or claimed any interest. On or about March 31, 1915, Liebler & Co. were adjudicated bankrupts, and Dittenhoefer, having been chosen trustee, confirmed the service of the order by specific notice.

The prayer for relief was that all parties be enjoined from instituting or prosecuting any suit on account of the said deposit against the complainant, and particularly that the action at law of the Shubert Theatrical Company of New Jersey be stayed; that the Shubert Theatrical Company of New York render an account of the profits of "The Blue Bird" as between it and Liebler & Co.; that the court determine the rights of the various parties in and to the balance of the "Blue Bird Special" account.

The answer of the Shubert Theatrical Company of New Jersey put the complainant on proof of its case. The answer of the Welden National Bank admitted the allegations of the bill and prayed for similar relief. The record is defective in failing to show the citizenship of the defendants not answering, or whether the subpœna was or was not served upon them, or whether they were or were not beyond the jurisdiction of the court.

In the case of a res within the jurisdiction of the court the interests of persons without the jurisdiction are determined and disposed of as provided in section 57 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. 1916, § 1039]). In the case of personal controversies, the rights of parties without the jurisdiction will not be prejudiced by the final decree in the cause. Equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix).

The District Judge denied the defendant's motion to dismiss the complaint, and granted the complainant's motion for an injunction enjoining the defendant Shubert Theatrical Company of New Jersey from prosecuting the action in the District Court or any similar action in any other court.

The appellant relies for reversal on two grounds: First, it denies the constitutional jurisdiction of the court, because it says the suit is not ancillary to the action at law and there is a want of the required diversity of citizenship; second, it denies the equitable jurisdiction of the court, because the bill is not a bill of interpleader.

[1] We are clearly of opinion that the bill is ancillary to the action at law and that the court has complete jurisdiction of the cause because of the diversity of citizenship in the action at law. As a pleading its allegations would constitute an original bill, and this court would have no jurisdiction of it as such for want of proof of diversity of citizenship. But it is filed, among other things, to stay the action at law, and so is connected with and ancillary to it. The jurisdiction of this court over the action at law by virtue of the citizenship of the parties extends to the ancillary bill. Minnesota Co. v. Soutter, 2 Wall. 609,

17 L. Ed. 886; Krippendorf v. Hyde, 110 U. S. at p. 284, 4 Sup. Ct. 27, 28 L. Ed. 145. Mr. Justice Miller said in the former case (2 Wall. at p. 633, 17 L. Ed. 886):

"But we think that the question is not whether the proceeding is supplemental and ancillary, or is independent and original, in the sense of the rules of equity pleading, but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court had sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that, when a bill is filed in the Circuit Court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law."

[2] Constitutional jurisdiction of the parties being established we come to a further inquiry: Is the subject-matter of the bill within the jurisdiction of equity? It is true that in most of the cases cited there was a res within the jurisdiction of the court. Although we do not think this fact essential, there is strong ground for saying that the account is such a res in this case.

Here an account was opened by two individuals, each of whom had authority to draw upon it, and at the same time the bank was told that the moneys were coming from a particular source to be deposited under an agreement between named parties. This was notice to the bank that if the account was not opened entirely for those parties at least they had an interest in it. The ownership of the account, both wholly and in part, is claimed by different persons, viz. the Shubert Theatrical Company of New Jersey, by the trustee in bankruptcy of Liebler & Co., and by the Welden National Bank, assignee of Liebler & Co. If the case stopped here it seems to us plain that the bank would be exposed to the danger of paying the balance, either in whole or in part, to four different persons, to wit, the Shubert Theatrical Company of New Jersey, the trustee of Liebler & Co., the Welden National Bank, and the Shubert Theatrical Company of New York, if it chose to sue. Nothing but a bill of interpleader in equity could protect the bank from this danger.

Although the relation of a bank to a depositor is that of debtor and creditor, still here there is an indebtedness, the bank knows not to whom, and although the bank may be regarded as merely debtor to the person or persons opening the account, whoever they may be proved to be, still, as between competing claimants, the moneys in the account should be treated as a special fund. The bank is ready and willing to pay it into court, if it be required. St. Louis & Iron Mountain Ry. Co. v. McKnight, 244 U. S. 368, 37 Sup. Ct. 611, 61 L. Ed. 1200 on which the appellant relies, does not apply. It was an attempt to consolidate a multitude of separate controversies in no way connected with each other, or with any particular fund or any specific duty, in one suit. But, whether the account be regarded as a special fund or not, the bank is certainly under a duty or obligation which is claimed

of it by several parties adversely to each other, so that a typical case of what equitable interpleader is intended to protect is presented.

[3] The Shubert Theatrical Company of New York insists that since the amendment to the Judicial Code by Act March 3, 1915 (38 Stat. 956), adding section 274b, the complainant can have in the action at law the very relief asked for in the bill, which is a conclusive objection, if true. The section reads:

"Sec. 274b. 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."

We construe this section as contemplating relief between the original parties. The earlier language is expressly restricted to defenses and the subsequent provision as to affirmative relief should be read as relief against the complainant only, so that in an action at law the defendant may have the same relief he can in a suit in equity under equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), viz. an affirmative judgment against the complainant by counterclaim in the answer, instead of having to file a cross-bill as the old practice required.

Although the bill is not strictly one of interpleader, because the complainant is not a mere stakeholder, but itself claims an interest in the account, it is one in the nature of interpleader. This was recognized in Groves v. Sentell, 153 U. S. 485, 14 Sup. Ct. 898, 38 L. Ed. 785, Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246, and McNamara v. Provident Life Assurance Society, 114 Fed. 912, 52 C. C. A. 530. In the Killian Case the plaintiff was not in possession of anything, nor subject to liability to different claimants for the same thing or duty, so that equitable relief was denied him. See, also, Hayward v. McDonald, 192 Fed. 893, 113 C. C. A. 368.

The order is affirmed.

HART v. CRANE.

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

No. 4796.

1. MORTGAGES ⊂⊃38(1)—EVIDENCE AS TO CHARACTER OF INSTRUMENT—WEIGHT AND SUFFICIENCY.

Where one of the owners of land executed a note to a bank, with defendant apparently as surety, and filled in defendant's name as grantee in a deed previously executed in blank, and defendant subsequently paid the note and recorded the deed, evidence *held* to show that the deed, though absolute on its face, was given as security.

2. MORTGAGES ⇐38(2)—EVIDENCE AS TO CHARACTER OF INSTRUMENT—DEGREE AND PROOF.

Evidence to show that a deed absolute on its face is a mortgage must be clear and convincing.

Booth, District Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit by Pennock Hart against W. S. Crane. From a decree in favor of defendant, plaintiff appeals. Reversed and remanded.

Frank H. Sullivan, of St. Louis, Mo. (S. Duffield Mitchell, of West Chester, Pa., John W. McAntire, of Joplin, Mo., George F. Haid, of University City, Mo., and Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., on the briefs), for appellant.

Thomas Hackney, of Kansas City, Mo. (Edward J. White, of St. Louis, Mo., and Martin Lyons, of Kansas City, Mo., on the brief), for appellee.

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

CARLAND, Circuit Judge. The appellant commenced this action against appellee for the purpose of having a warranty deed of conveyance from himself and the other grantors, Mitchell and Evans, dated October 19, 1911, whereby there was granted to appellee 80 acres of land in Jasper county, Mo., declared to be a mortgage, that a judicial sale of a certain undivided interest in the land owned by Mitchell be declared void, and that appellant be allowed to redeem. The District Court referred the case to a master, who made findings of fact and conclusions of law. On exceptions to these findings, the same were confirmed by the trial court.

The decision below having sustained the integrity of the deed, the case did not proceed to a consideration of the other issues in the case. The question, therefore, before this court is: Did the trial court err in sustaining the deed? Counsel for appellant concedes the rule that the legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court, unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts. But counsel claim that a grave mistake was committed by the master and the court below in refusing to find as facts some of the most important elements in the case and about which there can be no shadow of doubt from the uncontradicted evidence. We have therefore given the evidence careful consideration. The testimony bearing upon the question as to whether the deed was an absolute conveyance or a mortgage is not voluminous, and consists largely of the testimony given by the witness Mitchell and appellee. Mitchell is one of the grantors, but he and Evans, the other grantor, conveyed their interest in the land to appellant in July, 1913, for $100 each.

[1] Notwithstanding Mitchell parted with his interest in the land, we think it sufficiently appears that he was not a disinterested witness.

Prior to the execution of the deed of October 19, 1911, appellant, Mitchell, and Evans were the owners of the land in controversy by conveyance from one H. R. Chitwood in the following undivided proportions: Appellant, three-eighths; Mitchell, three-eighths; and Evans, one-fourth. Prior to the transaction in question Mitchell and appellee had some dealings in relation to the land, but they throw no light on the question under discussion. About the middle of October, 1911, Mitchell was making an effort to dispose of the property, and in order to be prepared to make a deal he decided to get a warranty deed executed and acknowledged by the owners of the land. Mitchell testifies that this decision was made with the knowledge of appellee, who was also trying to find a purchaser for the land; but whether this is so is unimportant. Mitchell obtained the deed in controversy, executed in blank as to grantee and consideration by Hart and Evans. Mitchell filled in the blanks. In a letter by Evans, dated October 20, 1911, at Pittsburgh, Pa., inclosing the deed to Mitchell, Evans stated:

"I hope you will make the riffle, and anything you sell for will be agreeable to me and Pennock Hart."

In a letter by Pennock Hart, dated May 31, 1911, Pennock Hart said:

"Would it be possible to sell half the property, and lease the other half? Harry [Evans] and I will agree to anything that will let you out."

Mitchell testified: That on October 30, 1911, he was in need of funds. That a few days before appellee had said that he could get the Bank of Carthage, Mo., to loan him (Mitchell) $2,750, and that he (appellee) would become surety on the note. That Mitchell should deposit the deed from Hart, Mitchell, and Evans with the bank, after inserting appellee's name as grantee and the words "one dollar and other consideration" as the consideration, to secure appellee for becoming surety on the note. That pursuant to this arrangement on the above date Mitchell gave his note to the Bank of Carthage for $2,750, payable in three months at 8 per cent., with appellee as surety. The proceeds of the note, $2,695.50, being the face of the note less $54.50 discount, was placed to the credit of Mitchell on the books of the bank. That the deed was delivered to Maring, cashier of the bank, by appellee, with the statement that, when Mitchell paid the note, the deed was to be returned to Mitchell.

When the note became due, Mitchell did not pay the same, but appellee paid it about 38 days after it became due. At the time of this transaction Mitchell owed Crane $675, which he paid out of the proceeds of the note. It does not appear what was done with the balance. Appellee paid the note March 9, 1912, and had the deed recorded. Mitchell signed the note as principal, and appellee as surety. Appellee testifies that this was done so as not to inform the bank that he was the real borrower of the money, and not Mitchell. Appellee was a director in the bank at the time. Maring, cashier of the Bank of Carthage, testified that the loan was made to Mitchell with Crane as surety. At the time of the making of the loan Thomas & Hackney, attorneys, passed upon the title to the land and made their report to

the Bank of Carthage for which Mitchell paid. More than 13 months after the transaction in regard to the loan Mitchell paid back taxes on the land.

Mitchell and appellee both testified: That at the inception of the transaction Mitchell was desirous of obtaining a loan from appellee. Appellee testifies that he first saw the deed from Mitchell, Hart, and Evans about October 26th or 27th. That in September, 1911, Mitchell wanted some money, and wanted to know if appellee would loan any money on the property. That appellee replied that he would not loan any money on the land. That appellee did not know whether the title was clear or not; suggested that Mitchell get an abstract. That Mitchell must get an abstract before appellee would have anything to do with the land, and the abstract would have to be passed upon by his attorneys. Appellee further testified: That he figured on buying the property from Mitchell, and the deed was delivered to appellee at the office of Thomas & Hackney. At the time the deed was delivered the two letters heretofore referred to from Hart and Evans were also delivered to appellee. That the papers were delivered to appellee, and not to the bank. That appellee asked the bank to keep the papers, to put them with his papers in the bank. Appellee never consented to Mitchell retaining the abstract. That Mitchell promised to bring it back, but never did. That the actual price appellee was to pay for the land was $2,695. Appellee told Mitchell that he was short of money, and did not have the money on hand sufficient in actual cash to pay for the land, but would get it from the bank, and did not want to be in the attitude of borrowing himself, and that he did not want the people at the bank to know anything about his business transactions whatever. Appellee told Mitchell he would pay him $2,695 in cash for the land. The reason appellee did not immediately place the deed on record was that there was a judgment against the property in favor of Mrs. Munhall of $2,800, and the statute of limitations would run on it in July of the next year.

Appellee had the deed recorded at the time he did because, either on the morning of the 8th or 9th of March, Mr. Thomas called appellee up and told him that his land was advertised for sale for taxes; that Mitchell agreed to pay the taxes down to 1912, but he did not do it. The tax sale proceeding was against Chitwood, the grantor of Hart, Mitchell, and Evans, who appeared on record as the owner of the land. Mr. Mitchell did not turn the papers over to Mr. Maring, the cashier of the bank. "They were given to me by Mitchell, and I left them with the bank among my papers. That appellee never told Mitchell that, if he paid the note, the deeds would be returned."

There was evidence that at the time of the transaction resulting in the loan from the bank the land in question was worth $300 per acre. There was also evidence that, as agricultural land, it was worth from $50 to $55 an acre. The master found the value of the land would not exceed $100 per acre. On October 30, 1911, the land was occupied by one Foster, who farmed it in a small way, paying or agreeing to pay $50 per year rent. There was no change of possession up to the time the suit was commenced. Appellee testified that he told Foster

he was willing that he should remain upon the land, whether he paid rent or not.

[2] These are the salient facts in connection with the controversy upon the question as to whether the deed, although absolute in form, was really a mortgage. The testimony of Mitchell is in direct contradiction of that of appellee. In favor of appellant's contention is the fact that both parties agree that, when Mitchell approached appellee, it was to secure a loan; that he subsequently obtained the loan from the Bank of Carthage, and appellee signed the note as surety, taking, as Mitchell claims, the deed by Hart, Mitchell, and Evans as security. We do not attach much importance to the fact that Mitchell obtained an abstract of the property and paid for an examination of the same. In most localities this would be one of the duties of the vendor or mortgagor. In favor of appellee it appears that the deed is absolute on its face, and it is the rule that the evidence which is necessary to show it to be a mortgage must be clear and convincing.

If the transaction was intended as a sale of the land, the method adopted for that purpose was certainly unusual; that Mitchell borrowed the money from the bank and appellee became surety on the note is undisputed. On the face of the transaction the money all belonged to Mitchell; still, if we are to sustain the integrity of the deed, we must find that the money did not belong to Mitchell, but to appellee, in face of the fact that Mitchell paid out of the proceeds of the note $675 to appellee. It is said the true nature of the transaction was obscured by reason of the fact that the parties wished to avoid judgment liens then in existence against Mitchell; but the transaction as carried out would not be effective for any such purpose. It is also said that the other grantors, Hart and Evans, so far as their action is concerned, contemplated a sale, and that Mitchell probably had no authority to put the deed up as security.

We are of the opinion, however, that under the evidence in the record in regard to the relationship of the several grantors that Mitchell had authority to do anything with the property that would let him out. The master thought that it was reasonable to believe that, if the parties intended anything but an absolute sale, they would have insisted upon and obtained a contract evidencing the arrangement. Of course, if the parties had done so, there would have been no lawsuit; but, as they did not do so, the case must be judged upon the facts as they appear. The rule that a deed absolute upon its face can be shown by parol evidence to be a mortgage exists because parties do not always execute a mortgage when one is intended. We are of the opinion that the conceded fact that Mitchell first applied to appellee for a loan becomes of great importance in the decision of this case. Morris v. Nixon, 1 How. 118, 11 L. Ed. 69; Cobb v. Day, 106 Mo. 278, 17 S. W. 323. If it was not for the fact that the master and trial court have decided the question at issue in favor of appellee, we should have no hesitancy in holding upon the facts that the deed from Hart, Mitchell, and Evans to appellee was in fact a mortgage; but, notwithstanding the finding below, we think the circumstances as detailed in the record require us to differ with the master and the court.

The decree below is reversed, and the case remanded for such further proceedings as law and justice may require.

BOOTH, District Judge. I dissent. The testimony of the two parties to the transaction in controversy was in direct conflict. The circumstantial evidence in part tended to corroborate one, in part the other. No obvious error by the court below in the application of the law is pointed out, and in my judgment there was no grave mistake made in the consideration of the facts. In accordance with the well-established rule applicable under such circumstances, the decree below should be affirmed

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ATCHISON, T. & S. F. RY. CO. v. INTERNATIONAL LAND & INVESTMENT CO.

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

No. 4785.

1. CARRIERS ⊂⊃92—CARRIAGE OF GOODS—CONFIRMATION—DEFENSES.
The rule, as commonly stated, that a common carrier is liable in conversion for misdelivery or nondelivery of property intrusted to it for transportation, and that upon the making of an adverse claim and demand by a third person the carrier assumes the risk of correctly deciding between the claimant and the shipper or consignee, has resulted in adding the compulsion of legal process to the exceptions of act of God and public enemies, which is a defense to a carrier's failure to deliver property, and so a carrier will be protected against the shipper or consignee if the property has been seized or taken from its possession by attachment, replevin, or search warrant at the instance of a third person.

2. CARRIERS ⊂⊃92—CARRIAGE OF GOODS—CONVERSION.
A carrier should, where property in its possession for transportation is seized or taken from its possession by attachment, replevin, or search warrant, give notice to the shipper or consignee of the proceeding.

3. CARRIERS ⊂⊃93—CARRIAGE OF GOODS—CONVERSION—LIABILITY.
Where a carrier decides correctly, and voluntarily surrenders property in its possession for transportation to an adverse claimant, who is in fact the true owner, it is not liable as for conversion of the property.

4. CARRIERS ⊂⊃93—CARRIAGE OF GOODS—CONVERSION—WHAT AMOUNTS TO.
Plaintiff, which had owned and used hotel cars in its land business, sold them to a third party, reserving title until the purchase-money notes were paid. Thereafter plaintiff asserted a default. The purchaser, claiming to have paid in full, leased the cars for use in a traveling show business. Defendant railroad company granted the lessee, for a consideration, the use of the spur track near his residence as a space for storage of the cars; the agreement reserving to defendant no power or right of supervision. While the cars were on such storage track, plaintiff made formal demand therefor upon defendant. Thereafter defendant transported the cars for the lessee, and redelivered them to him. *Held* that, in view of defendant's obligation as a common carrier to transport for any person, defendant was not, despite the commonly stated rule that a common carrier is liable in conversion for misdelivery or nondelivery of property intrusted to it for transportation, and that upon the making of an adverse claim and demand by a third person the carrier assumes the risk of correctly deciding between the claimant and the shipper or consignee, liable, for when the demand was made defendant had no control

over the cars, and when defendant transported them it was not guilty of connivance with the lessee.

Smith, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska; J. W. Woodrough, Judge.

Action by the International Land & Investment Company against the Atchison, Topeka & Santa Fé Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

William R. Smith, of Topeka, Kan., and Robert Dunlap, of Chicago, Ill. (Gardiner Lathrop, of Chicago, Ill., and Charles L. Hunt, of Concordia, Kan., on the brief), for plaintiff in error.

George B. Thummel, of Omaha, Neb. (John J. Sullivan and James E. Rait, both of Omaha, Neb., on the brief), for defendant in error.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

HOOK, Circuit Judge. This is an action by the International Land & Investment Company against the Atchison, Topeka & Santa Fé Railway Company for the conversion of three hotel cars. The plaintiff, which had owned and used the cars in its land business, sold them to a third party, reserving title until purchase-money notes were paid. Afterwards it asserted a default and demanded possession from defendant by formal instrument and correspondence. The vendee, claiming to have paid in full, had previously leased the cars to one Evans for use in his traveling show business. In turn the vendee notified defendant that it was the owner and would hold defendant liable if it failed to transport the cars on its order or that of Evans. The plaintiff resided at Omaha, Neb., the vendee at Kansas City, Mo., and Evans at Independence, Kan. After the notices and demands defendant transported the cars for Evans for about three weeks from Independence and from town to town, and then delivered them for him to the Missouri Pacific Railroad at Pittsburg, Kan. Thereafter Evans continued in the control and use of them in his show business in Kansas, Oklahoma, Nebraska, Iowa, Minnesota, and Missouri. There was evidence at the trial tending to show that the conditional sale of the cars was a part of a larger transaction between the plaintiff and its vendee, in the conduct of which the plaintiff received the proceeds for joint account and division, that part of the notes for the cars had been paid by plaintiff's debiting the vendee in their accounts, and that at the time of the controversy there was due the vendee more than enough to pay the balance. The trial court held that to determine whether the remaining notes were so paid involved a complicated accounting, which could not be had in the case on trial. The evidence also showed quite clearly, notwithstanding a mistaken assumption of some of defendant's officials to the contrary, that when plaintiff's demands were made the cars were not in defendant's possession. Evans had caused them to be moved from near Kansas City to Independence. Defendant granted him for a consideration the use of a spur track at the latter place for storage purposes under an agreement of license reserving to itself no power or right of supervision. The cars were there wholly in Evans'

control and at his risk, and at the time of plaintiff's demands the defendant was under no duty of bailment or carriage to any person. The possession of defendant arose after the demands, when it took the cars for transportation on Evans' order. The evidence also showed that defendant endeavored in good faith to perform the duties imposed upon it as a common carrier, without intention to aid either party against the other. The trial court instructed the jury that defendant had committed a conversion and that the only question open was the value of the cars. A verdict and judgment for the plaintiff, and this writ of error by defendant followed.

[1-3] The rule as commonly stated is that a common carrier is liable in conversion for misdelivery or nondelivery of property intrusted to it for transportation, and that upon the making of an adverse claim and demand by a third person the carrier assumes the risk of correctly deciding between the claimant and the shipper or consignee. The result of this is that, though the carrier is without adequate means of information, it will be held in conversion if it errs in its decision. In the statement of the rule it is generally recognized as productive of much hardship to common carriers impartial as between the contending parties and desirous only of discharging the duties imposed upon them by law. It has been suggested as a possible relief that a carrier in such a position might file a bill of interpleader and bring the parties in to settle their own controversy (Hutch. Carr. § 752), but difficulties of jurisdiction, the loss of market, the perishable character of the property, etc., would seem to impair its adequacy. The hardship of the rule has resulted in adding the compulsion of legal process to the exceptions of "the act of God and the public enemies," and it is held that the carrier will be protected against the shipper or consignee if the property has been seized or taken from its possession by attachment, replevin, or search warrant at the instance of a third person. Stiles v. Davis, 1 Black. (66 U. S.) 101, 17 L. Ed. 33; Pingree v. Railroad, 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479; Robinson v. Railroad (C. C.) 16 Fed. 57; Bliven v. Railroad, 36 N. Y. 403. The carrier should, however, give notice of the proceeding. It is also settled that it will not be held liable, should it decide correctly and voluntarily surrender the property to the adverse claimant who is in fact the true owner. The Idaho, 93 U. S. 575, 23 L. Ed. 978.

[4] Although the rule has been broadly stated as above, its concrete application has almost always been in actions by shippers or consignees against carriers for violation of their contractual obligations. Though generally assumed to apply, it has not often been invoked, as in this case, by a stranger to the transportation claiming adversely. Much of the support for this particular application of the rule consists of dictum in cases in which the question was not involved and the general language of text-writers. It is a broad extension of the liability of an ordinary voluntary bailee to common carriers without allowance for the compulsory character of the duties of the latter or the public interest in unobstructed commerce. That there are some differences between an ordinary bailee and a common carrier as regards liability to third persons is clear. Thus in Bates v. Railroad, 60 Wis. 296, 19 N.

W. 72, 50 Am. Rep. 369, it was said that public policy and the proper discharge of the duties imposed upon common carriers require that they should not be held in garnishment for personal chattels in their possession and in actual transit at the time the writ is served. Of the various cases cited for plaintiff's contention, but two, Shellenberg v. Railroad, 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561, and Atchison, T. & S. F. R. Co. v. Jordan Stock Food Co., 67 Kan. 86, 72 Pac. 533, are in point. And the latter was an action in replevin, though, because no writ or order of delivery was issued, it may fairly be said to have been equivalent to one in conversion. On the other hand, in Kohn v. Railroad, 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726, it was held that conversion would not lie upon mere demand; that because of the stringent obligations of a common carrier in respect of transportation, and its difficulties in case of an adverse claim, the demand should be accompanied by legal process. In Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531, the court said:

"Common carriers, by reason of the nature of their business, which imperatively requires them to receive and forward goods, when tendered in the usual course of their business, have long formed an exception to the stringency of general rules in respect to what constitutes, in similar cases, a conversion."

But if the rule for which plaintiff contends be well founded, which we need not determine, we do not think it can be extended to the case at bar. Plaintiff's demands upon the defendant, made when the latter was not in possession or control, amounted to no more than notice of the claim. Obviously the failure to comply at that time did not constitute a conversion. The defendant could not lawfully have taken the cars away from Evans and delivered them to the plaintiff. The fact that they were on wheels and were on a spur track owned by defendant made them conveniently movable, but was not decisive of the question of possession or control. The case would not have been different, had Evans dismantled the cars and put the parts upon a designated portion of the right of way under an agreement like the one he held. Afterwards, with notice of plaintiff's claim and of the claim of the vendee, the defendant transported the cars for Evans and redelivered them to him. It asserted no title in itself; its possession was temporary; it acted in good faith, and did not connive with the vendee or Evans to deprive the plaintiff of its property. In fact the cars were not put beyond the plaintiff's reach. The simple remedy of replevin from Evans was as available after the transportation as before. Giving full force to the incidents held in varying circumstances to constitute a conversion, we do not think sufficient were shown at the trial.

The judgment is reversed, and the cause is remanded for a new trial.

SMITH, Circuit Judge, dissents.

PHILADELPHIA & R. RY. CO. v. SKERMAN.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 39.

1. COURTS ⟸352—PROCEDURE IN FEDERAL COURT—ARGUMENT OF COUNSEL—PROPRIETY.

In an action against a railroad company for damages for injuries resulting from a crossing accident, a statement by plaintiff's counsel that he claimed $50,000 damages is not, the case being tried in the federal District Court for New York, open to objection, though the cause of action arose in Pennsylvania, where such statement would have been open to objection; this being particularly true as the trial court directed the jury that the statement had nothing to do with the verdict except as to the limit of plaintiff's demand.

2. REMOVAL OF CAUSES ⟸119—RESIDENCE—ACQUISITION—DETERMINATION.

In an action for personal injuries occurring in Pennsylvania brought by plaintiff in a state court in New York, and removed by defendant to the federal court, the question whether plaintiff had acquired a residence in the state of New York, which under Code Civ. Proc. N. Y. § 1780, was a condition precedent to instituting suit therein, is for the jury, where plaintiff testified that he was a single man, and, finding no employment in Pennsylvania after the action, moved to New York with the intention of residing therein.

3. RAILROADS ⟸327(1)—CROSSING ACCIDENTS—NEGLIGENCE.

Under the decisions of Pennsylvania which govern a right of action for injuries received in that state when run down at a railroad crossing, the failure of the traveler before crossing tracks to stop, look, and listen is negligence per se, and that rule cannot be ignored by the jury.

4. RAILROADS ⟸348(8)—CROSSING ACCIDENTS—TESTIMONY.

Testimony by plaintiff, who was struck in the nighttime by a train coming down grade by force of gravity merely, and which bore no light, the locomotive coming tender first, that he stopped, looked, and listened, cannot be rejected as contrary to the physical facts, and a verdict by the jury based thereon overturned.

5. TRIAL ⟸312(3)—PROVINCE OF COURT—DIRECTIONS TO JURY.

In an action for injuries received in a crossing accident, where the negligence of defendant railroad company and the residence of plaintiff were the matters in issue, the case went to the jury on Saturday evening. On the following day, at 12:20 a. m., the court excused counsel until Monday morning, and furnished the jury with blanks for a sealed verdict. On Sunday at 8 a. m. the court, in the absence of counsel, sent to the foreman, in addition to the blank form of verdict for plaintiff and a blank form of verdict for defendant, a blank form with a finding for plaintiff on the question of residence, and a statement as to whether the jury had agreed on an issue of negligence, as well as a blank form with a finding on the issue of negligence, and a statement that the jury had not agreed on the question of residence. The jury, after sending in a special verdict finding for plaintiff, on the question of residence, and reciting the disagreement on negligence, handed in a sealed verdict which, when opened on the following Monday morning, contained a finding for plaintiff on both issues. *Held* that, if the conduct of the judge was irregular, it was in no way calculated to influence the jury or to prejudice defendant.

Hough, Circuit Judge, dissenting.

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

Action by William Skerman against the Philadelphia & Reading Railway Company, begun in the state court, and removed to the federal court. There was a judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 225 Fed. 85; 230 Fed. 814, 145 C. C. A. 124.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for plaintiff in error.

Gilbert D. Steiner and John C. Robinson, both of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. January 31, 1913, the plaintiff in this case was struck by one of defendant's trains as he was crossing Race street, Shamokin, Pa.

November 25th he began suit to recover damages for his injuries in the Supreme Court of the state of New York for Richmond county. The defendant removed the case to the District Court of the United States for the Eastern District of New York.

[1] At the opening of the trial, the plaintiff's counsel said to the jury that the plaintiff—

"asks for a verdict at your hands for $50,000.

"Mr. Brown: I object to that statement, and move that a mistrial be ordered on the ground that it is contrary to law for the plaintiff's counsel to state the amount of damages that they ask for in the presence of the jury.

"The Court: Motion denied. I shall instruct the jury that that is not evidence, and has nothing to do with the verdict except as an indication of the limit of the plaintiff's demand.

"Defendant excepts."

The defendant's objection is based upon the practice in Pennsylvania as stated by the Circuit Court of Appeals for the Third Circuit in Vaughan v. Magee, 218 Fed. 630, 134 C. C. A. 388:

"In the ordinary suit on a bond, note, contract, or account, the amount in suit can be stated, goes in evidence, and affords the jury a money basis on which the rights of the parties can be determined. In damage cases there is no fixed sum in controversy. The amount of damages a party recovers is ascertained by the jury from evidence regularly offered and admitted by the court of such pertinent facts as will enable the jury to itself fix the money value of the injury sustained. While among those facts may, at times, be certain definite amounts in the way of medical, surgical, and nursing expenses, and other items capable of exact fixation, yet, when it comes to determining the amount of the damages to be awarded, this is the province of the jury alone, and of a jury uninfluenced by the figures or estimates of any other person as to the amount thereof. The law, therefore, permits no estimate to be given by either party to the jury, even under oath, of the money amount of such damages, and to get the same character of estimates before a jury by indirect methods is a reprehensible practice.

"Whatever may be the practice in other jurisdictions, the courts of Pennsylvania have been stern and unyielding in that regard. Wherever a court, in its charge, or counsel, in addressing a jury, have brought to a jury's notice that a plaintiff claimed a fixed sum for damages, it has been adjudged a mistrial. Carothers v. Pittsburgh Railways Co., 229 Pa. 560 [79 Atl. 134]; Reese v. Hershey, 163 Pa. 253 [29 Atl. 907, 43 Am. St. Rep. 795]; Quinn v. Phila. Rapid Transit Co., 224 Pa. 162 [73 Atl. 319]; Dougherty v. Pittsburgh

Railways Co., 213 Pa. 346 [62 Atl. 926]; Hollinger v. York Railway Co., 225 Pa. 419 [74 Atl. 344, 17 Ann. Cas. 571]."

No such practice prevails here, and we are not favorably impressed by it. It seems to us that counsel has a clear right to state what the plaintiff asks and expects to recover for his injuries. It is not evidence, but, at most, mere matter of argument, in making which counsel are entirely within their rights. Even if it were viewed as improper, Judge Chatfield at the time, and subsequently in his charge, fully corrected any undue weight that the jury might have given it.

[2] The next exception relied upon by the defendant is as to the jurisdiction of the court in connection with the residence of the plaintiff. He testified that he was a single man, by occupation a miner, and that, getting no employment in Shamokin after the accident, he moved to Brooklyn with the intention of residing in New York state. After being there two weeks, he went to Staten Island for two weeks, where he began his suit at law, and then returned to Brooklyn, where he remained two weeks, and, finding no work, went to Jersey City, from whence he returned to Staten Island some three weeks before this trial. Under section 1780 of the New York Code of Civil Procedure, unless a resident of the state of New York, he could not maintain his action against the defendant, which was a foreign corporation. Because of misunderstanding by the court of the point intended to be raised, we reversed a judgment in favor of the plaintiff at a former trial (230 Fed. 814, 145 C. C. A. 124), saying:

"The question of the plaintiff's residence was one of intention to be drawn, not only from his testimony as to intention, but from the surrounding circumstances. It was for the jury, not being a pure question of law, but depending upon facts. The jury might find residence on less evidence in the case of an unmarried and disabled laboring man looking for light work than they would in the case of a man with a family, well-to-do and accustomed to a permanent domicile.

"The objection made by the defendant is a substantial one, and, although it should have been pleaded more specially and brought more clearly to the attention of the trial judge than it was, we feel obliged to reverse the judgment and order a new trial."

On the present trial the court left the question of the plaintiff's residence to the jury as a question of fact in accordance with our decision, and they have found it in the plaintiff's favor.

[3] The defendant next contends that the case should not have been submitted to the jury at all because the defendant's liability in tort depends upon the law of Pennsylvania, where the accident occurred, which makes it an obligation to stop, look, and listen before crossing the tracks of a railroad company. This is not a rule of evidence, but a rule of law, peremptory, absolute, and unbending, which the jury should never be permitted to ignore or evade or pare away by distinctions and exceptions. Not to stop, look, and listen is negligence per se. The decisions of the Supreme Court of Pennsylvania fully establish this. Among others, Aiken v. Penna. R. Co., 130 Pa. 380, 18 Atl. 619, 17 Am. St. Rep. 775; Ihrig v. Erie R. R. Co., 210 Pa. 98, 59 Atl. 686.

[4] The plaintiff testified that he did stop, look, and listen, and the jury must have believed him. The accident happened on a dark, rainy night. The train was coming down hill by the force of gravity merely. The locomotive was coming tender first, and there was evidence that there was no light on the tender. Under these circumstances the jury might find, and indeed must have found, under the instructions of the court, that although the plaintiff did stop and look and listen, he was not guilty of negligence in not seeing or hearing the approach of the train in time to avoid it. His story is not, as the defendant contends, preposterous. On the other hand, its contention amounts to saying that one who does stop, look, and listen can under no circumstances be hit by a moving train. It might have been so held in this case, if the accident had happened in broad daylight, or even at night, if the train were being moved by a locomotive carrying the usual brilliant headlight, and especially if moving fast. We think the case was rightly submitted to the jury.

[5] The jury went out on Saturday, October 21, 1916, at 2 o'clock, and returned at 5 p. m. with the request that a part of the charge as to the question of plaintiff's residence be read to them. October 22d at 12:20 a. m. the court excused counsel until Monday morning, October 23d at 10 a. m., and furnished the jury with blanks for a sealed verdict. October 22d at 8 a. m. the court, in the absence of counsel, in his own words—

"* * * sent to the foreman, in addition to the blank form of verdict for the plaintiff and the blank form of verdict for the defendant, a blank form with a finding for the plaintiff upon the question of residence, and a statement as to whether they had or had not agreed on the issue of negligence. I also submitted to the foreman of the jury a blank form with a finding that they had agreed upon the issue of negligence and a statement that they had not agreed upon the question of residence. It is evident that there would be no need of asking the jury if they had agreed upon a verdict for the defendant on the question of residence, because the previous instructions had been to the effect that such an agreement would be conclusive of the case."

October 22d at 10 a. m. the jury sent to the court a special verdict as follows:

"We, the jurors impaneled herein, find for the plaintiff on the subject of residence. We have not been able to agree on the question of negligence."

The court thereupon left the jury in further consultation. At 12 p. m. the jury handed in a sealed verdict, which was opened on Monday morning, the clerk inquiring as follows:

"'Gentlemen of the jury, you say that you, the jurors impaneled in this case, find for the plaintiff on the subject of residence, so say you all.' And so said the jury all. The clerk then inquired further: 'Gentlemen of the jury, you say that you, the jurors impaneled in the case, find a verdict for the plaintiff, and that you assess the damages in the sum of $23,350, so say you all.' And so said the jury all."

If what the judge did was irregular, it was in no way calculated to influence the jury nor prejudicial to the defendant. He gave them no instructions, and as we are satisfied that the jury were correctly advised as to the law of the case the judgment is affirmed.

HOUGH, Circuit Judge, dissents.

ANDERSON v. HULTBERG.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1918.)

No. 4837.

1. CREDITORS' SUIT ⟸42—RIGHT TO MAINTAIN.
It is indispensable to the maintenance of a creditors' bill to avoid, as in fraud of his creditors, conveyances made or caused by a debtor before the judgment on which the creditors' suit is founded was rendered against the debtor, that the complainant show the existence, at the times the conveyances were made, of the trust, the indebtedness, or the actual fraudulent intent of the judgment debtor on which complainant relies.

2. JUDGMENT ⟸708—CONCLUSIVENESS—EVIDENCE.
Where, after a conveyance, judgment is rendered against the grantor, in a suit to which the grantee is not a party, such judgment will estop the grantee from denying that the judgment was rendered at the time specified in its record, and that the grantor was then indebted to the judgment creditor, but it estops the grantee no further, and neither the judgment, nor the record of the action or proceedings on which it is based, is proof or competent evidence against the grantee, of a trust, or an indebtedness of the grantor, or of his intent to defraud his creditors, at the time the conveyance was made, nor of the circumstances or character of the transaction out of which the adjudged indebtedness arose, nor of any of the facts at issue between the grantor and his judgment creditor.

3. EVIDENCE ⟸578—FORMER PROCEEDING—ADMISSIBILITY.
Complainant's assignor claimed mining property acquired by defendant's husband, which claim defendant's husband repudiated. Meanwhile he not only agreed to transfer to defendant certain other mining property, but paid the consideration for parcels of land which were conveyed to her. Thereafter the husband and complainant entered into an agreement for arbitration of their dispute. To this agreement defendant was not a party, nor was she a party to the suit on the award in favor of complainant. *Held* that, in a creditors' suit in federal court by complainant to set aside the conveyances to defendant, evidence received by the arbitrators and in the suit on the award was not admissible, except as offered by defendant or received under stipulation; this being particularly true in view of the strict rules in the federal courts as to the admission of testimony of witnesses at former trials and the fact that defendant was not even a party to the proceedings.

4. EVIDENCE ⟸248(6)—ADMISSIONS—ADMISSIONS AGAINST INTEREST.
In such case, statements or admissions by defendant's husband, made after execution and recordation of the conveyances to her, are inadmissible to impeach her title, for declarations by a grantor after his conveyance are inadmissible to attack the title of the grantee.

5. COURTS ⟸406(1)—CIRCUIT COURT OF APPEALS—EQUITY CASES—NEW TRIAL.
An appeal in an equity case in the federal courts is heard de novo by the Circuit Court of Appeals; consequently incompetent evidence, which the trial court itself stated would be disregarded, the court receiving the testimony without determining in the first instance its competency or relevancy, must be disregarded on appeal.

6. TRUSTS ⟸72—RESULTING TRUSTS—STATUTES.
Under Gen. St. Kan. 1909, §§ 9699, 9700, declaring that when a conveyance for a valuable consideration is made to one person, and the consideration is paid by another, no use or trust shall result in favor of the latter, and title shall vest in the former, but that every such conveyance shall be deemed fraudulent as against the creditors of the person paying

the consideration therefor, and that when a fraudulent intent is not disproved a trust shall result in favor of creditors to the extent of their just demands, and also in favor of subsequent creditors, if there be sufficient evidence of a fraudulent intent, no resulting trust arises where the title to Kansas land is taken in the name of one party, another paying the consideration, unless it be established that the case falls within one of the exceptions of the statute.

7. TRUSTS ⟸372(3)—ACTIONS—EVIDENCE—SUFFICIENCY.
In a creditors' suit, wherein the title of defendant to Kansas land was attacked on the ground that the property was paid for with moneys obtained from a mining claim, which defendant's husband, who paid the consideration, held in trust for complainant's assignor, evidence *held* insufficient to establish any trust.

8. FRAUDULENT CONVEYANCES ⟸296—EVIDENCE—SUFFICIENCY.
In a creditors' suit, wherein defendant's title to Kansas lands, the consideration for which was paid by her husband, was attacked, evidence *held* insufficient to show that complainant's assignor was a creditor of the husband when the land was paid for, or that the payments for the land disabled the husband from discharging any such debts.

9. FRAUDULENT CONVEYANCES ⟸298(3)—EVIDENCE—SUFFICIENCY.
In a creditors' suit, wherein defendant's title to Kansas land, the consideration for which was paid by her husband, was attacked, evidence *held* insufficient to show that the husband caused title to the land to be conveyed to the defendant wife, with actual intent to hinder, delay, or defraud his present or subsequent creditors.

10. FRAUDULENT CONVEYANCES ⟸299(12)—EVIDENCE—SUFFICIENCY.
In a creditors' suit, wherein defendant's title to Kansas land, the consideration for which was paid by her husband, was attacked, evidence *held* insufficient to show that defendant did not receive and hold title for her own benefit, or that she held title for her husband as the real owner.

11. CREDITORS' SUIT ⟸50—RELIEF—RECEIVERS.
Where, in a creditors' suit, receivers were appointed to take charge of the rents and profits of the land involved, defendant is, on denial of complainant's claim, entitled in such suit to an accounting of the rents and profits taken by the receivers.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Creditors' bill by Nels O. Hultberg against Friedborg A. Anderson. From a decree for complainant, defendant appeals. Reversed and remanded.

Axel Chytraus, of Chicago, Ill., and Charles Blood Smith, of Topeka, Kan. (John J. Healy and E. Allen Frost, both of Chicago, Ill., on the brief), for appellant.

Harris F. Williams, of Chicago, Ill., and David Ritchie, of Salina, Kan. (John Barton Payne, Silas H. Strawn, and Walter H. Jacobs, all of Chicago, Ill., on the brief), for appellee.

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

SANBORN, Circuit Judge. On September 7, 1907, the plaintiff below, Nels O. Hultberg, filed a creditors' bill against Mrs. Friedborg A. Anderson, the wife of Peter H. Anderson, founded on a judgment in favor of Hultberg and against Anderson for $264,708, rendered by the

District Court of Dickinson county, Kan., on January 31, 1907, and upon executions thereon returned nulla bona, to avoid a deed to Mrs. Anderson made by the Northwestern Mutual Life Insurance Company for $12,500, dated December 26, 1899, recorded January 8, 1900, of land in Kansas called the Hafner farm, and a deed to Mrs. Anderson made by Gustaf A. Alstrom for $6,000, dated April 1, 1901, and recorded April 15, 1901, of land in Kansas called the Alstrom farm, and to subject these lands to the payment of the judgment against Anderson on the grounds (1) that Anderson bought these lands, caused them to be conveyed to his wife, and paid for them with the proceeds of a mining claim that he held in trust for Hultberg's assignor; (2) that Anderson bought and paid for the lands, and caused them to be conveyed to his wife, when he was indebted to the assignor of Hultberg for the proceeds of the mine and was insolvent, with the intent and purpose to defraud his creditors; (3) that he bought and paid for the lands, and caused them to be conveyed to his wife, with actual intent to hinder, delay, and defraud his creditors; and (4) that he caused the lands to be conveyed to Mrs. Anderson for himself and for his benefit, and that she has since held them in trust for him, and he has ever since been and still is the real owner thereof. Mrs. Anderson by her answer denied all the equities alleged in the bill, evidence was taken, there was a final hearing, and the court below rendered a decree for the plaintiff, Hultberg, on the ground that Anderson paid for the land with the proceeds of the mine, which he held in trust for the assignor of Hultberg.

Mrs. Anderson has appealed, and her appeal presents two questions: First, were the judgment against Anderson in the Kansas court, and an award and decree in Illinois on which that judgment was based, and the evidence or testimony in those cases, to none of which Mrs. Anderson was a party, or any of them, competent evidence against her of any of the essential facts requisite to establish the claim of Hultberg against her, except the fact that the Kansas judgment was rendered, and that at the time of its rendition, January 31, 1907, Anderson was indebted to Hultberg in the amount of $264,708; and, second, was the decree below sustained by sufficient competent evidence upon the merits of the issues?

A brief statement of the facts that are conceded or conclusively established and a short history of pertinent proceedings anterior to the Kansas judgment will render the discussion and decision of these questions more intelligible. In 1897 the Swedish Evangelical Mission Covenant of America, a corporation of Illinois organized for religious purposes and not for pecuniary profit, having its principal place of business in Chicago, was maintaining Hultberg at Chinik, in Alaska, as a missionary, and it sent Anderson, who had been a student with it in Chicago, to the same place as an assistant missionary and school-teacher, and paid his expenses of travel and a salary of $700 in goods a year. In the year 1898 gold was discovered near Chinik. In October of that year R. L. Price duly located, gave, filed, and recorded notice of location, and became the owner of placer claim No. 9 Above on Anvil Creek. On November 17, 1898, Price, for a recited consideration of

$20, which was paid to the attorney in fact of the grantor by Peter H. Anderson, conveyed this claim to him. In the summer of 1899 Anderson extracted from this claim gold from which he derived a net income of $40,000, and from placer claim No. 2 Above on Anvil Creek, which he also owned, gold from which he derived a net income of $18,000. In the summer of 1900 Anderson extracted from the claim No. 9 a net income of about $175,000. In 1900 the Covenant made a claim that Anderson had acquired and held No. 9 and its proceeds in trust for it, but it never claimed that he so held No. 2 Above, but admitted that he was the owner of that claim, although it was originally located in his name in the autumn of 1898. Anderson denied that he had acquired or held No. 9 or its proceeds in trust for the Covenant, denied that it ever had any interest in it, and continued to work the mine himself, or by a California corporation which he controlled, until the year 1903, when Claes W. Johnson and the White Star Mining Company of Illinois secured from Anderson, or from his California corporation, a contract of purchase and went into possession thereof. Thereafter, and in the year 1903, the Covenant, for a recited consideration of $1, conveyed all its title and interest in No. 9 and in its proceeds, and all its claims against Anderson, to the plaintiff, Hultberg. In the same year Hultberg and Anderson made a written agreement to submit to three arbitrators all the claims of Hultberg, as successor of the Covenant, against Anderson, and all the latter's defenses and contentions, and to abide and perform the award of these arbitrators. The White Star Mining Company and Claes W. Johnson were parties to this agreement, but Mrs. Anderson was not. Much evidence and the testimony of many witnesses was introduced before the arbitrators, and their award, made on April 13, 1904, was that Hultberg was entitled to recover of Anderson $232,200, to be paid by him immediately. Thereafter, in a suit in the circuit court of Cook county, Ill., to which Hultberg, Anderson, and others were parties, a decree was rendered on June 13, 1904, whereby the court adjudged that the award was valid, and that Anderson pay to Hultberg $232,200 and interest from April 13, 1904. This decree is the cause of action, and the only cause of action, upon which the judgment of the Kansas court of $264,708, against Anderson, which was rendered January 31, 1907, was founded.

At the final hearing before the court below counsel invoked, and now in this court counsel for the plaintiff, Hultberg, invoke, the award, the decree of the Illinois court, the testimony of stenographers that certain witnesses testified to certain facts before the arbitrators, and the testimony of witnesses to statements of Anderson derogatory to the title of Mrs. Anderson to the land in controversy, which were made long after the deeds were delivered to Mrs. Anderson and recorded, as evidence against her that Anderson held claim No. 9 Above and its proceeds in trust for the Covenant at the time her deeds were made, that he was then indebted to the Covenant, that he paid for the land with moneys he held in trust for the Covenant, that the land was bought and conveyed to her by Anderson with intent to hinder, delay, and defraud his creditors, and that she has always held the land in trust for Anderson, and it has always been really his. The court below

seems to have held that such evidence was competent to prove that Anderson held claim No. 9 and its proceeds in trust for the Covenant.

[1] But it was indispensable to the maintenance of the plaintiff's suit that he should clearly prove that at the times the deeds to Mrs. Anderson were made in December, 1899, and April, 1901, not on January 31, 1907, when the Kansas judgment on which his suit is founded was rendered, Anderson held the title and the proceeds of claim No. 9 in trust for the Covenant, or that at those times he was indebted to the Covenant, and his payment for the lands deeded to Mrs. Anderson deprived him of the means to pay his just debts then existing, or that he bought the lands and caused them to be conveyed to his wife with the actual intent to hinder, delay, or defraud his creditors, or that she has always held them in trust for him and they have been really his. It is indispensable to the maintenance of a suit on a creditors' bill to avoid conveyances made or caused by the debtor before the judgment on which the creditors' suit is founded was rendered against the grantor as in fraud of the latter's creditors that the plaintiff prove the existence, at the times the conveyances were respectively made, of the trust, the indebtedness, or the actual fraudulent intent of the judgment debtor on which the plaintiff relies. Horbach v. Hill, 112 U. S. 144, 149, 5 Sup. Ct. 81, 28 L. Ed. 670; Bruggerman v. Hoerr, 7 Minn. 337, 343 (Gil. 264–269), 82 Am. Dec. 97; Burton v. Platter, 53 Fed. 901, 906, 907, 4 C. C. A. 95, 100, 101; Tunison v. Chamblin, 88 Ill. 378, 385; Mattingly v. Nye, 8 Wall. 370, 373, 375, 19 L. Ed. 380; Clark v. Killian, 103 U. S. 766, 768, 769, 26 L. Ed. 607.

[2] The subsequent judgment against the debtor in an action to which the prior grantee was not a party or privy estops the grantee from denying that the judgment was rendered at the time specified in its record and that the grantor was at that time indebted to the judgment creditor in the amount therein stated, but it estops him no farther. Because such a prior grantee is not a party or privy to the subsequent judgment against his grantor in an action commenced after the grants were made, as in this case, and because "no grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant, otherwise a man having no interest in property could defeat the estate of the true owner" (Dull v. Blackman, 169 U. S. 243, 248, 18 Sup. Ct. 333, 42 L. Ed. 733; Freeman on Judgments [1st Ed.] § 162), neither the judgment nor the record of the action or proceedings on which the judgment is based is either proof or competent evidence against the grantee of the existence of a trust, of an indebtedness of the grantor or of his intent to defraud his creditors at the time the prior conveyance was made, nor of the circumstances or character of the transaction out of which the adjudged indebtedness arose, nor of any of the facts at issue between the grantor and his judgment debtor, nor of any adjudication or fact disclosed in the proceedings for that judgment, except the fact of the rendition of the judgment and of the indebtedness of the grantor to the judgment creditor at the time of the rendition of the judgment to the amount therein stated (Mattingly v. Nye, 8 Wall. 370, 373, 375, 19 L. Ed. 380; Dull v. Blackman, 169 U. S. 243, 248, 18 Sup. Ct. 333,

42 L. Ed. 733; Gottlieb v. Thatcher [C. C.] 34 Fed. 435, 438; Burton v. Platter, 53 Fed. 901, 906, 907, 4 C. C. A. 95; Lynch v. Burt, 132 Fed. 417, 428; Harrington v. Wadsworth, 63 N. H. 400, 401; Bruggerman v. Hoerr, 7 Minn. 337, 343 [Gil. 264–269], 82 Am. Dec. 97; Corser v. Kindred, 40 Minn. 467, 468, 42 N. W. 297; Minnesota Debenture Co. v. Johnson, 94 Minn. 150, 152, 102 N. W. 381, 110 Am. St. Rep. 354; Yeend v. Weeks, 104 Ala. 331, 338, 16 South. 165, 166, 167, 53 Am. St. Rep. 50; Sweet v. Dean, 43 Ill. App. 650; Coles v. Allen Preer & Illges, 64 Ala. 98; Taylor v. Means, 73 Ala. 468).

[3] For the same and still stronger reasons neither the award of the arbitrators, nor the judgment against Anderson thereon in the Illinois court, nor any decision which that court or the abitrators made, nor the records of those proceedings, nor the testimony of witnesses in the hearing before the arbitrators, nor the admissions or statements of Anderson after the deeds were made, were competent evidence against Mrs. Anderson, except in those instances in which she and her attorneys in this case stipulated that they should be considered in evidence or themselves offered them in evidence. All those proceedings were commenced years after Mrs. Anderson received her deeds and recorded them. She was not a party or a privy to any of them. They were all founded on the agreement of arbitration which Hultberg and Anderson signed. Mrs. Anderson never signed it or took any part in the proceedings under it and none of those proceedings to whose introduction in evidence in this case she did not consent are more competent evidence against her upon any issue in this case than they would be against any other stranger. They were res inter alios acta, and had no effect upon her rights. The testimony of stenographers or other witnesses to what Anderson or any other witnesses testified before the abitrators was incompetent, because she had never agreed to the arbitration, or to the taking of any testimony before the arbitrators, the court, or the examiners appointed in the arbitration proceeding. Because she had no opportunity to cross-examine the witnesses, or to produce evidence to rebut their testimony, the testimony of witnesses at a former trial of the same cause between the same parties is inadmissible upon a second trial between them in the federal courts. Ex parte Fisk, 113 U. S. 713, 722, 725, 5 Sup. Ct. 724, 28 L. Ed. 1117; Whitford v. Clark County, 119 U. S. 522, 525, 7 Sup. Ct. 306, 30 L. Ed. 500; Beardsley v. Littell, Fed. Cas. No. 1185; Salt Lake City v. Smith, 104 Fed. 457, 469, 43 C. C. A. 637, 649. Much more is the testimony of witnesses at a former trial of the same issues in a suit or proceeding to which the objector was neither a party nor a privy.

[4] Nor is the testimony that crept into this case of the statements or admissions of the grantor, Anderson, derogatory to the title of Mrs. Anderson, which were made many months after her deeds were delivered and recorded, competent evidence to impeach her title. Declarations or admissions of a party who has never had, or has had and has conveyed, or has caused the title to property to be conveyed, made subsequent to the conveyance, and which were not a part of the things done at the time of the transaction, are inadmissible to assail

the title of the grantee. Burt v. McKinstry, 4 Minn. 204, 207 (Gil. 146, 149), 77 Am. Dec. 507; Derby v. Gallup, 5 Minn. 119 (Gil. 85, 97); Zimmerman v. Lamb, 7 Minn. 421, 423 (Gil. 336, 338).

[5] The result is that in the consideration and determination of this case in this court all the incompetent evidence to which reference has been made must be disregarded, for the court below stated in the course of the hearing before it that it admitted evidence offered without determining its competency or relevancy, but that it should not consider or give weight in the decision of the case to evidence thus admitted which it deemed incompetent or irrelevant. An appeal in a suit in equity in the national courts invokes a new hearing and decision of the case on its merits, and accordingly the incompetent evidence to which reference has been made must be disregarded in this court, and the case must be considered and decided upon the competent and relevant evidence in the case only.

[6] That evidence leaves no doubt that Anderson bought and paid for the farms and caused them to be conveyed to his wife. She testified that he paid for them out of the proceeds of placer claim No. 2, which it is conceded that he owned for his own benefit, and which she testified he had previously given to her. In the view which this court takes of this case, it is, however, not material in the state of the evidence whether he paid for the lands with his own money or with hers. For the statutes of Kansas declare that, when a conveyance for a valuable consideration is made to one person and the consideration is paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, although every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration therefor, and that when a fraudulent intent is not disproved a trust shall result in favor of prior creditors to the extent of their just demands, and also in favor of subsequent creditors, if there be sufficient evidence of a fraudulent intent. General Statutes of Kansas 1909, §§ 9699, 9700. The deeds to Mrs. Anderson are therefore presumptively valid and impregnable to the attack of the plaintiff, unless he has proved by substantial and convincing competent evidence either (1) that they were paid for with funds held by Anderson in trust for the Covenant, or (2) that the Covenant was a creditor of Anderson at the times the payments for them were made, and that those payments made him unable to pay the just debts he then owed, or (3) that he then had the actual intent to hinder, delay, and defraud his creditors by the purchase and payment for these lands, or (4) that he placed the title to these lands in the name of Mrs. Anderson, and she received and held it, not for the benefit of herself, but for his benefit, and that he has ever since been and is the real owner of these lands.

[7] Does the competent evidence in this case establish the fact that in December, 1899, when the Hafner deed to Mrs. Anderson was made and paid for, or in April, 1901, when the Alstrom deed was made and paid for, Anderson held placer claim No. 9 Above, or the proceeds thereof, in trust for the Covenant? The records and writings which vested the legal title under which the Covenant claims An-

derson held as trustee for it disclose the facts that this claim No. 9 was discovered and located on October 18, 1898, by R. L. Price, by G. W. Price, his attorney in fact, and that on November 17, 1898, R. L. Price, by G. W. Price, his attorney in fact, sold and conveyed it by a mining deed dated on that day to Peter H. Anderson. Anderson is not named as trustee, nor is the Covenant named in this deed, or in any of the writings relating to the title. The testimony establishes the fact that Hultberg was the missionary of the Covenant at Chinik in 1897 and 1898, that Anderson was his assistant and the teacher of the school, that for their services the Covenant paid their expenses and $1,100 worth of goods per annum to Hultberg and $700 worth of goods per annum to Anderson, and that they were permitted to use and dispose of these goods as they saw fit. Anderson boarded with Hultberg until August 31, 1898, when Hultberg and his family left Alaska, and he did not return until the next summer.

The competent testimony in this case, upon which alone reliance may be placed as tending to show that Anderson held this claim in trust for the Covenant, is this: Mr. Elliott testified that in June, 1899, Anderson told him that claim No. 9 had been staked and recorded by Eskimos, but it had been held that they could not hold claims, and then he was appointed at his own suggestion as trustee for the Eskimos and the Covenant to take the claim; that he asked Anderson in June, 1899, to loan him some money, and Anderson said he had no money of his own, but that he had some of the Covenant's money, and that he then loaned him $25; that from 1897 to 1904 Anderson was mining; that he, Elliott, worked part of claim No. 9 under a lease from Anderson as agent for the Covenant, but that the lease did not say as agent, but Anderson told him so. If the claim had been staked and recorded by Eskimos, and Anderson had become the trustee of the supposed title resulting from those facts, that title and that alleged trusteeship must have been superseded and made void, for the only title established by the evidence is that in Anderson the individual, derived from the location of Price in the fall of 1898. If Anderson had no money of his own in June, 1899, that is no evidence that he did not own the $20 which Price testified he paid him for claim No. 9 in November, 1898, for at that time he had been serving more than a year as a teacher and missionary, and had doubtless received for his salary more than $700 worth of goods, and Hultberg testified that he paid nothing for his board prior to August 31, 1898. Nor is the fact, if one has faith sufficient to believe that it was a fact, that Anderson told Elliott that he had made a lease of a part of No. 9 to him as agent for the Covenant worthy of serious consideration as evidence of Anderson's trusteeship, in the face of the fact that the written lease was made by Anderson the individual and not as trustee, and that he held the possession and took the proceeds of the claim under a perfect title in his individual self.

Hultberg testified that on August 24, 1897, Anderson told him that all he owned in the world was 27 cents. But that was more than a year before he bought claim No. 9 Above, and is not sufficient to raise even a suspicion that the $20 he paid for that claim in November, 1898, was not his own money.

Mrs. Frederickson testified that in the spring of 1899 Mrs. Anderson told her that she had received a letter from Anderson in which he wrote that he had found a claim out in Alaska for the Covenant, and that they could build schools and hospitals all they wanted to. But this testimony in no way identifies the claim which Anderson referred to in the letter with claim No. 9 Above, or with claim No. 2 Above, or with claim No. 1 on Rock Creek, all of which he owned, or with any of the thousands of other claims which he did not own. This and all the other competent evidence in this record has been thoughtfully compared and considered. But it is far from sufficient to overcome the record title in Anderson, the established fact that he paid for the deed of the property himself, that he might have obtained the $20 he paid for it from the proceeds of the goods that were shipped to him for his services, that he might have borrowed it, that there is no evidence that any of the moneys of the Covenant were used to make that payment, that no declaration of trust or writing of any kind made or signed by Anderson, admitting or indicating that he held the claim in trust for the Covenant, is produced, that his relation of employé of the Covenant to teach school and do missionary work for his expenses and a salary in goods did not deprive him of the right with the means he derived from his salary, or with borrowed money, to buy and own mines and other property for his own benefit, and did not charge any property he thus acquired with any trust for the benefit of the Covenant, that the Covenant was incorporated to spread the gospel, and not to speculate in mines, and Anderson was not its employé or agent for the latter purpose, and that he took possession of and worked the mine, claimed and took its proceeds for himself, and constantly and persistently denied that the Covenant had any interest in it as cestui que trust, or otherwise, throughout his relation to it. In the face of these facts the evidence that he held claim No. 9 or the proceeds of it in trust for the Covenant in December, 1899, or in April, 1901, when the deeds were made and paid for, not only utterly fails to prove such a trust, but it is so weak as to be almost negligible.

[8] Was the Covenant a creditor of Anderson when the deeds were paid for, and did those payments disable him from paying the debts he then owed? The only theory on which it is contended that the Covenant was Anderson's creditor is that he held claim No. 9 and the proceeds he had extracted from it prior to April 1, 1901, in trust for the Covenant, that he had not paid those proceeds over to it, and that he was therefore indebted to it for them. But as the plaintiff has utterly failed to prove the trust relation between him and Anderson, those proceeds were the property of Anderson, he was not indebted to the Covenant for them, the Covenant was not a creditor of Anderson, there was no evidence that he owed any other debts, and there was conclusive evidence that the proceeds which he had derived from the mines he owned, including No. 9 Above, amounted to more than $50,000 when he paid for the Hafner farm, and to more than $200,000 when he paid for the Alstrom farm. There was, therefore, no substantial evidence that the Covenant was a creditor of Anderson when he bought the lands and paid for the deeds.

[9] Did Anderson buy these farms, cause the title to them to be conveyed to his wife, and pay for them with the actual intent to hinder, delay, or defraud those whom he might subsequently cause to become his creditors after the deeds were made? Did he intend to hinder, delay, or defraud any of his creditors? There is no persuasive evidence that he had any such intent. There was no motive to induce such an intent. He owed no debts. He had tens of thousands of dollars. His mines were constantly producing large amounts, and promised to continue to do so. The claim of the Covenant that he held placer claim No. 9 Above and its proceeds in trust for it had not been placed in suit, had not gone beyond a fraternal religious claim and appeal to him, and he knew and insisted that the claim was unfounded. It is incredible that he then had any intent to purchase and pay for these lands and place the title in his wife to hinder, delay, or defraud any of his creditors prior or subsequent. The true explanation of the transaction is found in the testimony of Mrs. Anderson. She had become acquainted with Mr. Anderson in 1896 or 1897, when they were both studying or working for the Covenant in Chicago, and before Anderson went to Alaska. In the fall of 1899, after he had worked the mines that summer, he sent for her to come West and she went to Seattle, Wash., to meet him when he came down from Alaska that autumn, and they were married in San Francisco in November of that year. She was a young woman of frugal habits, accustomed to earn her own living. She testified that before her marriage, when Anderson and his Alaska friends came down to Seattle from Alaska, they were extremely extravagant; that they were pouring money left and forth; that she never saw anything like it; that she told Anderson that he must be careful, or they would not have anything; that she simply did not like it a bit; that Anderson and his Alaska friends rented a whole palace car coming down from Seattle to San Francisco, and paid $9 only for a room at the Palace Hotel; that she was not brought up that way, and she did not like it; that she told him that he would have to change, or she would be unhappy; that she said to him, "You must give me something for my own self, or certainly I shall be unhappy. You have said No. 2 is not very rich, nor Rock Creek. Give me these two mines and let me have the proceeds, and I understand there is enough this year to buy me something that I can go back on if things go wrong with you—if you should invest wrong;" and that after more talk on that day, the day before their marriage, he gave her those mines and the proceeds of them, and that they were hers ever after. She also testified that the two farms were purchased with the proceeds from those two mines and that those proceeds were her money. So far as this story relates to the intent, purpose, and object of Anderson in buying these farms and placing the title in them in Mrs. Anderson, it rings true. It discloses that that intent and purpose was to buy Mrs. Anderson something that she could go back on if things went wrong with Anderson, or if he invested wrong. It may be conceded that he never conveyed the title to the two mines or their proceeds to Mrs. Anderson, and that the proceeds of those mines are not traced into the payments for the farms. It may even be conceded that Anderson paid

for them with his own money. He was in a position where he had the right, and it was perhaps his duty, to purchase these farms and have them conveyed to his wife, or to make some other like provision to secure her against his probable misfortune, and the evidence convinces that such was his object and intention in their purchase and conveyance, and that he had no intent to hinder, delay, or defraud any of his creditors either prior or subsequent.

[10] Finally, did Anderson place the title to the farms in the name of his wife, and did she receive and hold it, not for her benefit, but for his, and has he ever since been the real owner thereof? The competent evidence in support of an affirmative answer to this question is that John R. Anderson has occupied and farmed the Hafner farm ever since the year 1910, and has sent Peter H. Anderson one-half of the net proceeds of this farm and operation; that Albert E. Anderson, another brother of Peter H. Anderson, has occupied and farmed the Alstrom land ever since it was conveyed to Mrs. Anderson, and has paid Peter H. Anderson one-third of the proceeds of this farm and operation; and that on November 11, 1902, Mrs. Anderson made a written lease of 80 acres of the Hafner farm, in consideration of love and affection, to A. Anderson and Martha Anderson, the father and mother of Peter H. Anderson, until the decease of the last survivor of the lessees, for the purpose of furnishing a home for them during their natural lives. But Mrs. Anderson was not a business woman when she was married; the fact that her husband, who is accustomed to business transactions, collects the rents or income of his wife's property, does not convert it into his property or charge it with any trust in his favor. On the other hand, such a transaction charges the funds he collects with a trust in her favor, and, if he converts them to his own use, renders him her debtor to the amount that he converts, and in view of the record title in Mrs. Anderson during all the years since 1899 and 1901, in view of the position and relation of the parties when the deeds were made, the object and intent of Anderson in the purchase of these farms, to secure his wife against his possible misfortune, the conclusion is irresistible that these farms have been, ever since they were conveyed to her, the property of Mrs. Anderson, that they have never been and are not charged with any trust for her husband's benefit, or held by her for him or for his benefit, and that he has not had them, and is not now entitled in law or in equity thereto.

For the reasons which have now been stated, the plaintiff has failed to prove the alleged equities of his bill, and he is entitled to no relief against Mrs. Anderson, and she is entitled to a decree of dismissal of the bill on the merits and for her costs.

[11] There is an order in the record, made October 6, 1913, appointing a receiver to collect the rents and profits of the lands, and if that receiver has collected such rents or profits Mrs. Anderson is entitled to an accounting therefor and a recovery thereof in this suit. There may be other matters that should be determined by the decree, or by preliminary or supplementary orders.

Let the decree below be reversed, with costs against the appellee, and let this case be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

CYBUR LUMBER CO. v. ERKHART.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1918.)

No. 3172.

1. APPEAL AND ERROR ⟸882(20)—REVIEW—INVITED ERROR.
A plaintiff cannot except to his own motion for voluntary nonsuit, because, if it was error to grant it, he invited the error.

2. APPEAL AND ERROR ⟸78(4)—REVIEW—FINAL JUDGMENT.
A judgment of nonsuit entered over the protest of the defendant is a final one, reviewable at the instance of the defendant, though not an adjudication of the merits of the controversy.

3. APPEAL AND ERROR ⟸1203(5)—STATUTES—APPEAL—REMAND—EFFECT.
Where a judgment for plaintiff in the federal District Court for Mississippi, was reversed on writ of error, with direction that on the next trial, if the evidence was the same, a verdict for defendant should be directed, plaintiff, upon trial after remand under Code Miss. 1906, § 802, which is applicable and allows a plaintiff to take a nonsuit at any time before retirement of the jury to consider its verdict, may take a voluntary nonsuit at any time before submission of the case to the jury and its retirement.

4. DISMISSAL AND NONSUIT ⟸5—RIGHT OF DISMISSAL—PREJUDICE TO DEFENDANT.
Ordinarily a plaintiff may, at any time, discontinue his action as a matter of course before hearing, exceptions to the rule being where the pleadings of defendant entitle him to a cross-action or to a decree against plaintiff, or where his counterclaim would be barred by limitations if plaintiff was allowed to dismiss his action, and hence a plaintiff, action begun in the federal court, may, at any time before submission, dismiss his action, even though the dismissal will enable him to commence another action in a different forum; the defense being a mere denial of liability, and defendant not being prejudiced by the possibilities of future litigation.

5. COURTS ⟸339—FEDERAL COURTS—PRACTICE—STATUTES.
Conformity statute (Rev. St. § 914 [Comp. St. 1916, § 1537]), declaring that the practice, pleadings, forms, and modes of procedure in civil cases of the District Courts of the United States shall conform as near as may be to the practice and procedure existing in the courts of the state within which the district court is held applies to judgments of nonsuit, and where the state practice permits a nonsuit before verdict, the federal courts should follow the similar practice.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action by Corbet Erkhart, by J. H. Erkhart, his next friend, against the Cybur Lumber Company. There was a judgment of voluntary nonsuit, and a motion for judgment and to set aside the order granting the nonsuit. Plaintiff brings error. Affirmed.

See, also, 238 Fed. 751, 151 C. C. A. 601.

W. J. Gex, of Bay St. Louis, Miss., and J. C. Henriques, of New Orleans, La. (Gex & Waller and J. C. Henriques, all of Bay St. Louis, Miss., on the brief), for plaintiff in error.

J. H. Mize, of Gulfport, Miss. (O. F. Moss, of Lucedale, Miss., and Mize & Mize, of Gulfport, Miss., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. Corbet Erkhart, by next friend, sued the Cybur Lumber Company in tort, and recovered a judgment. The defendant prosecuted a writ of error to this court and the judgment was reversed, the court holding that a verdict for the defendant should have been directed upon the evidence in the record, and the cause was remanded to be proceeded with in conformity with the opinion rendered by this court, 238 Fed. 751, 151 C. C. A. 601. Upon the remand of the case the plaintiff took a voluntary nonsuit, over objection. Subsequently the defendant moved for a judgment, which motion was overruled. It then moved to set aside the order granting the plaintiff a nonsuit, which motion was also denied. Another motion was made to redocket the case and to set the same for a hearing, and this motion was also denied.

[1, 2] 1. A plaintiff cannot except to his own motion for a voluntary nonsuit, because, if it was error to grant it, he invited the error. But when he moves for a voluntary nonsuit, and a judgment of nonsuit is entered over the protest of the defendant, the judgment is a final one and reviewable at the instance of the defendant, though not res judicata of the merits of the controversy. Connecticut Fire Ins. Co. v. Manning, 177 Fed. 893, 101 C. C. A. 107.

[3] 2. It is a statute of the state of Mississippi that:

"Every plaintiff desiring to suffer a nonsuit on trial shall be barred therefrom unless he do so before the jury retire to consider of its verdict." Miss. Code of 1906, § 802.

Under this statute a plaintiff, at any time before the jury had retired to consider their verdict, had a right to take a nonsuit. When the verdict was set aside by the court, with direction that on the next trial, if the evidence was the same, a verdict for the defendant should be directed, the whole case was reopened, and relatively to the second trial the case was in the same situation it was when it was ripe for trial in the first instance. The direction of the court was only intended to operate on evidence adduced on the second trial, and had no effect on the plaintiff's right to discontinue his case by suffering a voluntary nonsuit.

[4] The general rule is that a plaintiff may discontinue his action as a matter of course before the hearing. There are exceptions to the general rule, as where the pleadings of the defendant entitle him to cross-relief, or to a decree against the plaintiff, or where his counterclaim would be barred by the statute of limitations if the plaintiff was allowed to dismiss his action. C. & A. R. R. Co. v. Union Roller Mills Co., 109 U. S. 702, 713, 3 Sup. Ct. 594, 27 L. Ed. 1081.

The case at bar is a suit for personal injuries, and the defense only goes to the denial of the facts on which the plaintiff bases his action, and falls within the general rule. The defendant is not hurt by the withdrawal of the plaintiff's suit. It is true that the plaintiff may bring his suit over either in the same court or in another court having jurisdiction. In those jurisdictions where law and equity

causes were tried by different tribunals, it was not unusual for a plaintiff to discontinue his case in a law court and recommence it in a court of equity. It is not regarded as such prejudice to a defendant that the plaintiff or complainant dismissing his bill may, at his pleasure, harass him by filing another action for the same matter. Bank v. Rose, 1 Rich. Eq. (S. C.) 294.

[5] Under the Conformity Statute (Rev. St. U. S. § 914 [Comp. St. 1916, § 1537]), the practice, pleadings, and forms and modes of procedure in civil causes, other than equity or admiralty, in the District Courts of the United States, shall conform "as near as may be" to the practice, pleadings, and forms and modes of procedure existing in the courts of record of the state within which the District Court is held. This section has been applied to judgments of nonsuit, and it has been held in actions at law that when the state practice permits a nonsuit before verdict, the reviewing court will not disturb a judgment of nonsuit granted in the United States Courts according to the state practice. McCabe v. Southern Ry. Co. (C. C.) 107 Fed. 213; Connecticut Fire Ins. Co. v. Manning, 177 Fed. 893, 101 C. C. A. 107.

In the last-cited case Sanborn, J., dissented, but his dissent was placed on the practice pertaining to appellate procedure. In that case, after its remand to the Circuit Court, the defendant on the second trial moved for a judgment on the pleadings, which motion was overruled, and exceptions thereto were taken. Judge Sanborn undertook to differentiate that case by calling attention to the time when the motion to dismiss was made.

No error appears in the record. Judgment affirmed.

BEAR CAT MINING CO. v. GRASSELLI CHEMICAL CO.*

(Circuit Court of Appeals, Eighth Circuit. December 27, 1917.)

No. 4660.

DAMAGES ⊜62(4)—DUTY TO PREVENT—BREACH OF CONTRACT—"TRIFLING."

Plaintiff, the lessee of a mine, sublet the premises to defendant, under a lease giving defendant the privilege of terminating the same at any time on 30 days' notice. Defendant, after operating the mine for some time, gave notice of its intention to terminate the lease, and at the same time notified plaintiff that it would suspend operating the pumps; the mine being one which required constant pumping to prevent flooding. At the end of the 30-day period the owner of the mine forfeited plaintiff's lease on account of the flooding of the mine. *Held*, that plaintiff could not, as the forfeiture of the lease was only consequential damage resulting from defendant's breach of contract in suspending pumping operations before the termination of the 30-day period, which could have been avoided at trifling cost, recover the value of the lease; the expression "trifling" meaning a sum trifling in comparison to the consequential damages.

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

Action by the Bear Cat Mining Company, a corporation, against the

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

*Rehearing denied March 26, 1918.

Grasselli Chemical Company, a corporation. There was a judgment in favor of plaintiff for $1 damages only, and it brings error. Affirmed.

Albert S. Marley, of Kansas City, Mo. (John S. Marley, of Kansas City, Mo., on the brief), for plaintiff in error.

A. E. Spencer, of Joplin, Mo. (George J. Grayston, of Joplin, Mo., on the brief), for defendant in error.

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

AMIDON, District Judge. The plaintiff, the Bear Cat Mining Company, held a lease dated April 29, 1913, for a mining property in Jasper county, Mo., including the machinery for the operation of the mine. The lease ran for a term of 10 years, with a royalty of 10 per cent. of the value of all ore sold. On July 18, 1913, the plaintiff subleased the same property to the defendant, Grasselli Chemical Company, for similar purposes, for a term ending April 29, 1923. It was agreed in the lease that, if the defendant should at any time fail or refuse to keep any stipulation on its part, plaintiff might, at its option, terminate the lease, and retake possession of the property, giving the defendant 10 days' written notice thereof. The royalty was fixed at 15 per cent. The lease further provided that defendant "shall also have the right and privilege of terminating this lease at any time upon giving said first party 30 days' notice in writing of its intention to terminate this lease at least 30 days after the delivery to said first party of such written notice." Defendant operated the mine until September 29, 1913, when it mailed a notice of its intention to terminate the lease to the plaintiff. The evidence is reasonably satisfactory that this notice was received. At the same time the defendant notified plaintiff that it would suspend operating the pumps. The mine was one which required the operation of the pumps constantly to prevent flooding. In the notice defendant also notified plaintiff that he could take possession of the property at any time, and operate the same, and do whatever was necessary for its protection. Defendant left the mine on October 4, 1913. Neither he nor the plaintiff did anything by its operation to protect it during the month of October, and at the end of the month the owner of the mine declared a forfeiture of his lease with plaintiff, and went into possession of the property.

The present action is brought by the plaintiff to recover $50,000 damages (the alleged value of plaintiff's lease), for defendant's failure to comply with the terms of his sublease, and the breach relied upon is his abandonment of the property during the 30 days covered by the notice, thus giving a right to the owner of the property to forfeit plaintiff's lease. The court directed a verdict in favor of the plaintiff for $1 damages only, upon the ground that it was the duty of the plaintiff himself, upon receiving the notice that was given him, and the right to retake possession of the property and safeguard his own leasehold interests, to do whatever was necessary to that end, for the purpose of mitigating his damages; that he could not stand by and permit his lease to be forfeited, and then seek to recover full damages therefor.

This decision was clearly right. The rule of law applicable to the case was never better stated than by Judge Selden in Hamilton v. McPherson, 28 N. Y. 72, 76, 84 Am. Dec. 330:

"The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him."

Mr. Benjamin, in his work on Sales, page 1327 (4th Am. Ed.) says that a man thus situated must do all that "a reasonable man of business" would have done under the same circumstances to prevent the damages from being enhanced. Sedgwick on Damages (9th Ed.) § 205, says:

"Where damages are claimed, not for the direct injury, that is, the loss of the value of the contract itself, but for consequential loss the plaintiff cannot recover for such loss if he might reasonably have avoided it"

—and cites a multitude of cases, English and American, to support this rule.

The damages here which the plaintiff sought to recover were clearly "consequential," as that term is employed by Mr. Sedgwick. If the plaintiff had gone into possession of the mine, and worked it during the period of 30 days, he could have recovered as damages all the loss which he suffered by that operation. Such damages would have been the direct result of the defendant's violation of the contract. But the damages which the plaintiff is in fact seeking to recover are not the direct result of defendant's violation of the sublease, but are more properly referable to plaintiff's violation of his own lease with the owner of the mine. In the leading case in the Supreme Court, Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117, the rule is stated as follows:

"Where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

The word "trifling" in this passage has reference to the situation of the parties. It means a sum which is trifling in comparison with the consequential damages which the plaintiff is seeking to recover in the particular case. The rule which we have stated will be found further illustrated in the following cases: Ramsey v. Perth Amboy Shipbuilding & Engineering Co., 72 N. J. Eq. 165, 65 Atl. 461; Atkinson v. Kirkpatrick, 90 Kan. 515, 135 Pac. 597; Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073; Oxford Knitting Mills v. American Wringer Co., 6 Ga. App. 642, 65 S. E. 791; Kimball Brothers Co. v. Citizens' Gas & Electric Co., 141 Iowa, 632, 118 N. W. 891; Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101.

The judgment is affirmed.

SLOSS-SHEFFIELD STEEL & IRON CO. v. RUSSELL.

(Circuit Court of Appeals, Fifth Circuit. January 14, 1918.)

No. 3076.

1. MASTER AND SERVANT ⟸281(3)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.
   In an action for personal injuries received by plaintiff, who was caught upon a nail in the axle of a small traveling wheel used on defendant's coal conveyer, evidence *held* sufficient to support a judgment for plaintiff under the instruction which charged that, if the act of plaintiff in getting on the conveyer contributed to the accident, he could not recover.
2. MASTER AND SERVANT ⟸101, 102(1)—INJURIES TO SERVANT—SAFE PLACE TO WORK.
   It is the duty of the master to furnish his servant with a safe place in which to work and safe appliances with which to work.
3. MASTER AND SERVANT ⟸228(3)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.
   Employers' Liability Act Ala. (Code 1907, § 3910) subds. 1, 2, declare that, when a personal injury is received by a servant, the master is liable to such servant as if he were a stranger when the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master, or when the injury is caused by reason of the negligence of any person in the service or employment of the master who has any superintendence intrusted to him whilst in the exercise of such superintendence. The coal conveyer of defendant, consisting of an endless steel belt resting on small traveling wheels, was unsafe because large nails bent so that they would not fall out were used to hold the wheels in place at the ends of the axles. The foreman of the master directed plaintiff, the only laborer at work, to do the best he could in removing rock, wood, or other foreign matter which might go into the crusher. Plaintiff was caught by one of the nails and injured. *Held*, that the accident fell within the scope of both sections, particularly the latter, and so contributory negligence could not be imputed to plaintiff; defendant's negligence consisting not only of the furnishing of unsafe machinery, but of the negligence of its foreman.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action by Henry C. Russell against the Sloss-Sheffield Steel & Iron Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

John P. Tillman, Lee C. Bradley, and L. C. Leadbeater, all of Birmingham, Ala. (T. A. McFarland and Tillman, Bradley & Morrow, all of Birmingham, Ala., on the brief), for plaintiff in error.

A. Leo Oberdorfer, of Birmingham, Ala. (Beddow & Oberdorfer, of Birmingham, Ala., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. [1] Defendant in error (called plaintiff hereafter) was an employé of the Sloss-Sheffield Steel & Iron Company (hereafter called defendant). In connection with the operation of

the coal mine of the Company a machine called the "conveyer" or "picking belt," was used in the separation of rock from the coal. This machine, driven by a shaft, is an endless steel belt, divided into two parallel sections about two feet six inches wide, separated by a slate compartment. The conveyer rests upon the axles of small traveling wheels which move along tracks on the sides. The wheels were held in place by cotter pins in the end of the axles. In the construction of this picking belt, the supply of cotter pins becoming exhausted, in their stead were used, as to some of the wheels, twentypenny nails, bent to keep them in place. The belt was protected by a plank or case, which prevented the exposure of the cotter pins or nails, except at one place. The ordinary requirement of the work was the service of about 14 persons, but on the morning of the accident the plaintiff Russell was the only laborer at work. He was directed by the foreman to do the best he could in removing rock or wood or any other foreign matter which might otherwise go into the crusher and damage that machine. It became necessary to remove a block of wood, and Russell got up on the belt and removed it. As he was getting down, or just after he resumed either the original place at which he was at work, or some other place alongside the picker, and at a place where there was no protecting case, his clothing was caught by one of the twentypenny nails, and he was pulled into a space between a post and the conveyer, and was very seriously injured.

The case was tried upon the assumption that the action of plaintiff in getting on the conveyer was negligent, and the trial judge instructed the jury that, if this had anything to do with his injury, they would find against him. The jury, notwithstanding this direction, returned a verdict in his favor. It is now insisted that the evidence is conclusive that getting onto the conveyer caused the accident, and that there was no evidence which would authorize a finding that the action involved in getting off and that which resulted in the accident were separable.

The question is whether the jury had any evidence to warrant the finding necessarily implied in their verdict that plaintiff recovered his position after getting off the conveyer, and that there was an interval before his clothes were caught by the nail, with the resulting injury. Plaintiff's testimony as to this matter was as follows:

"All that time I was on the belt; then when I threw it off I felt my feet getting close to the conveyer, and I slid off of there and straightened completely on my feet, and looked up at the end of the conveyer before I was caught." "I didn't fall off of the conveyer or belt; I slid off. I didn't lose my balance on it." "I turned over on my face and slid off on my feet. Then I looked up at the shaker, and as I looked at the shaker something pulled me." "I would have fallen forward, but I threw my hands down and went a somersault, and my feet went across this way, and I turned over, and I says, 'I am at the bottom; I will get off the conveyer,' and I got off safe and free, and after I got off and looked up into the shaker I was caught." "I turned over and slid off on purpose. It was not an instant after that something caught me; I could not say how long; I don't know what you call an instant; it was not a minute, I am satisfied. If the tick of a clock is a second, it was more than that; I could not say it was two seconds."

Defendant suggests that the federal courts, in applying state laws, do not have to follow the decisions of the state with reference to those matters which depend on general principles of jurisprudence, rather than upon the peculiar laws of a particular state, and suggests that what is known as the "scintilla doctrine" has no recognition in the federal courts. Assuming the correctness of these propositions, their application would not seem to require a reversal of the judgment herein. The charge of the District Judge distinctly and absolutely required the jury to determine whether the act of the plaintiff in getting on the conveyer had anything to do with his subsequent injury. If the jury had concluded that this action upon his part was the proximate cause of the injury, it would have been necessary to sustain their finding. The rule which would have required the sustaining of their verdict in that event will require that the verdict rendered should not be set aside. There is evidence to support the finding. Indeed, if the testimony of the plaintiff be accepted as true, a different conclusion would have been difficult. At all events, the jury has so found, and, in the exercise of his discretion, the District Judge has refused to set aside the verdict.

[2,3] The plaintiff in error insists that, even if the action of plaintiff in getting on the conveyer had nothing to do with the accident, the company is still not liable because of the contributory negligence of the plaintiff. The plaintiff was 62 years of age; he had worked in coal mines and for a time on a locomotive; he had never seen a conveyer before he saw the one by which he was hurt. The conveyer was in the condition when he was hurt that it was at the time of his employment. The employer owed to him the duty of furnishing a safe place in which to work and safe appliances with which to work. His attention was not called to the fact that it was unsafe for him to work at certain places alongside the conveyer, on account of the fact that the wheels were not protected as they were elsewhere, and on account of the fact that twentypenny nails had been used instead of cotter pins in the original construction. The lack of safety inhering in the machinery as primarily constructed and the dangers resulting from a failure to maintain the protecting case were not obvious to an inexperienced hand. According to the statement of the plaintiff, he was working at the point he was directed to work by the superintendent. He was, according to his testimony, at that place when he was injured. While the injury resulted in part from conditions considered in the first paragraph of the Employers' Liability Act, no injury would have occurred to him but for the improper and negligent action of the superintendent, a matter regulated by the second section of the act. The circumstances are such that contributory negligence cannot legally be imputed to the plaintiff.

The judgment is affirmed.

HOWE, Immigration Com'r, v. UNITED STATES ex rel. SAVITSKY.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 72.

1. ALIENS ⟸53—IMMIGRATION—UNLAWFUL ENTRY.

Where a naturalized citizen of Canada, on being requested by his brother, a resident of the United States, to come into this country on account of the dangerous illness of the brother's wife, applied to the immigration office in Montreal, established pursuant to Immigration Act Feb. 20, 1907, c. 1134, § 32, 34 Stat. 908 (Comp. St. 1916, § 4281) for permission to enter the United States, and after examination of himself and of his wife was given a pass, the entry of such person into the United States cannot be deemed in violation of law.

2. ALIENS ⟸53—IMMIGRATION—DEPORTATION—PERSONS LIKELY TO BECOME PUBLIC CHARGE.

Immigration Act 1907, § 2, as amended by Act March 26, 1910, c. 128, 36 Stat. 263 (Comp. St. 1916, § 4244), provides for the exclusion of aliens likely to become a public charge and persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude. Section 20 of the act of 1907 (Comp. St. 1916, § 4269) provides for deportation within three years after entry of an alien who shall become a public charge from causes existing prior to landing. A naturalized citizen of Canada who was physically fit, after regularly obtaining a pass, entered the United States. Thereafter, it appearing that a check which he had drawn while in Canada proved bad, and there being a contention that he was guilty of fraud, the alien was ordered deported as a person liable to become a public charge at the time of his entry. *Held*, that as the alien denied any dishonesty or commission of an offense, and as it appeared that he had entered into business in the United States and was earning a substantial salary, he cannot be deported as a person liable to become a public charge, or as one who has committed or attempted the commission of a crime involving moral turpitude.

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

Proceeding by the United States, on the relation of Harry Savitsky, against Frederick C. Howe, as Commissioner, etc., for discharge of the relator from custody under an order of deportation. From an order issuing the writ, respondent appeals. Affirmed.

Francis G. Caffey, U. S. Atty., of New York City (Harold A. Content, Asst. U. S. Atty., of New York City, of counsel), for appellant.

Goldstein & Goldstein, of New York City (Jonah J. Goldstein and Myron S. Yochelson, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of Judge Mayer in a habeas corpus proceeding discharging an alien ordered to be deported to Montreal, Canada, on two grounds: First, that he had entered the United States without the inspection required by section 20 of the Immigration Act of February 20, 1907; and, second, that under section 2 of that act as amended March 26, 1910, he was a person likely to become a public charge at the time of his entry. The relevant provisions of section 20 are:

"That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of * * * Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States." Comp. St. 1916, § 4269.

The relevant provisions of section 2 are:

"That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; * * * prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose. * * *" Comp. St. 1916, § 4244.

Section 32 provides:

"That the Commissioner General of Immigration, under the direction or with the approval of the Secretary of * * * Labor, shall prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico, so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries, and shall have power to enter into contracts with transportation lines for the said purpose." Comp. St. 1916, § 4281.

[1] In pursuance of the foregoing section the government has established a Board of Special Inquiry at Montreal. The relator, Savitsky, is a Russian by birth and a naturalized citizen of Canada, 26 years of age, having a wife and an infant daughter. His brother Abraham, a resident of Brooklyn, whose wife was dangerously ill, wrote requesting him to come to Brooklyn. He received this letter December 1, 1916, and at once applied to the immigration office in Montreal for permission to enter the United States, submitted to a physical examination, said that he was going to Brooklyn because of the illness of his brother's wife (who shortly after died), and did not know whether he would return or stay there permanently. Thereupon he was required to bring his wife, who was asked whether she knew of his intention to enter the United States, and she replied that she did, and gave her consent. He was then given a pass permitting him to enter, which he did, arriving at New York City December 4th. There seems to us to be no ground whatever for saying that he entered in violation of law.

[2] It furthermore appeared that he left $100 with his wife in Canada and took $100 with him, and there is no pretense that he was in any respect physically unfit. After being in Brooklyn two weeks he entered into partnership with his brother Abraham, investing $300 in the business and earning about $25 a week. It came, however, to the knowledge of the immigration officials that Savitsky had drawn a check for $113 before leaving Canada which proved bad, and that in a dispute with one Solomon Cohen arising out of the purchase of a milk

route, Cohen charged him with having sold some of the equipment and kept the proceeds. Of all these things Savitsky made explanations which did not satisfy the immigration inspector, who believed him guilty of dishonest practice in Canada. It is not necessary to go further into the details. Suffice it to say that it was for this reason Savitsky was found to be likely to become a public charge at the time of entry.

Section 2 of the act expressly covers exclusion because of the commission of a felony or other crime involving moral turpitude, and conditions the exclusion upon either a conviction of the alien or on an admission by him, neither of which exists in this case. If an immigrant may be excluded on the theory that because of charges of dishonesty neither proved nor admitted, this special provision of the act would appear to be useless. Certainly it can be circumvented in any case. It seems to us evidently intended, by defining the proof required, to prevent just such conjectures as were indulged in by the immigration inspector in this case. Indeed, with such latitudinarian construction of the provision "likely to become a public charge," most of the other specific grounds of exclusion could have been dispensed with. Idiots, imbeciles, feeble-minded persons, insane persons, persons affected with tuberculosis and prostitutes, might all be regarded as likely to become a public charge. The excluded classes with which this provision is associated are significant. It appears between "paupers" and "professional beggars." We are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future. If the words covered jails, hospitals, and insane asylums, several of the other categories of exclusion would seem to be unnecessary. We are referred to a decision of the District Court for the Southern District of New York in United States ex rel. Freeman v. Williams (D. C.) 175 Fed. 274, in which the deportation of an alien whose career before entering the United States had been one of habitual delinquency was sustained on the ground that he was likely to become a public charge. We are not persuaded by this decision, and think Savitsky did not fall within the class under which the order of deportation was made. Gegiow v. Uhl, 239 U. S. 9, 36 Sup. Ct. 2, 60 L. Ed. 114.

The order is affirmed.

SORENSON v. ALASKA S. S. CO.*

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 3021.

ADMIRALTY ⊂=118—APPEAL—CONFLICTING EVIDENCE.

A decree in admiralty, based on sharply conflicting evidence, will not, on appeal, be disturbed; the trial judge having heard the testimony.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

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

*Rehearing denied February 11, 1918.

Libel by Henry Sorenson against the Alaska Steamship Company, a corporation. From the decree (243 Fed. 280), libelant appeals. Affirmed.

James B. Metcalfe and J. Vernon Metcalfe, both of Seattle, Wash., for appellant.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., for appellee.

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

HUNT, Circuit Judge. Libel in personam for personal injuries received at Seattle by Sorenson, appellant, a seaman on the steamship Victoria, owned by the corporation appellee. The following is a brief summary of the case:

The ship had a lower hold, a between-deck, a steerage deck, and a main deck, with hatches above one another. There was also an orlop or false deck below the between-deck. The ship had loaded a coal cargo, about 1,800 tons in bulk, at Boat Harbor, Canada, and went to Seattle. The coal had been poured into the bottom hold of the ship through the hatch above, and was trimmed off by specially employed trimmers. In the loading the men shoveled the coal to the sides of the ship's lower hold, until the hold was so full that the men left the lower hold and went to the between-decks compartment, when more coal, about 20 tons, was poured down into the between-decks compartment, and a pile was made which reached up in a pyramid to a point above the level of the steerage deck. This was leveled, so as to allow the steerage hatch to be closed before sailing.

Appellant himself testified that he and the crew helped trim the coal; that when the ship was at Seattle the boatswain told him "to go down into the No. 2 hold and trim the coal away, and leave as much space as possible in the fore part of the 'tween-deck," because the ship was going to Bellingham to take in extra cargo; "to trim it up in the wings and in the after part, to do away with it the best way you possibly can." He also said that they were trimming the coal up in the wings, and the after part and wings were full, and there was still a pile of coal left in the hatch, and that he came out in the coamings and cut a hole in the corner in the starboard side of the hatch coaming in the 'tween-deck. The witness continued:

"We were trimming the coal up towards the wings in the after part, and we filled that up. Only we had filled up the coal back of us, and there was still a pile of coal left aft the hatch, and in order to put the hatches on, lower the freight, and stow the freight on the hatches, we had to take this pile away. * * * I cut the hole in the corner, and the best way to get away with the coal was to go down underneath the 'tween-decks. * * * There was lots of room in the sides. I slid down through the hole I cut in the coal pile in the corner of the 'tween-deck hatch."

Plaintiff said that, as it was dark, he called for a lantern; that the flame of the lantern went down, and an explosion immediately followed.

The evidence on behalf of the appellee was to the effect that, when the lower hold was stored and trimmed, there was some additional coal,

15 or 20 tons; that this quantity was put in the 'tween-decks hold; that the trimmers had come out of the lower hold before the additional coal was put in on the 'tween-decks; that the coal made a pyramid; that by putting coal in that way it would go down on top of what was in the lower hold; that the orders to the boatswain were to take six men to trim the coal out in the wings and in the after part of the 'tween-decks, and to go down and trim the coal in the after part and out in the wings, and to keep the fore part clear of the 'tween-decks; that these orders were given to trim the coal on the 'tween-decks out in the wings because the lower hold was full; that there was ample space to put the coal in the 'tween-decks compartment, and that the purpose was to get a space to put some freight in the fore part of the compartment; that no orders were given to trim the coal in the lower hold.

It is unnecessary to state the evidence in greater detail for it is clear enough that the case turned upon the question of what orders were given to the appellant on the morning that he was injured, and what was the fair construction to be put on such orders. If his version had been accepted by the trial court as the correct one, and the appellees had been held guilty of negligence, we would have sustained a decree in his favor. But the only serious question in the case was one of fact, which depended for decision upon conflicting evidence. The judge who tried the case evidently gave the testimony most careful attention. After his first decision he granted a reargument, and again held that all the circumstances confirmed the positive testimony of the appellee that no authority was given to the seamen to disturb the lower hold, and that, as the act of Sorenson in going into the lower hold was purely voluntary, without suggestion on the part of his superiors, there could be no recovery for negligence, and only allowed for maintenance and cure.

This court should not, under such circumstances, reverse the finding. The Hardy, 229 Fed. 985, 144 C. C. A. 267.

The decree is affirmed.

THE JOSEPHINE.

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

No. 44.

COLLISION ⊂=75—SCHOONER AND ANCHORED SCOW—FAILURE TO MAINTAIN ANCHOR LIGHT.

A collision on a dark and stormy night in January between a scow, anchored behind a breakwater, and a schooner, which had just rounded the end of the breakwater, also seeking an anchorage out of the storm, *held* due solely to the fault of the scow for failing to carry an anchor light; the evidence being insufficient to sustain her claim the schooner was not keeping a proper lookout at the time.

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

Suit in admiralty for collision by David Cohen and others, owners of the schooner Thomas R. Wooley, against the barge Josephine; Jo-

sephine E. Cane, claimant. Decree for libelants, and claimant appeals. Affirmed.

This is an appeal from a decree of the District Court (Judge Mayer presiding), upon a libel in rem against the scow Josephine for a collision occurring inside the Stonington breakwater in the early morning of January 16, 1913, between herself and the schooner Thomas R. Wooley. The District Court held the Josephine solely at fault for failure to maintain an anchor light on the night in question and exonerated the schooner. The finding of the court as to the light was upon disputed evidence and the appellant does not challenge it here, but accepting the fact that the scow was at fault for failure to maintain her light, insists that the schooner was likewise at fault in omitting to maintain a proper lookout when she came into the harbor.

On the 15th of January, 1913, the schooner set sail from College Point, N. Y., bound for New Bedford, Mass., with 700 barrels of cordage oil. At 4 a. m. on the 16th, while somewhere off Stonington, Conn., the weather, which had become threatening, forced her into Stonington Harbor for refuge. The wind was southwest, it was raining in squalls, and the schooner could not see objects on the water more than a few feet outboard, though lights were plainly visible, as there was no fog. The harbor at Stonington is in part formed by two breakwaters, one upon the east, which does not concern this case, the other upon the south and west, terminating in an arm extending northeast and southwest. The southern and western breakwater formed on the night in question a protection against the weather. Inside it and upon the anchorage ground three barges had been anchored, the first, the Josephine, without a light, the second, with an anchor light properly burning on its after staff, and the third, which need not be considered. The Josephine was 115 feet long, and on the night in question loaded to a freeboard of probably not over 2 feet. She was anchored close up to the second barge which carried the light.

The Wooley was coming down Long Island Sound, with her sheets eased, running free on the starboard tack, bound east. To enter Stonington Harbor she had to starboard her wheel and come around through an angle of more than 180 degrees. When off the harbor she saw the light of the second barge across the breakwater, as well as the light upon the end of the breakwater itself. Starboarding, she jibed and came around on the port tack, continuing to come into the wind until she rounded the end of the breakwater. Thereupon she continued close-hauled, meaning to anchor on the port side of the barge, of which she saw the light. As she approached, she eased her foresheets and let her jib run. She had passed the light on the second barge and was about to luff into the wind, when her mate, Cornillet, made out the second barge about 25 feet off the starboard bow. He called out to the captain, who was at the wheel, and who at once put down his helm; but it was too late to avoid a contact. The schooner's rudder fouled the tackle of the barges and she was forced inshore, where she sank, doing the damage in question.

There were three in the crew of the Wooley, the master, Swenson, the mate, Cornillet, and the cook, Carroll. Before rounding the breakwater all were on deck, but their subsequent positions and maneuvers are the subject of dispute.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellant.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellees.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). The sole questions in the case are whether the Wooley main-

tained no proper lookout, and, if not, whether she has shown beyond reasonable doubt that her failure did not contribute to the collision. On the first of these questions the claimant has the burden, on the second the libelant. It is difficult from the testimony to learn with certainty just what the mate and cook on the Wooley were doing at the time of the accident. The testimony as it reads in the record is confused and in some places seems to be inconsistent. So far as we have been able to learn, the most reasonable understanding of the facts is as follows:

After the Wooley had made out the light at the end of the breakwater and the light of the second barge across the breakwater, of which she was then about abreast, the cook stood by aft to take in the main sheet for the jib; necessarily this took place shortly before the end of the breakwater was reached, the wind being southwest. After making fast the main sheet, the schooner being on the port tack, both men went forward, where all future work was to be. We may assume that at the last minute the captain expected himself to ease the main sheet or perhaps to come quite into the wind. In any case the two men were not needed aft again. Whether they eased the foresheets before or after they let run the jib does not definitely appear, but at some time, presumably after the schooner had rounded the end of the breakwater, both men were at work easing the foresheets. This was obviously desirable, as the vessel was coming to anchor and wished to diminish her headway as much as possible. The captain gave the order to let the jib run, which was executed, and at some time thereafter both men were standing forward of the mainmast ready to slip the anchor.

While in this posture the mate made out the Josephine some 25 feet forward and on the starboard bow. It nowhere definitely appears whether just before they had been looking out or what they were doing, but it does appear that the mate had acted as lookout before the necessary maneuvers to bring the schooner around the breakwater and to anchor. At the moment of the collision there was nothing to intercept the view of either of the men forward and there was nothing to engage their attention as they were only waiting for the word to slip the anchor. The vessel was under diminished headway, the foresail probably shaking in the wind, and there was every reason to suppose that there was no vessel forward of the light on the second barge. Nowhere in the testimony can we find that either the mate or the cook was asked whether they were looking out just before the collision. Under these circumstances it does not seem to us that the claimant has proved her case. There is nothing in the events themselves which suggest a failure to keep a lookout. The night was black and squally, and there is no reason to suppose that the barge, no more than a low-lying log in the water, would have been made out sooner than she was whether a lookout was kept or not.

Moreover, in view of the gross fault of the Josephine, which lay on an anchorage without light in a night like that in question, we are not disposed to inquire too nicely into the faults of the schooner. The

Victory and The Plymothian, 168 U. S. 411, 423, 18 Sup. Ct. 149, 42 L. Ed. 519.

Decree affirmed, with costs.

CRESCENT TOOL CO. v. KILBORN & BISHOP CO.

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

No. 26.

1. TRADE-MARKS AND TRADE-NAMES ⊜95(3)—UNFAIR COMPETITION—LIMITATION OF ARTICLES.

To entitle a complainant to injunctive relief because of the imitation by defendant of nonfunctional features of his product, it must be shown that such features have become associated by the public with him as the manufacturer or source.

2. TRADE-MARKS AND TRADE-NAMES ⊜93(3)—UNFAIR COMPETITION—INJUNCTION.

Complainant began in 1908 to make and sell an adjustable wrench of new and original shape, and by advertising has built up a large trade in the same, which has become known to dealers and consumers as the "Crescent" type of wrench. Each wrench has complainant's name as maker marked thereon, but it did not appear that its sale had been in any part due to its source, as distinct from its utility and neat appearance, when in 1910 defendant began to make and sell a similar wrench. Defendant did not use the word "Crescent," nor imitate complainant's packages, and each of its wrenches was plainly marked with its name as maker. *Held*, that such evidence was not sufficient to entitle complainant to a preliminary injunction against defendant for unfair competition.

Appeal from the District Court of the United States for the District of Connecticut.

Suit in equity by the Crescent Tool Company against the Kilborn & Bishop Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

This is an appeal from a temporary injunction granted by the District Court for Connecticut on the 25th day of January, 1917, restraining the defendant pendente lite from manufacturing and selling its adjustable wrenches. The facts as set forth in the affidavits are substantially as follows:

The plaintiff is a New York corporation, organized in 1907 for the purpose of manufacturing tools, and has since that time been engaged in the manufacture among other things of pliers and wrenches. In December, 1908, it put upon the market an adjustable wrench, and has widely advertised the same from that time to the present. The wrench, on account of its appearance and new and original shape, pleased the public, and its sales grew rapidly from year to year, so that it became known to the jobbing trade and retailers and consumers as the "Crescent" type of wrench. Its main structural features were all old in detail. It was adjustable to bolts and nuts of different sizes somewhat after the manner of a monkey wrench, but it was nevertheless quite different mechanically from a monkey wrench. It had a straight handle of web and rib construction, spreading slightly from the neck to the end, with a hole in the end of the web by which it could be hung up. No adjustable wrench of precisely the same character had ever appeared upon the market. There had, however, been adjustable wrenches, some with straight handles, some with web and rib curved handles, and there had been other tools with straight web and rib handles, somewhat broader at the end

than at the neck. Plaintiff's name is plainly printed upon the web of the handle in raised letters.

The defendant is a Connecticut corporation, organized in 1896 and engaged in the manufacture of wrenches and other hardware for some 18 years past. Some time in 1910 it began the manufacture of an adjustable wrench, which it called its "K & B 22½° adjustable." This is substantially a direct fac simile of the plaintiff's wrench, with the exception that the defendant's name appears upon the web in place of the plaintiff's as follows: "The Kilborn & Bishop Company, New Haven, Connecticut, U. S. A.," in distinct raised letters. The defendant made no effort to imitate the boxes or packages of the plaintiff's wrench, nor did it use the word "Crescent" in any way in its sale; but it did begin selling the goods in general competition with the plaintiff's wrenches until the order issued herein.

There is evidence in the correspondence between the plaintiff and its customers that confusion has arisen between the plaintiff's wrenches and the defendant's, customers having supposed that the Kilborn & Bishop wrench was a Crescent, but there was no evidence that the defendant in any way facilitated this confusion.

Harrie E. Hart, for appellant.

J. William Ellis, of Chicago, Ill., for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge. [1] The cases of so-called "nonfunctional" unfair competition, starting with the "coffee mill case," Enterprise Mfg. Co. v. Landers, Frary & Clark, 131 Fed. 240, 65 C. C. A. 587, are only instances of the doctrine of "secondary" meaning. All of them presuppose that the appearance of the article, like its descriptive title in true cases of "secondary" meaning, has become associated in the public mind with the first comer as manufacturer or source, and, if a second comer imitates the article exactly, that the public will believe his goods have come from the first, and will buy, in part, at least, because of that deception. Therefore it is apparent that it is an absolute condition to any relief whatever that the plaintiff in such cases show that the appearance of his wares has in fact come to mean that some particular person—the plaintiff may not be individually known—makes them, and that the public cares who does make them, and not merely for their appearance and structure. It will not be enough only to show how pleasing they are, because all the features of beauty or utility which commend them to the public are by hypothesis already in the public domain. The defendant has as much right to copy the "nonfunctional" features of the article as any others, so long as they have not become associated with the plaintiff as manufacturer or source. The critical question of fact at the outset always is whether the public is moved in any degree to buy the article because of its source and what are the features by which it distinguishes that source. Unless the plaintiff can answer this question he can take no step forward; no degree of imitation of details is actionable in its absence.

[2] In the case at bar it nowhere appears that before 1910, when the defendant began to make its wrenches, the general appearance of the plaintiff's wrench had come to indicate to the public any one maker as its source, or that the wrench had been sold in any part be-

cause of its source, as distinct from its utility or neat appearance. It is not enough to show that the wrench became popular under the name "Crescent"; the plaintiff must prove that before 1910 the public had already established the habit of buying it, not solely because they wanted that kind of wrench, but because they also wanted a Crescent, and thought all such wrenches were Crescents.

Upon the trial the plaintiff may, however, be able to establish this, and it is only fair to indicate broadly the considerations which will then determine the scope of his relief. In such cases neither side has an absolute right, because their mutual rights conflict. Thus the plaintiff has the right not to lose his customers through false representations that those are his wares which in fact are not, but he may not monopolize any design or pattern, however trifling. The defendant, on the other hand, may copy the plaintiff's goods slavishly down to the minutest detail; but he may not represent himself as the plaintiff in their sale. When the appearance of the goods has in fact come to represent a given person as their source, and that person is in fact the plaintiff, it is impossible to make these rights absolute; compromise is essential, exactly as it is with the right to use the common language in cases of "secondary" meaning. We can only say that the court must require such changes in appearance as will effectively distinguish the defendant's wares with the least expense to him; in no event may the plaintiff suppress the defendant's sale altogether. The proper meaning of the phrase "nonfunctional," is only this: That in such cases the injunction is usually confined to nonessential elements, since these are usually enough to distinguish the goods, and are the least burdensome for the defendant to change. Whether changes in them are in all conceivable cases the limit of the plaintiff's right is a matter not before us. If a case should arise in which no effective distinction was possible without change in functional elements, it would demand consideration; but the District Court may well find an escape here from that predicament. Certainly the precise extent and kind of relief must in the first instance be a matter for the discretion of that court.

Order reversed, and motion denied.

MANNERS v. TRIANGLE FILM CORP. et al.

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

No. 104.

1. TRADE-MARKS AND TRADE-NAMES ⟸95(2)—UNFAIR COMPETITION—TITLE TO PLAY.

To give the author and owner of a spoken play the right to enjoin the use by another of the same title for a photoplay, on the ground of unfair competition, aside from any question of property right in the title, it must be shown that he had used it so extensively as to give it a secondary signification.

2. TRADE-MARKS AND TRADE-NAMES ⟸95(2)—UNFAIR COMPETITION—RIGHT OF INJUNCTION.

That complainant wrote and had produced at seven matinée performances a one-act play entitled "Happiness" *held* not to give him any

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

prior right in such title, which entitled him to enjoin its use three years later as the title of a photoplay. Nor did the fact that he later announced his intention to write and produce a three-act play under the same title give him any additional rights.

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

Suit in equity by J. Hartley Manners against the Triangle Film Corporation and the Rialto Theater Corporation. From an order granting an injunction pendente lite, defendants appeal. Reversed.

For opinion below, see 244 Fed. 293.

Alex. L. Strouse, of Milwaukee, Wis. (Alfred S. Barnard and Walter N. Seligsberg, both of New York City, of counsel), for appellants.

David Gerber, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order granting an injunction pendente lite. May 1, 1917, the suit was brought and the affidavits show that the complainant in 1914 wrote a one-act play called "Happiness," which he presented seven times in all at Friday matinées in the Cort Theater, New York City, in March and April of that year; Laurette Taylor having the chief part. Between May and December, 1915, he announced extensively in the newspapers that he intended to present a three-act play under that title with Laurette Taylor in the leading rôle. His contention is that in this way he has acquired a property in the word "Happiness" as a trade-mark when used in connection with a play.

Between February 3 and 17, 1917, the New York Motion Picture Company manufactured a film at its premises in Los Angeles, Cal., upon a scenario written between January 1 and 17 of that year by C. G. Sullivan, and on March 30 gave the photoplay the title "Happiness," without having any knowledge whatever of the complainant's play. This photoplay was purchased by the defendant Triangle Film Corporation, was advertised to be produced with Edith Bennett in the leading rôle, the first presentation to be at the Rialto Theater in Brooklyn, belonging to the Rialto Theater Corporation. April 27 the complainant notified the manager of the Rialto Theater of his exclusive claim to the title, and April 30 mailed a similar notice to the defendant Triangle Film Corporation, which was received May 1. At this time the defendant Film Corporation had expended $48,295.18 in the purchase of the play and about $4,000 in advertising. The first performance was given May 29, and by June 18, when the injunction was granted, the photoplay had been widely exhibited throughout the United States.

The dispute is solely as to the title of the play. There is no similarity whatever between the defendant's film and the complainant's one-act sketch in respect to the subject-matter, and there is no evidence that the defendant Film Corporation is attempting to make the public believe that its photoplay is the same as the complainant's. The contest being as to the rights of the parties respectively, it is of no impor-

tance that the defendant Film Corporation could have changed and can now change the title of its photoplay at small expense. That fact cannot create any right in the complainant which he has not, or impose any duty on the defendants.

[1] There may, of course, be competition between a spoken play and a photoplay as to subject-matter. This was decided in the Kalem Case, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285. There may be unfair competition in the appropriation of the same title of a play, quite apart from the consideration of any property right. In that case, however, it would be necessary to show that the claimant had used the title so extensively as to give it a secondary signification. Macmahan Co. v. Denver Co., 113 Fed. 468, 51 C. C. A. 302, and our decision in Crescent Co. v. Kilborn, 247 Fed. 299, — C. C. A. —, handed down herewith.

We think on the affidavits in this case the motion for a preliminary injunction should have been denied. Our view is, not that the affidavits show that the complainant had abandoned his rights in the title "Happiness," but that they do not show that he had ever obtained a prior right to or any monopoly in the word because of seven matinée performances of a one-act sketch in New York City in 1914. The word "Happiness," being public property, must, in order to acquire a secondary significance, have been used generally in connection with a play, and so have become known to the public said to be likely to be misled, viz., the public throughout the United States.

[2] The fact that the complainant in 1915, a year later, announced his intention to thereafter produce a three-act play under the same title created no monopoly in the name which did not then exist. He was referring to a play to be composed and produced which he might never write or never produce and which if he did both might be different from the one-act play produced in 1914. His language is merely that of expectation, which cannot create a right against the public. Maxwell v. Hogg, 2 Ch. App. 307; Civil Service Association v. Dean, Law Reports, 13 Ch. Div. 512. The defendant's business ought not to have been interrupted because of an announcement which might never be realized.

The order is reversed.

BROWN v. STANDARD OIL CO. OF NEW YORK et al.
BROOKS et al. v. BROOKLYN UNION GAS CO. et al.

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

No. 15.

NEGLIGENCE ⊂=22—DANGEROUS INSTRUMENTALITIES—RUNNING INFLAMMABLE LIQUID INTO RIVER.

A water pipe leading into a separation tank in the yard of respondent's oil refinery, partly filled with sludge acid, which is inflammable, was accidentally left open, and the filling of the tank caused the sludge to run over the top, down its side, and upon the ground below. On its discovery a foreman ordered a watchman to flush off the tank and ground

with a hose, which was done, the water carrying the sludge running down a gutter and into the river at the foot of the street near by, where libelants' tug was lying at the bulkhead. A few minutes later flames broke out on the surface of the water, and before the tug could be moved it took fire and burned, with the loss of one life. *Held*, that a finding that the fire was caused by the sludge, so negligently permitted to run into the river, and that respondent was liable for the damage done was sustained by the evidence.

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

Suits in admiralty by Egbert N. Brown, Jr., James Brooks, and Andrew Bull against the Standard Oil Company of New York, the Brooklyn Union Gas Company, and the City of New York. Decree for libelants against the Standard Oil Company alone, and it appeals. Affirmed.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Ray R. Allen, both of New York City, of counsel), for respondent-appellant.

Foley Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for libelant-appellee.

Lamar Hardy, Corporation Counsel, of New York City, for appellee City of New York.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. Four libels against the Standard Oil Company to recover respectively damages for injuries to the tug Protector, for the death of her engineer, and for loss of the effects of the crew were consolidated and tried together in this action.

March 11, 1911, some time after 5 p. m., the tug Protector was lawfully lying at the bulkhead at the foot of North Twelfth street, Brooklyn, just about to take in water for her boiler tanks from a city hydrant. For a considerable distance on the north side of the street the Standard Oil Company has a refinery, with various sheds, buildings and tanks, extending to the end of the pier on the north side of the slip. On the south side of the street the Brooklyn Gas Company has a large plant, extending to the bulkhead and pier on the south side of the slip. Flames suddenly shot up some 12 feet high from the surface of the water around the tug, setting her afire, as a result of which she drifted from the bulkhead to the south side of the slip and sank. The bulkhead began to burn and the fire eventually spread to the sheds of the oil company on its pier and to the fence and coal elevator on the premises of the Gas Company. The crew had just time to escape from the tug to the stringpiece of the bulkhead except the engineer, who was burned to death.

The libels were filed against the Brooklyn Gas Company and the city of New York as well as against the oil company, charging the companies with maintaining a nuisance and with the escape of oil from their premises into the city sewer on North Twelfth street, and charging the city with negligence in not abating the nuisance. The District

Judge very properly found against the libelants on these points, and therefore dismissed the libels against the gas company and the city.

The oil company was carrying on a lawful business, and one in which, from its nature, fires were likely to occur. Therefore the principle of res ipsa loquitur does not apply. There being no contractual relation between it and the libelants the only duty it owed them was the exercise of ordinary and reasonable care, and the burden of proof that it had not exercised such care was on the libelants. Consistently with these principles of law the District Judge found the oil company guilty of negligence as matter of fact, and entered a decree in favor of the libelants. We have to inquire whether the evidence justified the conclusion.

The particular negligence found arose as follows: As one step in the refining of crude petroleum, either into naphtha oil (gasoline) or kerosene oil, it is treated with sulphuric acid. The acid takes out certain impurities and holds them, along with a percentage of oil not accurately proved in this case, in solution. This solution is called sludge acid and is pumped into a circular iron tank about 15 feet high containing water and there shaken up with air, with the result that the water combines with the acid and leaves the oil and tarry matters free. The purpose of the operation is to recover the acid and use it over again. This process is called separation, and the tank is called a separator.

On the day in question sludge acid had been run into one of the separators and at about 5:30 p. m. before the operation of separating had been begun, the oil company's night foreman noticed that a stream of liquid about 18 inches wide was flowing down the side of the separator. Examination showed that this was caused by the water valve in the pipe on the side of the separator having been partly opened by jarring on the line or by some such cause. The effect of the water continuing to flow into the separator after it was filled was to cause the sludge acid, which is lighter than the water, to flow over the top. There is nothing to show how long this overflow had been going on before the foreman discovered it. He closed the valve, and, as the sludge would burn the clothes or shoes of any one coming in contact with it, ordered a watchman to flush off the surface of the tank and of the ground where the sludge was with the ordinary corporation 3-inch hose. The sludge and the water together ran from the separator through a gate to a gutter on the north side of Twelfth street, and then some 200 feet down the street, crossing over to the south side and passing through an opening in the stringpiece into the river. About 15 minutes after the discovery of the overflow and perhaps ten minutes after the sludge had reached the river, the fire broke out as above described.

Some of the witnesses from the tug had observed oil floating on the surface of the water in the slip with the usual iridescent color. Two experts for the defendant testified that the fact of iridescence showed that the oil must have been very thin, not over 1/10,000 of an inch, and quite insufficient in quantity to produce the flames that broke out. They also said that in their opinion it would be impossible for the oil

in the sludge acid carried by the water from the separator into the river to have caused the flames. Experiment with samples of sludge taken out of one of the separators in the usual course of refining showed that it was inflammable.

The District Judge found the defendant liable on the ground that it was the ignition of the sludge acid which caused the flames, and that the possibility of ignition was a result that should have been foreseen and guarded against. He said:

"As to the issue with reference to the oil company, I think that the testimony sufficiently shows the proximate cause of the fire was some substance which surrounded the tug and which caught fire from a means that is not exactly shown, but which should reasonably have been anticipated; that the material came from the acid separator; that it was negligence to allow a stream of water to carry material from the top of these acid separators to the slip, and therefore that the libelants should recover against the Standard Oil Company."

It appeared that there were factories and garages in other more distant parts of Brooklyn connecting with the sewer in North Twelfth street and the oil company contended that the oil on the surface of the river might have come from them. In view, however, of the fact that no fire on the water had been known or heard of by any of the witnesses in the last 20 years; that such an overflow of sludge from the separator was most unusual; that sludge was inflammable; and that the flames burst out a very short time after it was flushed into the river—we cannot regard the finding of the District Judge that it was the sludge that burned as mere conjecture; on the contrary it rested on very strong circumstantial evidence and should not be disturbed unless clearly wrong. We concur in his further finding that to flush the sludge into the river without foreseeing the danger of its being ignited was a want of ordinary and reasonable care.

The decree is affirmed.

BUMPASS v. McGEHEE.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

No. 4640.

1. FRAUDULENT CONVEYANCES ⇐66—CONVEYANCE TO DEFEAT "CREDITORS"—RECOVERY OF PROPERTY BY ADMINISTRATOR.

Kirby's Dig. Ark. § 81, provides that "any executor or administrator of any fraudulent grantor, who * * * shall have conveyed an estate in land * * * with intent to delay his creditors in the collection of their just demands, may apply to a court of chancery * * * and have the same set aside and canceled for the use and benefit of the heirs at law of the fraudulent grantor, saving the rights of the creditors and purchasers without notice." *Held*, that such statute applied to conveyances made by the defendant in pending actions for torts, to defeat the collection of any judgments which might be recovered therein, although on the trial the plaintiffs were defeated; they being "creditors" within the remedial intent of the statute.

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

2. LIMITATION OF ACTIONS ⊂=103(2)—ACTION AGAINST ADMINISTRATOR—LIMITATION.

Under such statute, where an administratrix was herself the fraudulent grantee of the decedent, who was her husband, she held the property in trust for the heirs at law, and limitations did not begin to run against a suit by them for its recovery, until she repudiated the trust.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit in equity by Martha Adella Bumpass against Ellen A. McGehee. From the decree, complainant appeals. Modified.

John W. Blackwood and John W. Newman, both of Little Rock, Ark., for appellant.

Samuel M. Taylor, William D. Jones, and Daniel Taylor, all of Pine Bluff, Ark., for appellee.

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

HOOK, Circuit Judge. This is a suit by Martha Adella Bumpass against Ellen A. McGehee, her mother, to recover an interest in lands and personal property in Arkansas, and for an accounting. Both claim through James M. McGehee, deceased, who was their father and husband, respectively. The plaintiff, who has appealed, makes no complaint of a part of the decree of the trial court. The controversy brought here involves: First, property referred to as "lands in section 6," and it depends upon the construction of a deed made by McGehee, the ancestor, in 1876; second, lands and personal property transferred by McGehee to the defendant in 1892.

The trial court construed the deed of 1876 as vesting in plaintiff an undivided one-seventh of the "lands in section 6," subject to a life estate in her mother. When the deed was executed, Mr. and Mrs. McGehee had four children, including the plaintiff. Three others were born afterwards. Mrs. McGehee and the first four children were expressly mentioned by name several times as the beneficiaries of the conveyance, but in such a confusing way, in connection with the terms "bodily heirs" and "heirs," that it is difficult to give the deed a satisfactory construction. No useful purpose would be served by setting forth the language employed. The case is so exceptional that it is unlikely ever to occur again, or our decision to constitute a precedent to be followed. We agree with the trial court that it was the grantor's intention to give his wife a life estate, but as to the remainder we think more weight should be given to the specific references in the deed to the four children then living. As something has to give way, it is reasonable to restrict the phrase "all her bodily heirs" to those named and who are recited as participating with their mother in the consideration. This would exclude the three children subsequently born, and give to plaintiff an undivided one-fourth, subject to the life estate. To this should be added what she would receive under the Arkansas law of descents and distributions as an heir of one of the

first four children who afterwards died. As a moral confirmation of this conclusion, if not a legal factor in the construction, it may be observed that in the same year McGehee by another deed conveyed other lands to his wife and children "born after that date," thus indicating a several purpose as to his offspring.

[1] By two deeds and a bill of sale executed in 1892 McGehee transferred to defendant a large amount of real and personal property. It was practically everything he owned. The evidence is overwhelming that there was no consideration for the transfer, but that the sole reason was McGehee's fear of the result of two libel suits recently brought against him and nearing trial. In other words, he put his property in his wife's name to evade execution on the judgments if obtained. Notwithstanding the transfers, he continued to exercise his customary domination over the property until his death the following year. Mrs. McGehee was appointed administratrix and continued so at least until 1901. An Arkansas statute (section 81, Kirby's Digest) provides that:

"Any executor or administrator of any fraudulent grantor, who by deed, grant or otherwise, shall have conveyed an estate in land, tenements or hereditaments, with intent to delay his creditors in the collection of their just demands, may apply to a court of chancery by proper bill or petition and have the same set aside and canceled for the use and benefit of the heirs at law of the fraudulent grantor saving the rights of creditors and purchasers without notice."

It has been held that the right to sue given by this statute extends also to an heir. Moore v. Waldstein, 74 Ark. 273, 85 S. W. 416. It is urged against the relevance of the statute that the plaintiffs in the libel suits had not obtained judgments when the deeds were made, but were afterwards defeated, and that therefore they were not creditors. The suits were pending, however, and the plaintiffs were potential creditors. We think they were creditors within the remedial intent of the statute as construed by the court in Moore v. Waldstein, supra.

[2] The seven-year statute of limitations (section 5056, Kirby's Dig.) is invoked, but we think Mrs. McGehee should be held as a trustee. The evidence shows that she did not repudiate the trust until 1910. This suit was begun in 1912, about two years afterwards. Under the statute first mentioned and above quoted it was her duty to restore the lands to her children to the extent of their interests. Had her husband fraudulently conveyed them to a third person, the right to sue for their recovery in behalf of the children would primarily have been hers as administratrix. Furthermore, when her husband died in 1903 some of the children were minors. The evidence shows that she frequently declared she was holding title for herself and all of them and that she would make a division when the youngest became of age in 1908. All this was consistent with her duty under the law and the facts. The relation between them was peculiarly one of trust and confidence and her conduct and assurances were such as naturally to lull the plaintiff into inactivity. Though the provisions of the statute cited do not extend to personal property, there is enough in the record before us to subject that involved here to the same trust as the lands. An accounting should be had of the property transferred by the deeds

and bill of sale, or of its proceeds, in which the plaintiff should be charged with all she has received by way of advancement or otherwise.

The case is remanded for a modification of the decree, and for further proceedings in accordance with this opinion.

STANDARD OIL CO. v. SUTHERLAND.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1917.)

No. 3046.

1. TRIAL ⊜156(3)—DEMURRER TO EVIDENCE—EFFECT.
In passing on requests based on the theory that there was insufficient evidence to sustain plaintiff's contention, the trial court should take that view of the evidence most favorable to plaintiff; and where reasonable men could draw different conclusions, the requests should be denied.
2. TRIAL ⊜284—INSTRUCTIONS—OBJECTIONS.
Where defendant reserved no exceptions to the general charge, it must be presumed to have been satisfied with it.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Anna Sutherland, administratrix of the estate of Phyllis Sutherland, deceased, against the Standard Oil Company, begun in state court and removed to the federal court. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Geo. H. Klein, of Detroit, Mich., for plaintiff in error.

Ralph E. A. Routier, of Detroit, Mich., for defendant in error.

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

PER CURIAM. An action was commenced by the administratrix in the Wayne county circuit court, Michigan, and removed to the court below on petition of defendant company. On the evening of December 19, 1913, the plaintiff's decedent, Phyllis Sutherland, was injured by a horse-drawn truck of defendant, and shortly after the injury she died. The injury occurred on Lincoln avenue at its junction with Baltimore avenue, Detroit, Mich. The action was to recover damages occasioned by the decedent's injury and death, and, as ultimately formulated, was rested solely on one count of the declaration embracing the provision of the survival act of Michigan "for negligent injury to persons"; issue being joined by the usual plea. The cause was tried to the court and jury and resulted in a verdict and judgment of $5,500 for plaintiff. The defendant brings error.

At the close of all the testimony the defendant requested the court to charge the jury as matter of law (a) that there was no evidence of negligence on the part of defendant; (b) that the "deceased was guilty of such contributory negligence * * * as would bar her from recovering had she survived, and * * * her administratrix is equally barred"; and hence that the verdict must be no

cause of action and in favor of the defendant. Further, (c) that there was "no evidence * * * of what this child (nine years and seven months of age) or any other child of her circumstances" would probably have earned after arriving at her majority, and that if the jury should find for the plaintiff under the survival act, the verdict should be for nominal damages only. The theory of the first and third requests alike was lack of evidence, and that of the second request the presence of evidence showing that decedent was neglectful of obvious dangers to her personal safety.

[1, 2] The settled rule in this court required the trial judge, in passing upon these requests, to take that view of the evidence which was most favorable to the plaintiff. The result of our examination of the record is convincing that fair-minded men might honestly draw different conclusions from the facts adduced; the requests, then, were rightly denied. Further, the general charge was clear and comprehensive, and as favorable to the rights of defendant as the evidence warranted. Defendant reserved no exception to the charge and must be considered to have been satisfied with it; but defendant presented motion for new trial upon grounds embracing all the assignments of error, and, while the motion entitled the trial judge to weigh the evidence, he denied the motion. Discussion of such a record or of the decisions relied on by defendant can serve no useful end.

We conclude that the judgment must be affirmed, and an order will be entered accordingly.

In re GARRITY.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 82.

1. BANKRUPTCY ⟸414(1)—DISCHARGE—BURDEN OF PROOF.
   The burden of proving matters preventing discharge in bankruptcy is on the objecting creditor.
2. BANKRUPTCY ⟸414(3)—DISCHARGE—EVIDENCE.
   Objections to discharge grounded upon Bankr. Act July 1, 1898, c. 541, § 29a, 30 Stat. 554 (Comp. St. 1916, § 9613), need not be proven beyond a reasonable doubt as upon an indictment, the rule being the same as in civil trials, and a fair preponderance of evidence being sufficient.
3. BANKRUPTCY ⟸408(2)—DISCHARGE—RIGHT TO.
   While mere inadvertence and omissions from the schedule of debatable items by ignorant persons will not be deemed within the false oath and concealment sections of the Bankruptcy Act, yet, where a schoolteacher desiring to avoid payment for an expensive fur coat prepared for an assetless bankruptcy, omitted from her schedules salary due when they were verified, and such salary constituted the entire assets of her estate, a discharge should be denied; for she cannot by her profession plead ignorance.

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

In the matter of the bankruptcy of Julia F. Garrity. From an order denying discharge, the bankrupt appeals. Affirmed.

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

Appeal from order denying discharge entered in the District Court for the Southern District of New York.

The bankrupt is a teacher in the public schools of this city, receiving a salary of $2,650 annually. She became a voluntary bankrupt on December 27, 1915, and scheduled no assets. In the preceding February she had purchased on credit a sealskin garment for $900, representing that she would soon be in funds from an inheritance. In May she realized $2,250 from that source, paid some debts, and spent the rest in making holiday through the summer. She had a bank account in which she deposited her monthly checks for salary until November, 1915. By this time she had refused to pay for the sealskin coat aforesaid, denying its quality, and vendors were pursuing or threatening legal proceedings. She closed out her bank account, but by error left $3 therein, which she testified was wholly unintentional; she "did not mean to leave any" (i. e., any balance). On December 24, 1915, she had earned a month's salary ($183.29), but under the custom of the board of education payment thereof would not be made for about two weeks. When confronted with these facts on examination at first meeting of creditors she agreed to pay the trustee this asset, and did so within about four months. She scheduled but two creditors, one of whom was secured by indorsement and filed no claim. The other (and objecting) creditor is the unpaid vendor of the sealskin coat, who has procured judgment. From an order denying discharge and affirming the referee's report finding false oath and concealment of December salary, the bankrupt took this appeal.

William R. Murphy, of Brooklyn, N. Y., for appellant.

Crim & Wemple, of New York City (Mitchell W. Alexander, of New York City, of counsel), for creditor.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). That the purpose and motive of this bankruptcy was to prevent the furriers collecting their judgment is especially clear. There were no business debts to discharge that the debtor might proceed in making a livelihood. Her teacher's salary would continue, bankrupt or not, and she would get it, except for the 10 per cent. now reachable by execution under the law of New York. Such an execution was in fact levied the day before petition filed.

[1, 2] That the burden of proving matters preventing discharge is on the objector, and that mere inadvertence and omissions from schedule of debatable items by ignorant persons will not be deemed within the false oath and concealment sections of this statute, we have often held (Re McCrea, 161 Fed. 246, 88 C. C. A. 282, 20 L. R. A. [N. S.] 246; Re Cohen, 206 Fed. 457, 124 C. C. A. 363; Re Braun, 239 Fed. 113, 152 C. C. A. 155); but objections grounded on section 29a of the act need not be proven beyond a reasonable doubt as upon criminal indictment (Re Leslie [D. C.] 119 Fed. 406; Re Delmour [D. C.] 161 Fed. 589; Re Doyle [D. C.] 199 Fed. 247). The rule is the same as in civil trials; a fair preponderance suffices.

[3] This bankrupt by her profession cannot plead ignorance. The intent to prepare for an assetless bankruptcy is reasonably inferable from her own testimony as to her bank account. She has herself testified to the fact of having her December salary due when she swore to her schedules, and she has not even claimed to believe that the ordinary delay in payment enabled her to keep what she had earned before petition.

The importance of everything is relative; $183 is not absolutely a large sum, but here it was by bankrupt's own testimony the entire estate. Such an omission was not trivial, inadvertent, nor ignorant.

Furthermore both the referee (after personal examination) and the District Judge have found that there was a purpose to conceal. We do not differ with such successive considered findings of fact, except when very clearly satisfied of error.

Order affirmed, with costs.

GALLUP et al. v. CREAL et al.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1918.)

No. 3078.

ADVERSE POSSESSION ⟸115(1)—PROCEEDINGS—JURY QUESTION.

Under a Texas statute enabling an adverse possessor of land to acquire 160 acres, which must include his improvements, although his actual occupancy may be of only part of the land claimed, defendant claimed 160 acres in section 21, though he had previously claimed 160 acres in the adjacent section 6, basing title on his purchase from one who by virtue of actual occupancy of a different, but contiguous, tract claimed to have acquired 160 acres out of section 6. It appeared that the parcel, on which defendant's improvements were located, was partly in section 21 and partly in section 6; but there was evidence tending to prove the possession of his vendor, on which defendant relied to support his claim to land in section 6, was of only a part of the improved tract, and not the part of it in section 21, the actual adverse occupancy of which defendant relied on to support his claim to land in that section. *Held*, that there was no incompatibility between defendant's claim to land in section 6 and to other land in section 21, which precluded submission to the jury of the question of his right to an adverse title to 160 acres in section 21, on the ground he had already claimed land in section 6, based on his possession of land in both sections.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Trespass to try title by David L. Gallup and others against Griffin Creal and Monroe Reese. There was a judgment for the last-named defendant, and plaintiffs bring error. Affirmed.

Ballinger Mills, of Galveston, Tex., for plaintiffs in error.

Oliver J. Todd, of Beaumont, Tex. (J. A. Mooney, of Woodville, Tex., on the briefs), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This is the second writ of error in this case. When the case was here before, a judgment in favor of the present plaintiff in error was reversed. Creal v. Gallup, 231 Fed. 96, 145 C. C. A. 284. The pending writ of error presents for review a judgment in favor of the defendant in error Reese for 160 acres of land in section 21 of a survey, which he claimed to have acquired by 10 years' adverse possession.

The law under which the claim was made is a Texas statute, which enables an adverse possessor of land to acquire 160 acres, which must include his improvements, though his actual occupancy may have been of only a part of the land claimed. Under that law one adverse possession for the required time supports only one claim to 160 acres. It was contended in behalf of the plaintiff in error that Reese lost the right to set up the claim on which he recovered by previously making the claim, based upon the same possession, of 160 acres out of section 6, which adjoins section 21. There was evidence tending to prove that the claim formerly made by Reese to 160 acres out of section 6 was based, not on his own possession, relied on to support the claim asserted in this suit, but upon his purchase from one who, by virtue of an actual adverse occupancy of a different, but contiguous, tract, claimed to have acquired 160 acres out of section 6. It appeared that the tract on which Reese's improvements are located is partly in section 21 and partly in section 6; but there was evidence tending to prove that the possession of his vendor, which Reese relied on to support the claim he made to 160 acres in section 6, was of only a part of the improved tract, and not that part of it in section 21, the actual adverse occupancy of which by Reese was relied on to support the claim which was sustained by the judgment now under review.

Under a phase of the evidence there was no incompatibility between Reese's former claim to 160 acres out of section 6 and the claim which he successfully asserted in this suit. The conclusion is that the record does not sustain the contention made in behalf of the plaintiff in error that the requested instruction to find against Reese should have been given on the ground that the uncontroverted evidence showed that he had formerly made a claim to 160 acres out of section 6, based upon the same possession which was relied on to support the claim he made in this case. The court did not err in submitting to the jury the determination of the issues raised by conflicting evidence.

The judgment is affirmed.

THE ANDREAS GERAKIS.

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

No. 21.

COLLISION ⇐74—TOW AND ANCHORED VESSEL—OBSTRUCTION OF FAIRWAY.

Evidence *held* insufficient to sustain the allegation of libelant in a collision suit that claimant's steamship, when struck by the tow of libelant's tug, was improperly anchored where she obstructed the fairway.

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

Suit in admiralty for collision by the Philadelphia & Reading Railway Company against the steamship Andreas Gerakis; S. Catevatis, claimant. Decree for claimant, and libelant appeals. Affirmed.

Kirlin, Woolsey & Hickox, of New York City (Cletus Keating and John M. Woolsey, both of New York City, of counsel), for claimant.

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

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. There is presented but one question by this appeal, and that of fact only, viz. the position of the anchored steamship, when struck by the tow of libelant's tug. If she was substantially where the libel alleged, she unnecessarily, and therefore negligently, impeded the fairway. The burden of proving such negligence was on libelant. Upon consideration of the evidence, we are as unable as was the trial judge to fix the steamer's position, further than to hold that she was not shown to be where the libel placed her.

Therefore the court below rightly dismissed the libel for lack of proof, and the decree is affirmed, with costs.

MOORE et al. v. SAUNDERS.

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

No. 4772.

1. PATENTS ⊂=328—INVENTION—MACHINE FOR SEALING ENVELOPES.
The Saunders patent, No. 796,936, for an envelope sealing machine, *held* void for lack of invention in view of the prior art.

2. PATENTS ⊂=26(1)—INVENTION—"COMBINATION" OF OLD ELEMENTS.
To constitute a patentable combination of old elements there must be coaction between them, and not merely a successive co-operation in which each performs alone its old function.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Combination.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit in equity by Daniel G. Saunders, Jr., against G. L. Moore and G. A. Alexander, doing business under the firm name of Moore & Alexander. Decree for complainant, and defendants appeal. Reversed.

Franklin F. Phillips, Jr., of Boston, Mass. (Pew & Proctor, of Kansas City, Mo., on the brief), for appellants.

Arthur C. Brown, of Kansas City, Mo. (Nathan Heard, of Boston, Mass., on the brief), for appellee.

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

HOOK, Circuit Judge. [1] This is a suit by Saunders against Moore and Alexander for infringement of patent to Saunders, No. 796,936, August 8, 1905, for improvements in envelope sealing machines. On final hearing the trial court held that defendants' device

infringed claim 5 of the patent in suit, and rendered a decree accordingly. Defendants appealed. Claim 5 consists of the following elements: (1) A feedboard; (2) a gage plate at one side of the feed board; (3) a stop board behind the feed board, there being a passage under the stop board; (4) a soft-rubber feed cylinder under the stop board to engage the bottom one of the pile of envelopes upon the feed board; (5) a presser bar mounted behind the stop board in position for the envelope to pass under the presser bar; (6) means of opening the flap; (7) means of moistening the flap; (8) means of closing the flap.

The trial court was of the opinion that plaintiff's presser bar or controller behind the stop board and his means for opening the flaps of the envelopes were new, and that defendants' retarding rubber finger and flap-opening means were infringing equivalents. We think it clear that there was no other element in the claim entitling plaintiff to prevail, and shall so confine our discussion.

In patent No. 390,277, to Allen, October 2, 1888, there is the customary platform for feeding a stack of sheets of paper. It is said:

"This invention relates to improved apparatus for feeding paper to printing presses, paper-damping machines, paper-ruling machines, envelope machines, and the like; and its object is to insure the regular and even supply of the paper sheet by sheet from a pile or stack of sheets."

The illustrations disclose a stop board against which a stack of paper or envelopes rests. They are fed from the top, instead of through a horizontal opening at the bottom of the stop board, as in the patent in suit. The forward edges of the sheets are pressed up into contact with a revolving feeder wheel, which is faced with rubber, and which engages the upper sheet and carries it forward. This is very like the plaintiff's device reversed in position. Allen's specifications then continue:

"A frictional pad or retarder is arranged beneath the feeder wheel, in order that, if more than one sheet should move forward, it will arrest the lower sheet or sheets, and permit only the upper one to be fed."

This is precisely the operation of plaintiff's device, excepting that the positions are reversed. Allen's retarder is recessed in the stop board, while plaintiff's is behind it; but such differences are not mechanically or functionally important. The frictional pad or retarder of Allen is actuated by a spring just as plaintiff's presser bar is, and its operation is the same. Allen's fourth claim contains the following elements: (1) The combination of a rotating feeder wheel; (2) a table for supporting a pile of paper beneath said wheel; (3) a fixed plate or stop in front of said table; (4) a frictional pad or retarder arranged against said stop, and between it and in front of the pile of paper, and constructed to move vertically; and (5) a tensile device for pressing said pad upwardly against said wheel. The arrangement of plaintiff's presser bar or retarder behind the stop board performs no different function than Allen's, nor does it perform it in a substantially different way.

Patent No. 674,050, to Wilkinson, May 14, 1901, is for an improvement in machines for sealing envelopes. The objects of the invention are:

"To provide means for so adjusting the feeding and sealing rollers as to accommodate them to well-filled envelopes; * * * to provide simple and efficient moistening devices which shall be capable of adjustment for envelopes of different sizes; * * * to provide simple and accurately operating devices for automatically feeding envelopes to be sealed."

In this machine the envelopes are fed from the bottom through an opening in the stop board, with the gummed face of the flaps down, as in plaintiff's. Fastened to the bottom of the stop board are two spring fingers, *76* and *77*, one of which is described as being "quite flexible." This finger operates as a retarder. It is, however, on the opposite side of the stop board from the one in the patent in suit.

In patent No. 109,882, to Donnellan, December 6, 1870, there is a stop board with a horizontal opening at the bottom through which the envelopes are fed one at a time. The moving mechanism is two cams, which carry the letters forward. They perform the same function as the rubber-surfaced wheel of plaintiff and the wheel and belt of defendants. An elastic stop, marked *K*, bolted to the bottom of the stop board, is made an element of the first claim of the patent. It is said:

"The object of the stop *K* is to prevent but one letter passing out of the feed device at a time, and this may be adjusted so as to adapt it to letters of various thickness."

That is similar to the construction of defendants' device, which is bolted behind and to the bottom of the stop board. Its operation is precisely that of plaintiff's presser bar and defendants' elastic finger. In specifying cams for carrying the letters forward, Donnellan says he does not confine himself to that method.

In considering plaintiff's means for opening the flaps of the envelopes, and for that matter, also, moistening and sealing them, patent No. 695,408, to Madas, March 11, 1902, is important. In this patent the moistening pad and the blade which engages the flap are together, the former on the under side of the latter. Madas says that the metal holder of the moistening paid is—

"provided with a sharp edge, so as to engage the flap of the envelope in order to moisten the same. The moistening pad is inclined from the support *n* to a higher point at its outer end, and is arranged with the sharp edge nearest the front of the box *s*, and with the sponge side opened on the under side."

Again:

"The envelopes are placed between the partitions and the front of the box *s* singly or in a pile, each envelope arranged with its flap side downward and the flat edge adjacent the side of the box."

After describing the opening at the bottom of what is equivalent to a stop board, Madas continues:

"As the envelope is carried through this opening, the sharp edge of the moistening pad engages the flap and the finger n^2 presses the mucilaged surface in contact with the sponge."

There are other significant portions of the specifications by Madas, and it clearly appears that plaintiff's means of opening the flap were not new.

[2] The plaintiff contends that defendants' machine infringes notwithstanding various structural differences, and in doing so he asserts against defendants a range of equivalents which he denies to the prior art. If the same measure of equivalency is applied on behalf of the prior art, there is nothing patentably novel in plaintiff's structure. His departure mechanically was slight. It was no greater than that which marks the difference between his devices and those of the defendants; and in function they were all alike. No ingenuity was displayed in coupling an old feeding device with means for opening, moistening, and sealing, which were also old. To be sure the new assemblage accomplishes as an entirety more than either old element did in separate operation, and in a way the elements were, as was said below, "successively co-operative." But the co-operation was like that of the successive changes of horses in a coach journey from London to Bath. Those out of London, their task done, dropped their burden at Maidenhead; others picked it up there, and carried it to Newbury; and so on to destination. There was, of course, a "successive co-operation"; but in the sense of the patent law a patentable combination of old elements means more than that. In Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749, the court expressed the requisite in this way:

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other."

There must be a coaction between them, and not a mere hitching up of separate contributions, each one of which continues independently to perform its customary function; otherwise, there is but a mechanical juxtaposition that is not patentable. In this import, plaintiff's feeding device does not coact with his means of opening, moistening, and sealing the envelopes. Each continues to do its old work in the old way. It may be observed in conclusion that there was no testimony as to how plaintiff's machine was accepted in the market. The proofs were confined to paper patents aided by some models.

The decree is reversed, and the cause is remanded, with direction to dismiss the petition.

MANTON-GOULIN MFG. CO. v. DAIRY MACHINERY & CONSTRUCTION CO.

(Circuit Court of Appeals, Second Circuit. November 21, 1917.)

No. 48.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—APPARATUS FOR MIXING MILK AND OTHER LIQUIDS.

The Gaulin patent, No. 756,953, for an apparatus for intimately mixing milk and other liquids, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the District of Connecticut.

Suit in equity by the Manton-Goulin Manufacturing Company against the Dairy Machinery & Construction Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 238 Fed. 210.

This is an appeal from a final decree in the District Court (238 Fed. 210), Thomas, J., presiding, for the District of Connecticut awarding the usual interlocutory decree of infringement upon patent 756,953, issued on April 12, 1904, to A. Gaulin. This patent had for its object an improved apparatus for intimately mixing milk and other liquids more or less resembling it by means of the action produced by the passage of liquids more or less heterogeneous under considerable pressure through very small orifices. Other machines had been made for the purpose of so mixing heterogeneous liquids, especially cream and milk, or butter and milk, and at the time when the patent was granted, and perhaps at the present time, the precise theory of how this is accomplished was not and is not understood. The process is now called "homogenizing," and in general consists in breaking up the fat globules to a much smaller size than they occur in nature, after which they do not rise to the surface of the heavier liquid, as otherwise occurs. The process had been attempted by passing the liquids through small orifices under great pressures, and the modification of the patent in suit arose from a change in the machine by which the passages were made of greater length and smaller width, and in which the pressure upon the liquid between the two surfaces was yielding.

In the specific device of the patent in suit the milk and cream are pumped into a tube and forced out between the concave conical surface of the tube and the convex surface of an agate valve, which closes it and is pressed into the concave surface. This pressure the patentee disclosed as accomplished by a spring action upon a conical valve. When the pressure becomes sufficient the spring will yield, and the liquid pass between the two surfaces under high pressures. The friction between the surfaces, and possibly between the globules of the milk, breaks these globules up into small enough sizes for the purpose in view. If, as always occurs in such cases, the liquids contain impurities, they will clog the very small orifice under the working pressure, and it becomes necessary, therefore, to keep within safe limits, that the valve yield and the orifice open. The further yield of the spring does this, opening the orifice, and reducing the accumulated pressures arising from the clogs. Thus was disclosed a machine supposed automatically to adjust itself to the impurities which the liquid might contain. The detailed description of the machine can only be found in the patent itself. One claim, No. 2, is in suit, which reads as follows: "In a machine of the class described, co-operating elements having squeezing surfaces, means to yieldingly hold the elements in contact, and means to force the milk between the surfaces, substantially as described."

The defendant's infringing machine was for the same purpose as the plaintiff's. In the defendant's present machine in suit, which is the only one that need be here described, the liquid is forced by a pump into a tube or chamber of heavy metal, at one end of which are a series of discs. These discs are held down by a steel spindle having a cap at one end which covers the discs. The surface of each, or nearly all of the discs, has upon it radial grooves from the inside out and an annular groove in the middle of the face of the disc; the radial grooves are staggered, so that the liquid, in forcing its way out through the grooves, moves straight from the inside of the disc to the annular groove, and then must turn at right angles until it finds an exit through the outer radial groove. In operation the cap is screwed down hard upon the discs, so that they cannot open, and at the outset all the liquid passes through the small grooves. The issue of infringement depends upon whether, as the pressure rises, the elasticity of the spindle is such as to allow the faces of the discs to open so that some of the liquid passes, not through the grooves themselves, but between the actual faces of the discs. The plaintiff's theory is that the impurities in the liquid inevitably clog up some of the grooves, and unless there was a yield in the spindle the machine would soon clog and become inoperative. They corroborate this contention by the acknowledged fact that in operation the pressure on the discs is successively relieved as the liquid pressure rises, and that the liquid pressure is thus kept within measurable bounds. The plaintiff contends that the elasticity of the spindle is sufficient to accomplish this result under

the high pressures obtained, and this issue was sharply contested in the evidence.

On the issue of validity the defendants rely chiefly upon prior patents to one Julien, the predecessor of the plaintiff in the art. Julien took out two patents in 1892, one a French patent, 220,446, and the other a British patent, 22,115. Later he took out a British patent in 1893, 14,840, and in 1898 a third British patent, 23,637. The details of these patents cannot be stated with sufficient accuracy to be intelligible without an examination of the figures themselves. It is sufficient here to say that the operation of all the patents was to allow the liquid to pass out through orifices much larger than the grooves of the defendant's machine or the orifice of the plaintiff's patent and relatively much shorter in length. These orifices were covered or uncovered by the movement of a piston, which movement was controlled by a spring. The pressures of the liquid moved the piston back until the orifices were uncovered, through which thereupon the liquid emerged. Julien also relied for part of his mixing upon bringing the jets of liquid as they emerged from the orifices in opposition with each other, supposing that the globules were further broken up by the impact of the opposing streams.

Livingston Gifford and Henry D. Williams, both of New York City, for appellant.

Frederick P. Fish and J. Lewis Stackpole, both of New York City, for appellee.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). The crucial question in this case is of infringement, and its answer depends altogether upon whether in operation the liquid passes between the faces of the discs elsewhere than at the grooves. If so, it can do so only by the elasticity of the metal in the spindle. We shall show later that, if the spindle through its inherent elasticity does allow the discs to separate, both the language of the claim and the theory of operation of the disclosure have been infringed, but at the outset the question of physical fact must be considered.

We think that the discs are not open at the outset. While the pressure is first rising, the liquid passes through the grooves, and, as appears below, we are disposed to accept Rautenstrauch's figures upon the equilibrium at that time between the disc and liquid pressure. However, it is quite clear that the liquid pressure could not increase (the delivery of the pumps being constant), unless there was some diminution in the aggregate discharge openings, and that this can only arise either from some clogging of the grooves or from the expansion of the metal, making their cubic capacity smaller. The clogging of the grooves is proved by Hancock's experience and by the test of November 3, 1915, which does not seem to us to have been conducted with unusually dirty milk.

It is furthermore demonstrated by the impracticability of a solid disc with perforations which has been experimentally tried. Such a disc will operate for a while perfectly, but only for a while. Soon the pressures arise beyond the limit of safety and the machine becomes inoperative. Indeed, the fact is not disputed by the defendant in parts of the record that in operation clogs will occur which obstruct the flow of the liquid and must in some way be relieved. The only

alternative suggestion in place of the clogging of the grooves anywhere in the record is that the expansion by heating of the metal in the discs closes the grooves and diminishes their cubic capacity. This is in our judgment a negligible factor. The milk is at 110° F. when it comes from the pump, and no one suggests that it is pasteurized, say 140° to 160° F., when it issues. The metal of the grooves must quickly take its temperature from the liquid, and no one has attempted to calculate what a change in temperature of at most 30° to 50° F. would have upon monel metal. We may not speculate upon it without some data; prima facie, we have the right to disregard it. Therefore we must assume that the rise in liquid pressure, which always happens, is only from clogging of the grooves.

Now the universal practice is to reduce the pressure on the discs by backing the wheel as the liquid pressure, too, rises, and this repeatedly till the run is through. If this reduction of pressure on the discs does not noticeably increase the cubic capacity of the grooves, it can have no effect upon the clogs, which by hypothesis have partly closed the grooves. Does it enlarge the grooves themselves, according to Bentley's hypothesis? We think that the plaintiff's answer is good to this suggestion. It accepts Rautenstrauch's figures for the compressibility of the metal in the discs, and shows that the resulting total compression is substantially less than one-tenth of 1 per cent. at maximum pressure. We must remember, however, that the changes in disc pressure do not relieve all of it by any means, how much we do not know. Now it seems obvious that, if the total expansion in the grooves when all the pressure is removed is less than one-thousandth of the groove, it is the merest assumption to think that the expansion due to the relief caused by backing the wheel will have any substantial effect. We are to suppose that the clogs have stuck in the grooves by their own cohesion and the friction upon the sides. The change in diameter would, theoretically, it is true, relieve that friction, but within admissible limits the relief must be in practice imaginary.

Rejecting, therefore, the theory that the clogs are swept out by any change of diameter in the grooves, it seems to us clear that we have left only the opening of the discs to explain the decrease of the liquid pressures. That pressure varies with the velocity of discharge in capillary orifices, and with the square of the velocity in larger. We must assume, therefore, with Livermore, that when the pressure drops there has been an addition to the aggregate of the outlets at least proportionate to the drop, or the discharge would not be constant. Without attempting any accurate computation, we can see that a very slight opening of the discs will accomplish this.

Therefore we have only left the question whether the defendant has proved this to be impossible. Rautenstrauch's calculations are, so far as we can see, subject to only one exception whose importance we cannot tell. In calculating the pressure tending to extend the spindle, he has not allowed for any pressures upon the faces of the discs. He does this avowedly because he says that it begs the question to suppose that they open at all, and so it does. At the outset, and even while the discs are held fast, it would nevertheless seem that some allowance

should in any case be made for the pressure of the liquid within the grooves; but no one appears to have calculated their area, and so we are forced to omit this factor. Nevertheless the total pressure tending to extend the spindle is given by Rautenstrauch as 6,480 plus 3,436, practically 10,000 pounds. He calculates, moreover, that at its extreme tension the pressure on the discs, which tends to contract the spindle, is about 23,000 pounds, and so he insists it is impossible for the discs to separate. This would, of course, be true, if it were certain that the disc pressure were always so high; but the reasoning fails in application because, although the disc pressure starts at its maximum, the wheel is in practice soon "backed."

The critical equilibrium is therefore between the consequent pressure on the spindle from the wheel and the pressure from the liquid. No one has told us, nor can any one possibly tell us, what the remaining pressure upon the spindle may be after the wheel is "backed," and we have no basis for speculation. It is true that the rotation of the wheel is said to be through a small angle, but in common experience we all know that as one tightens a screw thread the final increments of necessary pressure enormously increase for a given angle of rotation. It may easily be possible that the wheel, in being "backed" a few degrees, may cause the disc pressure to fall off below the liquid pressure and to allow the discs to separate. We are to remember that the slightest separation of the discs, even if they separate only at one side, may make up for the closing of a large number of radial grooves. We must therefore reject the defendant's demonstration that the discs cannot separate, as based upon assumptions not capable of verification in practice.

The actual photographs strongly corroborate our a priori conclusion that the discs do separate. For example, it is hard to see how one can account for such a picture as "I," except upon the theory that the discharge is coming out of the upper right-hand half of the space between two of the discs at any rate, perhaps more. If so, they have been separated at one side. It is true that from the photograph we must suppose that some of the opening must be clogged, because nowhere does an unbroken sheet of liquid issue; but, if we assume the width of the opening to be minute, there is no reason to deny the possibility that in parts of its area there may be clogs. "K" is another such photograph; though the crack has somewhat changed, "No. 4" is again a significant illustration.

Nor do we find any trouble in accounting for the radial marks upon the flat surface of the discs, though it seems to us an exaggeration to call them "scores." For a portion of the time, as we have seen, the discs are held tight, and the milk issues only from the grooves. During that period the flat side of the disc is being "scored" by the liquid passing through the groove. Later, after some of the discs have opened, it does not by any means follow that some do not remain in contact and the "scoring" continues between them. Finally, as we have suggested, it seems possible, perhaps even probable, that, when the discs do separate, they do not float upon a film of liquid, but, on the contrary, that at least at one point remain in contact, minutely tilting as

it were. Now, while it is true that, assuming them to separate at all, there can theoretically remain only a single point of contact, yet over a large part of the area of each surface the separation may not be enough to allow the liquid to issue. Over that portion it will continue to leave through the grooves, and the "scoring" will continue there as well. There is, as we have seen, some evidence in the photographs for assuming that this may in effect be what happens at times.

Furthermore, we have Hancock's testimony that the plain surfaces of the discs show evidence of impurities caught between them; testimony which, if true, indicates that they have been separated in operation. The defendant's explanation that these impurities may have adhered, after the discs have been freed and are being taken out, seems to us possible, but not so likely as that which accords with the assumption of separation. While we are not inclined to press unduly upon Willman's answer to the twenty-ninth cross-interrogatory, it is perhaps fair in this connection to allude to it as a corroboration, if not inadvertent. We believe, therefore, that while the subject is not capable of an absolute demonstration, the balance of the evidence makes enough in the plaintiff's favor to go beyond mere speculation, and we conclude that the discs do open enough to allow the liquid to flow between their plain surfaces during the "normal" operation of the machine.

We have no hesitation in finding that, this fact proved, the defendant's machine infringes as it is actually used. Gaulin's disclosure had for its fundamental feature the yield of the two surfaces between which the liquid flowed. That yield was necessary because in practice it was not possible to insure that the cubic capacity of a rigid exit would be kept constant. In commercial practice the milk cannot be secured which is free enough from contamination for that. Hence, to maintain the necessary capacity of the exits, it was essential that there should be some accommodation for the inevitable clogs. Now, it may be possible to devise a machine in which a succession of exits may come into operation so that as the earlier become clogged, more will be opened. A modification of Julien's machine may serve. If these were all rigid, so that the liquid did not open each in some proportional relation to the pressures, Gaulin's disclosure would not perhaps be infringed. But so long as the organization of the machine allows for the necessary accommodation to increased pressures through the inherent elasticity of the metals, it seems to us of no consequence where that elasticity may be. The spindle is in that aspect in every sense an equivalent of the spring, verbally under the claim, and functionally under the disclosure.

Nor do we mean to pass upon the question, here academic as we view it, whether Gaulin's patent was, or was not, a "pioneer." It is enough that his claim singled out the yield of the surfaces of pressure and that the defendant cannot proceed without such a yield. Nor do we say whether Gaulin's invention depended more fundamentally upon the relations between the sectional area and the length of the exits. If the defendant were to make a machine in which in practice the discs did not separate, that question might arise; we say nothing about the

possible interpretation of the claim or its validity in that case. It is enough now to hold, as we do, that while the machine is put out in such form that it can, and indeed must, be operated to relieve the disc pressure by letting the discs separate, it infringes. The principle applies which was laid down by this court in Parsons Non-Skid Co., Ltd., v. Atlas Chain Co., 198 Fed. 399, 117 C. C. A. 286, except that that case was much weaker than that at bar, because there the infringing use was only the optimum, while here it is necessary to any commercial practice. Under such circumstances there can be no possible escape from infringement, unless the defendant can make the machine such that in practice the discs will not separate. This litigation would not determine that such a machine would infringe.

We do not think that anything in the prior art deserves extended consideration. All of Julien's patents were clearly based upon fixed and unyielding orifices of discharge. The supposed action of Julien's piston to uncover the orifices in part is a mere gloss, and would not anticipate, event if the patent operated as supposed.

Finally, it seems to us of no moment whether Gaulin understood the correct theory of homogenization, and what that theory may be, or whether Julien's machine could homogenize effectively.

The decree is affirmed, with costs.

AUTO PNEUMATIC ACTION CO. v. KINDLER & COLLINS et al.

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

No. 29.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—PIANO PLAYER.
   The Danquard patent, No. 766,601, for a mechanical piano player contained within the piano case, was not anticipated in the prior art and discloses patentable invention; also *held* infringed.
2. PATENTS ⇐32—INVENTION—COMMERCIAL SUCCESS AS EVIDENCE.
   While the mere success of an invention does not determine its patentability when it follows a long history of failure, it puts upon one who challenges its originality the burden of showing that the success arose from some cause which had nothing to do with the difficulties of invention.
3. PATENTS ⇐168(1)—CONSTRUCTION—ARGUMENTS IN PATENT OFFICE.
   Arguments made in the Patent Office by the applicant to the examiner are not to be taken as a measure of his patent, where not accompanied by any changes in the claims.
4. PATENTS ⇐109—VALIDITY—AMENDMENT OF APPLICATION.
   The rule that an applicant must not introduce a new invention by amendment does not forbid the adding of new claims from which an element of the original claims is omitted, even though it results in expansion, when the whole disclosure readily suggests the change, and there are no intervening rights.

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

Suit in equity by the Auto Pneumatic Action Company against Kindler & Collins, the Claviola Company, the Superior Pneumatic Ac-

tion Company, and the Needham Piano Company. Decree for complainant, and defendants appeal. Affirmed.

This is an appeal from a decree of the District Court for the Southern District of New York (A. N. Hand, District Judge, presiding), holding valid and infringed claims 26, 27, and 31 of patent 766,601 to T. Danquard, August 2, 1904. The patent relates to mechanical players attached to pianos known as "pneumatic self-playing instruments." These are of two sorts—those which are embodied in the piano case and those which form a separate unit, which is wheeled back and forth from and to the piano board and plays directly upon the keys. The patent in suit is of the first sort, and operates, as all of such kind do, by means of pneumatic bellows, the collapse of which under suction operates a mechanism connected with some part of the piano action. The patent does not concern either the pneumatic bellows or the mode of their actuation through a tracker sheet. It touches rather the connection between the exhaust bellows and the piano action, and the integration of all the parts into one unitary structure, which may be moved into and out of the piano case without any reorganization of its parts. The important features of the invention consist of upright rods, called the "abstracts," which through the mediation of a pivoted piece of wood, called the "striker," directly touch and move the "wippen" of the piano action when the bellows are collapsed by a vacuum. When the mechanical attachment is not in operation, the piano action itself is quite as free as though the player were not attached, and the piano may be manually played without the slightest effect upon its tone.

An important feature of the invention is the structure of the "striker," which the patentee supposed he had much improved by making it resilient or cushioned. This feature of the patent, however, need not be considered in detail, as the defendant did not copy it, but used a solid block or cap as a striker, without any resilience. A more detailed description of the patent can only be obtained by an examination of the specification. Sufficient has been stated to show in general the elements upon which this case turns. The claims are as follows:

"26. A manually and mechanically operative piano having grouped above the keyboard and in front of the piano action the following devices: A wind chest, pneumatics operatively connected to said chest, a tracker and music sheet rolls, air conduits connecting the tracker and pneumatics, abstracts, and pivoted vertically swinging strikers, operating the piano action and actuated by the abstracts and arranged above the level of the pneumatics; said grouped devices being adapted for removal together from the instrument case.

"27. A manually and mechanically operative piano having grouped above the keyboard and in front of the piano action the following devices: A wind chest, pneumatics operatively connected to said chest, a tracker and music sheet rolls, air conduits connecting the tracker and pneumatics, abstracts operated by the pneumatics, pivoted vertically swinging strikers operating the piano action and actuated by the abstracts and arranged above the level of the pneumatics, and adjustable stops regulating movement of the action by the pneumatics and strikers.

* * * * * * * * * *

"31. In a mechanical musical instrument, the combination with the action wippens *4*, of a tracker *15*, rolls *14*, *16*, adapted to carry a music sheet over the tracker, pneumatics *24*, air conduits and valves connecting the tracker and pneumatics, upwardly extending abstracts *25* coupled to movable walls of the pneumatics, and pivoted strikers arranged above said pneumatics and adapted to be swung vertically by the abstracts against the wippens *4* for operating the piano action; all of said parts being arranged above the keyboard and in front of the piano action."

The defendant's infringing player is of the same class as the patent in suit, and indeed differentiates only in the character of the "striker." As appears in the claims, the "striker" of the patent is pivoted to swing vertically, and this feature the defendant originally adopted, but later, on consultation with its attorney, it varied its structure in this respect and sur-

rounded the upper end of the "abstract," which extended from the bellows to the "wippen," by a guide, consisting of a fixed horizontal piece of metal with a hole in it, through which the "abstract" freely moved, but which held it against lateral displacement. On the top of the "abstract" the defendant fixed a solid block, which bore directly on the under side of the "wippen," substantially as the defendant's "striker" bore.

The prior art, as has already been stated, had developed in two directions; the earlier being toward cabinet players, which were wheeled to and fro and played directly upon the keyboard. These were of many forms, which it is not necessary to consider, except to say that the nearest approach to the structure of the patent in suit is that contained in Courville, 755,364. The general internal disposition of parts in this mechanical player was nearly identical with that of the defendant. It operated by an exhaust which collapsed the several bellows, each operating one "abstract," which ran from the lower end of the bellows and through a guide similar to the defendant's, and terminated in a block or "striker," which bore on the lower side of a finger lever; itself actuating the keys. The defendant contends that it has done nothing more than substitute within the piano case a smaller attachment built after the lines of Courville, and this is substantially true.

Of the mechanical piano players in the second class, to which the patent belongs, the nearest anticipations are Brown, 581,390, Wright, 596,730, and Welin, 731,089. In Brown's action each bellows had a pin, or "abstract," extending downward, and fastened to an angle lever, which was rigidly attached either to the "abstract" of the manual action, or to the key lever itself. The collapse of the bellows raised this pin and imparted its motion to the "pin" or "abstract," which in turn operated upon the "abstract" of the manual action. In Wright's patent the collapse of the bellows pulled up a downwardly depending rod, which was caught under the loose side of a swinging lever. The free end of this lever bore upon the "abstract" of the action in a way not clearly shown in the patent. Yet the showing requires the assumption of some angle lever attached to the "abstract," similar to that of Brown's, else it is impossible to see how it could operate. In Welin's patent the motion was imparted to the "abstract" of the manual action through a lever, attached to it, against the free end of which an upward rod, actuated by the bellows, was pushed when the note was to be struck. It therefore required some addition to the "abstract" of the manual action itself, just as did Brown and Wright.

Those mechanical players which are not incorporated into the body of the piano, after a season of some popularity have disappeared from the market, and the only player which still remains is the plaintiff's. Brown's patent never went into much practical use, and has in any case now been displaced. None of the others succeeded, being crowded out by the plaintiff's player, made substantially in accordance with the patent, with the possible variation of the elastic element of the "striker." This mechanical player has been widely sold and has acquired substantial popularity.

The applicant in his file wrapper originally incorporated, not only the specification as now stated, but a mechanism for a folding pedal, which was afterwards divided out, and in this original application there was no claim of a sort similar to those now in suit. In all the claims an elastic "striker" was an element, except in those covering the pedal. The specification, moreover, at that time did not contain the following passage, this being introduced some three months later, at a time when the claims were extended to include a combination in which there were no elastic strikers (page 3, lines 83–90): "As regards relative arrangement of the pneumatics their abstracts, the pivoted strikers, the action wippens and the adjustable stops regulating movement of the action of the pneumatics and strikers, it is immaterial whether the strikers be elastic or not. In other words, the strikers may be made without slot *35*, giving them elasticity."

Thomas A. Hill, of New York City, for appellants.
Louis W. Southgate, of New York City, for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] The most important question in this case is the validity of the patent as against the prior art. Concededly the best anticipation is Brown's patent for a mechanical player contained within the case. Literally this does not come within any of the claims, for the "strikers," though actuated by the "abstracts," as Danquard calls them, or the "pins, *19*," as Brown speaks of them, are arranged below the lever of the bellows and not above. This prevents a literal anticipation of claims 26 and *27*, and similarly prevents anticipation of claim 31, in which the "strikers" must operate against the "wippens" of the manual action. This might seem to be, especially as concerns claims 26 and *27*, a somewhat immaterial matter; but when the structure is more carefully regarded the difference assumes much greater importance. It is impossible to see—at least, no one has been able to devise it—how, if the "strikers" are below the level of the bellows, they can operate upon the manual action without some angle lever or its equivalent, attached either to the key lever or to the "abstract" of the manual action. If the "striker" were below the bellows, the bellows must be so far raised in the case as to put the tracker rolls and the bellows themselves on top of the case, an unworkable arrangement. The same difficulty exists in the case of Wright, 596,730. Now it is true, respecting Wright, that figure 1 shows the swinging lever impinging directly upon what the specification called the "abstract," and it might be conceivable that the whole player was raised high enough, so that the end of the lever touched the under side of the "wippen"; but nothing of the sort is suggested in the specifications, and the same objection would apply as we have mentioned in the case of Brown, that to do so would raise the whole mehanical player above the top of the case. It is pretty safe, therefore, to suppose that, when Wright speaks of operating upon the "abstract," he necessarily presupposes some piece, permanently attached to the "abstract" of the manual action, against which the free end of the lever will bear; the "abstract," being itself a straight rod, could otherwise not be moved.

Welin's patent, 713,089, is even more obviously subject to the same criticism, and it therefore appears that the art prior to Brown had not devised any internal mechanical player which operated directly upon the manual action without the addition of something permanently affixed to the "abstract." This was an obvious disadvantage, because, in a mechanism so fixed in form and so delicate in adjustment as a piano action, it was a matter of no small consequence that it should be left without any added weight whatever. How far such weights as the angle levers of Brown and Wright and the movable levers of Welin actually affected the playing mechanism may perhaps be open to some question; but that it might be regarded by the owners of the piano themselves as a disadvantage, even though it could not be shown to be such, is quite obvious. Moreover, even if this were not the case, the adjustment of those levers was a complicated and laborious device.

It is true that it was conceded upon the trial that the Brown patent was removable as a whole from the piano instrument; but this does not touch the fact that the bracket or angle lever must be attached to each of the abstracts separately, even though the "pins, *19*" might be removed from their connection without being separately disengaged, a question at least open to doubt. We think, therefore, that within the division of the art to which this patent belongs the court below was right in saying that the invention was a new one.

The defendant is correct in saying that it has done no more than adapt the patent of Courville, 755,764, so that it shall be contained within the case. Its argument is that in so doing it did no more than to reduce the size of Courville, and that a mere reduction of size cannot be the basis of a patent, any more than any other new use of Courville's instrument can be deemed such. More could be said for this contention, were Courville adaptable as it stood by a mere reduction of size to a mechanical player contained in the case; but in some details at any rate this is not true. The finger levers, *N* [2], of Courville, operated upon the notes, while the defendant's "strikers" operate upon the "wippen." The finger levers had to be eliminated before Courville could be used, and such a mechanical change at least forbids the defendant's player from being considered literally as a new use of Courville. The change, taken by itself, is undoubtedly a small one; but it requires a consideration of how far one part of the art was at once readily transferable to the other.

Mechanical players had been in existence since 1880, the application date of Needham & Fowler's first patent, 238,145, and in their first forms were permanently fixed within the instrument itself. This method continued for some time, but they required to be specially built into the pianos for the purpose, and the player might be thought to affect the action. It was concededly an advance to devise removable players, and, when the art attempted it, it created both the movable cabinets and the players within the case at about the same time, Parker & White, 592,641; Brown, 581,390. Yet the cabinet player was in every sense less desirable than one contained in the case, and must be accepted as a concession to the difficulties of a removable case player, especially as it has disappeared in the face of Danquard's patent. We think it quite safe, therefore, to say that Courville was not obviously adaptable into a case player and that the subsequent attempt of the defendant to make it available as such depended upon suggestions which it obtained altogether from Danquard. The history of the art forbids any ready assumption that the change was within the scope of an ordinary artisan before Danquard appeared.

[2] It is true that there had been mechanical players, like Parker, 560,303, and White and Parker, 573,427, which operated directly on the "wippens"; but in all of these the player had been built into the piano permanently, and, when removable players were first so built, these patents did not in fact suggest the first answers to the problem. As is common in such cases, the final solution appears to be very close to several of the earlier answers; but we think that the long interval

during which the need existed, and the success which the final step at once secured, justifies us in refusing to substitute our own ideas of a prior obviousness. We are well aware of the risk of assuming that the mere success of an invention determines its patentability; but, when it follows a long history of failure, we think it puts upon one who challenges its originality a duty of showing that the success arose from advertising, exploitation, or the removal of external commercial conditions, which had nothing to do with the difficulties of invention.

The issue of infringement is verbal; it turns upon whether the defendant uses a pivoted "striker." Literally it does not, and the issue becomes one of equivalents. The "striker" performs its duty only at its free or movable end. Under the impulse of the "abstract" this end is pushed up against the "wippen" and falls of its own weight when the "abstract" is released. The pivot is simply to keep the "striker" in its lateral position; the small arc through which its end moves being of no consequence practically. A guide to keep the "striker" in its position precisely answers the purpose of the pivot, for it allows a free vertical motion of the operating end of the "striker," and at the same time keeps it from displacement as a whole. It would be, we think, a mere evasion of the claims to confine the patentee to the exact words which he used.

[3] The defendant, however, insists that the distinction which the applicant made of Brown's patent to the examiner should estop him here. It is true that on May 4, 1904, the applicant did distinguish Brown's "strikers," which turn only axially from his own pivoted vertically swinging "strikers"; but we attach no significance to his action, for no change in the claims accompanied it. For whatever reason it may have arisen, it is of course true that a patent, unlike other formal instruments of the sort, although it is the final embodiment of the purposes of the parties, is subject in its interpretation to the prior negotiations of the parties in a single instance. Whether or not this is legally an anomaly, so far as we know there is no decision which goes further than to hold that, where the applicant has assented to changes in a claim upon a reference in the Patent Office, he may not, by subsequent construction, resort to the elements which he has thus abandoned. We are far from being willing to establish a rule that arguments made in the Patent Office by the applicant to the examiner are to be taken as a measure of his patent. We read the claims as they are written, like the language of any other formal statement drawn up as the final memorial of the parties' intentions, and we decline to consider what was said arguendo during the passage of the case through the Patent Office, or any other of the preliminary negotiations which the patent itself was intended to subsume.

[4] Finally, the defendant insists that the applicant broadened the scope of his invention when he added the passage heretofore quoted in the statement and added new claims for nonelastic "strikers." The rule that an applicant must not introduce a new invention cannot be applied with dialectical rigidity, or it would forbid any change in claims which introduced any new element, for all elements of a claim are necessary parts of the invention. The case at bar is no different from

Hobbs v. Beach, 180 U. S. 383, 395, 21 Sup. Ct. 409, 45 L. Ed. 586, where an entire element was omitted in an amended claim, which had been inserted in the original. If the whole disclosure remains unchanged, and no intervening rights have arisen we do not cut so fine. It may be that the rule is no more than one of degree; but we know of no cases which forbid the omission of elements, even though they result in expansion, when the disclosure readily suggests the change. We think it no objection that the suggestion may arise from a further knowledge of the art which discloses that broader claims always were possible, so long as there are no intervening rights. In such cases the specifications suggest the change, but the applicant's mistake upon what preceded him has deceived him. This he may correct, at least when the departure is not too wide. In the case at bar, the change was no more than to omit an improved form of the striker; the specification readily suggested the inclusion of any form of striker.

The decree is affirmed, with costs.

VAN KANNEL REVOLVING DOOR CO. v. LYON & HEALY.

(Circuit Court of Appeals, Seventh Circuit. August 23, 1917.)

No. 2442.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT.

The Van Kannel patent, No. 656,062, for a revolving door, claims 1, 2 and 8, *held* valid and infringed.

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

Suit in equity by the Van Kannel Revolving Door Company against Lyon & Healy. Decree for defendant, and complainant appeals. Reversed.

This appeal involves the validity and alleged infringement of claims 1, 2, and 8 of patent 656,062 to Van Kannel, August 14, 1900, for improvements in revolving doors.

The scope of the invention is sufficiently stated in the following paragraph from the specification:

"My invention consists of certain improvements in that class of revolving doors which have a series of radiating wings rotating in a casing, the object of my present invention being to so construct the wings and casing of such a door that they will yield to the rush of a panic-stricken crowd, the end portions of the casing swinging outward and the wings of the door all being pushed to the front, so as to provide a wide and unobstructed passage on each side of the center of the door structure."

The claims here in question have to do with the foldable wings of the revolving door. They are:

"1. The combination, in a revolving door, of a structure having wings mounted so as to be revoluble around a central axis in fixed radial relation thereto, said wings having also independent hinges so disposed that all of the wings may be folded and lie side by side so as to project in one direction from the center.

"2. The combination, in a revolving door, of a structure mounted so as to rotate about a central axis, a series of wings mounted so as to swing inde-

pendently of their joint rotating movement about said axis, and self-releasing locking devices, whereby said wings are normally retained in fixed radial relation to said central axis."

"8. The combination, in a revolving door, of a center post, with radiating wings normally locked to said center post but mounted so that they will be automatically unlocked therefrom, and swung forwardly to project side by side when pressure is exerted upon them in other than a normal direction."

By the decree of the District Court appellant's bill for injunction and accounting was dismissed for want of equity.

Titian W. Johnson, of Washington, D. C., and Wm. O. Belt, of Chicago, Ill., for appellant.

James P. Helm, of Louisville, Ky., for appellee.

Before ALSCHULER and EVANS, Circuit Judges, and CARPENTER, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). The two questions involved are validity and infringement.

As to validity we have carefully considered the various contentions of counsel in connection with the evidence bearing thereon, and, independently of the adjudications in other jurisdictions, we have reached the conclusion that the claims are valid. In view of the judicial literature upon this very question already extant, to be found in the various opinions, it would serve no purpose to present further discussion thereon. Suffice to say, we are in consonance with the views expressed by Judge Mayer of the New York District Court, whose opinion sustaining the validity of these claims is reported in 219 Fed. 741, 135 C. C. A. 439, Van Kannel Revolving Door Co. v. Revolving Door & Fixture Co., in connection with an affirming opinion of the Circuit Court of Appeals for the Second Circuit there reported.

The validity of claims 2 and 8 was again involved and upheld in Louisville Trust Co. v. Van Kannel Revolving Door Co., 231 Fed. 166, 145 C. C. A. 354 (6th C. C. A.); Van Kannel Revolving Door Co. v. Straus et al., 235 Fed. 135, 148 C. C. A. 629 (2d C. C. A.). And the validity of all three of the claims was again sustained in the District Court of Kansas in the case of Van Kannel Revolving Door Co. v. Uhrich & Uhrich, 247 Fed. 44, decided June 8, 1916.

Does appellee's structure infringe these claims? It is a revolving door comprising a series of wings mounted to radiate about a central axis in fixed relation to it. To this extent it responds to elements in each of the three claims.

Claim 1 sets forth, as a further element, independent hinges on the wings, so disposed that the wings may all be folded to lie side by side projecting in one direction from the center. In the structure which the specification shows, this is of the piano hinge variety, a hinge extending the entire length of the wing. The wings of appellee's structure are also so mounted that they may all be folded side by side to project in one direction from the center. The folding is not accomplished by means of the piano hinges which the patent structure shows, but by contrivances of a very different sort. Suitably grooved plates are placed in the ceiling and floor, and into these extend, from the wings, studs which operate as the pintles of the ordinary hinge. When the wings are being folded together they revolve on these studs, which at the same

time move in the grooves of the plates in such manner that all the wings will side by side project in the same direction from the center. This plate and stud device is ingenious, and possibly of distinctive merit, but, after all, it constitutes in fact a hinge, which movably joins the wing to the center post, and by means of which the wings are made to project side by side in the same direction as set forth in this claim. The claim does not specify a piano hinge or any other of many varieties of hinges, known or unknown. Appellee's is but another form of hinge serving the same purpose as the hinge of this claim, and together with the other elements referred to the structure shows the entire combination of that claim.

Respecting the other claims, the main contention is that appellee's structure does not embody that element in claim 2 there described as "self-releasing locking devices whereby said wings are normally retained in fixed radial relation to said central axis," and in claim 8 as "radiating wings normally locked to a center post but mounted so they will be automatically unlocked therefrom and swing forwardly to project side by side when pressure is exerted upon them in other than a normal direction."

The structure which Van Kannel describes shows a series of spring bolts holding the wings in their normal relation to the central axis, but so constructed and connected that in cases of panic and inrush of people into the door openings, whereby there is abnormal pressure against the wings, the bolts will through such pressure on the wings be released, and the wings thus unlocked, and by the pressure forced outwardly side by side, leaving the passageway free upon both sides.

In appellee's door the same thing occurs, save only that the unlocking device is operated for releasing and unlocking, not by pressure of the body immediately against any part of the wing itself as in Van Kannel, but by pressure against the hand rail which is attached to and extends across the wing, and, as the evidence shows, is attached to the wings in all revolving doors, serving the purpose of protecting the glass in the wings, through being so placed that persons passing through would normally push against the rail in order to revolve the door.

Appellee contends that, because the abnormal pressure necessary to unlock the wings of its door must be applied to the hand rail, this is not the automatic releasing and unlocking as contemplated in these claims whereby the releasing and unlocking pressure may be applied to any part of the wing. Evidently to emphasize the idea that appellee's door wings are manually and not automatically unlocked, there is a plate near each handrail bearing the words, "In case of panic push here," as though in such case there was any reasonable likelihood that a panic-stricken crowd would read or give heed to such a notice. It is manifest that the utility of the unlocking device lies in the facility of its action in case of a panic, and that, if its operation depended in any degree upon the reading and following of directions for the manual operation of the safety device, disaster which would otherwise ensue, would in but few instances be averted. It seems plain to us that the reliance for the operation of the device in time of need is not in the directions appearing upon the plate, but in the fact that in such time of

panic persons crowding against the wings must inevitably press against the handrails and thereby release or unlock the fastening element, permitting the wings to fold outward side by side and leaving open the passageways. Claims 2 and 8 do not specify upon what part of the wing the abnormal pressure shall be applied to effect automatically the release or unlocking of the wings. It may be upon the handrail as well as upon the glass or frame of the wings. This operation of appellee's doors is "automatic" or "self-releasing" in the sense that the language and intent of these claims import. We thus find that appellee's door embodies also the essential elements of the combination stated in claims 2 and 8.

It is stated in appellant's brief, and not denied by appellee, that in the above-cited case which was decided in the District Court of Kansas the alleged infringing device is identical with the one here in issue. The record does not show this, but it seems the defendants there were the same persons who constructed appellee's doors.

Concluding as we do that claims 1, 2, and 8 are valid and have been infringed by appellee, the decree of the District Court must be reversed, with direction to enter a decree finding those claims valid and infringed by appellee, and directing an accounting. The patent having recently expired, no injunction will issue. Appellant is awarded costs.

PETER HEIBEL & SONS PLANING MILL & MFG. CO. v. CORRUGATED PAPER PATENTS CO.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1917.)

No. 4683.

PATENTS ⇐328—INVENTION—MACHINE FOR MAKING CORRUGATED PAPER.

The Langston patent, No. 878,403, for a machine for making double-faced corrugated paper, *held* void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the Corrugated Paper Patents Company against the Peter Heibel & Sons Planing Mill & Manufacturing Company. Decree for complainant, and defendant appeals. Reversed.

Hans v. Briesen, of New York City, for appellant.

Frederick R. Cornwall, of St. Louis, Mo., and Lawrence E. Sexton, of New York City (Frederick H. Bowersock, of Bridgeport, Conn., on the brief), for appellee.

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

HOOK, Circuit Judge. This is a suit by the Corrugated Paper Patents Company against Peter Heibel & Sons Planing Mill & Manufacturing Company for infringement of patent No. 878,403, February 4,

1908, to Langston, for improvements in machines for the manufacture of cellular board or double-faced corrugated paper. The plaintiff was given an interlocutory decree, and the defendant appealed.

The patent in suit relates particularly to a method and apparatus for applying the second facing sheet to single-faced corrugated paper "and pasting the parts together under a resilient but uniform pressure and while heat is being applied thereto." The first five claims are involved. The claims are as follows:

(1) "An apparatus of the character described, comprising a stationary heater having a smooth surface, and means spaced therefrom and movable in relation thereto for advancing the paper and holding it in resilient engagement with said heater."

In claim 2 the movable means spaced from the smooth surface of the heater is described as a "pressure-applying mechanism."

Claim 3 says the mechanism is movable substantially parallel to the surface of the heater.

(4) "A machine for making double-faced corrugated paper, comprising means for drawing a strip of single-faced corrugated paper and a strip of facing paper through the machine each under tension, means for applying paste to the crowns of the corrugations of the corrugated strip and then bringing the facing strip into contact therewith, a stationary heater in engagement with which the facing strip passes, and means traveling with said corrugated strip for holding said facing strip in engagement with said stationary heater."

(5) "A machine for making double-faced corrugated paper, comprising a stationary heater having a smooth surface, and an endless belt traveling adjacent said surface and serving to advance the paper, and also to hold it in resilient engagement with said stationary heater."

It is stated in the specifications that the first facing sheet is applied to the corrugated paper "in any suitable well-known manner," and that the essential portion of the invention claimed resides in the applying of the second facing sheet. It is said that the crowns of the corrugations are first treated with paste or other adhesive, the second facing sheet comes adjacent the heated surface, while the heavy belt above engages the opposite facing sheet already in place, and holds the product with uniform pressure against the heated surface. The moving belt aids in advancing the material, its freedom of movement between the pulleys permits adjustment to any unevenness in the corrugations, and its weight is generally sufficient to provide the necessary pressure against the smooth heated surface, and aids in pasting and in expelling the moisture.

Double-faced corrugated paper was made long before the Langston patent. There are from 100 to 150 different machines used in the art, many of which were patented before Langston entered the field. The patent in suit and the prior art should therefore be carefully examined, to see whether he made such an advance as merits the dignity of invention. There are some striking resemblances between the patent in suit and the French patent No. 362,835, April 14, 1906, to the Société Lacaux Frères. As with Langston, the Lacaux machine is for fixing a sheet of paper to corrugated pasteboard the opposite side of which has already been so covered. The uncovered corrugations carry glue or paste and the second sheet is affixed from below. There is the same endless belt above, which accompanies the corrugated filler and the facing paper in the movement of pasting, upon which plaintiff relied

much at the hearing. The same resiliency in the belt and adjustability to unevenness in the product appears in Lacaux. The belt is described in the second claim of that patent as:

"A heavy metal fabric, movable and endless, whose weight keeps the corrugated paper covered on one side pressed against the sheet of smooth paper serving to cover it."

The difference between them is this: In Langston the sheet of paper to be pasted to the corrugated pasteboard above passes over the smooth heated surface of a stationary table, while in Lacaux the stationary table is not heated, but is covered with felt, over which moves a flexible metallic conveyor, which has previously received its heat by contact with a cylinder equipped with gas burners or other devices. Had Lacaux discarded their conveyor and cylinder, removed the felt from the table, and applied the heat directly to a table surface capable of receiving it, they would have anticipated Langston in all features material here.

In patent No. 545,354, August 27, 1895, to Ferres, the material passes between two movable aprons or belts, the upper one of which rests upon and presses the facing paper to the corrugated pasteboard. It adds nothing to the function actually performed to describe the pressure as adjustable or resilient. The lower belt, on which the product rests and is carried, moves horizontally over a stationary metal plate which is heated by gas jets underneath and communicates the heat to the belt. The metal plate answers to Langston's table surface. By removing the lower belt and having the product move over a smooth stationary metal plate, Langston's machine would appear, except that in Ferres the second sheet of facing paper is put on from above, instead of from below. The upper apron or belt, which sags and rests upon the paper, is heated directly by burners. In mechanical arrangement and function there is little difference between the two devices. If Langston had preceded Ferres, and that is a test in such cases, it could have been said that the depending belt of the latter was the equivalent of Langston's, and that as to the lower members of the structures Ferres could not escape infringement by interposing his belt between the heated table surface and the pasteboard.

The patent to Duerden, No. 620,756, March 7, 1899, discloses the idea of passing the corrugated pasteboard and facing papers between two surfaces to which heat is directly applied, and which have a bearing across the product. It is specified that endless bands may be used to facilitate the passage between the heaters. Similarly, in patent No. 618,376, January 24, 1899, to Chapin, the corrugated pasteboard, already faced on one side, and the facing paper for the other side, are passed between two heaters or steam boxes, arranged one above the other on a frame. The lower is fixed, and presents a plain smooth upper surface. The upper one, with a like lower surface, may be raised or lowered as needed, but is not as automatically adjustable as the belts of Lacaux, Ferres, and Langston. Chapin's lower heater and Ferres' upper belt would substantially make Langston's device.

In Ferres' patent, No. 746,807, January 15, 1903, the strip of single-faced corrugated paper, to which paste has been applied, and the strip

of plain facing paper to be affixed, are drawn between the smooth, highly polished surfaces of two heaters, one above the other. In all essential particulars involved in this case, the two patents to Ferres of 1895 and 1903 disclose the Langston machine. All that was needed was to substitute the upper belt of the first patent for the upper heater of the second, and to reverse the relative positions of the single-faced corrugated board and the second facing strip. The doing of that was such an obvious expedient as not to involve invention. The product would then have been drawn over a smooth, stationary, heated surface, and its movement aided by an endless, depending belt pressing resiliently thereon.

The plaintiff urges a decree rendered in its favor against the manufacturer of defendant's machine, in the Southern District of New York. It is apparent from the opinions of that court that the presentation of the case made to it by the parties was incomplete and fragmentary. Anticipation was not pleaded as a defense, and the parties seemed for some reason to be content with disclosures of evidence narrowly and by piecemeal. The court was not advised of the extent and bearing of the prior art, such as appears in the record before us.

The decree is reversed, and the cause is remanded, with direction to dismiss the petition.

AMERICAN CONE & WAFER CO. v. CONSOLIDATED WAFER CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 55.

PATENTS ⊂=202(1)—ASSIGNMENTS—"IMPROVEMENTS."

The patentee of a device for baking ice cream cones made from batter assigned the patent, together with all rights and privileges thereunder, as well as all improvements that might be made thereto or thereunder. Thereafter the patentee invented a new device for baking ice cream cones, which, while bearing a resemblance to the original, was of a radically different mechanism. *Held*, that the assignment did not include the latter device, for an improvement, while it need not necessarily be a physical addition to the machine, leaving all its parts unchanged, does not necessarily include all changes which leave the chief features as before, and hence, the latter device being distinct from the former, it did not pass under the assignment.

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

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

Bill by the American Cone & Wafer Company against the Consolidated Wafer Company. From a decree dismissing the bill, complainant appeals. Affirmed.

The bill was to procure specific performance of a contract for the assignment of patent 1,122,913 issued to John P. Groset and assigned by him to the defendant. The gist of the action lay in the words of an earlier assignment from Groset to the plaintiff's predecessors in title of a patent, 1,010,619, issued to him before the patent now in suit. This assignment concluded with the following phrase after the description of the patent: "Together with all

rights and privileges thereunder, as well as all improvements that may be made thereto or thereunder." Several questions were litigated at the hearing besides that upon which the case turned below and turns here; i. e., whether Groset's second patent falls within the language just recited. They are not set forth here.

Both patents were for machines to mold and bake ice cream cones made from batter. No detailed description of the patents is intelligible without the accompanying drawings, especially as the second patent discloses an elaborate and complicated machine. A short description of each, full enough to make a discussion of the cause understandable, appears in the following excerpts from the opinion below: "The machine of Groset's first patent shows a horizontally rotating carrier provided with radially extending cup-shaped holders and vertically swinging pivoted arms carrying the conical formers co-operating with the cup-shaped holders. These cup-shaped holders are divided molds, and suitable mechanism is provided for opening the molds and for raising the conical formers. When the molds have received a charge of batter, the swinging arms carrying the formers drop down and form the batter into a hollow cone shape, after which the horizontal revolution of the table or carrier carries the closed molds and formers through a semicircular oven where the cone-shaped batter formations are subjected to heat for the purpose of cooking. * * * In the machine of the patent in suit, the divided molds and cone-shaped formers are carried by what might be termed a ferris wheel rotating, not in a horizontal, but in a vertical, plane, and instead of passing through a circular oven each set of molds and formers is provided with individual heating instrumentalities for the purpose of cooking the batter forming the cone."

James A. Watson, of Washington, D. C., and A. Parker Smith, of New York City, for appellant.

Charles Dushkind, of New York City (T. Hart Anderson, of New York City, of counsel), for appellee.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). We think it clear that the purpose of the language used was not to subject every future cone baker which Groset might devise to the assignment; the improvements covered by the phrase were those to that machine, not to the art in general. Every more efficient machine would be an improvement "upon" it, in common speech, but not "to" it. We attach significance to the word "thereto", and we should attach an added significance as well to "thereunder," if we could find any meaning for it. As it is, it seems to us rather a bit of scrivener's verbiage. It is, of course, true that any improved cone baker might supersede that purchased by the plaintiff's predecessors, and would therefore defeat the grant. Perhaps it would have been legal to bind Groset to assign any future machine against such a possibility; we need not pass upon that question. All we say is that, if the purpose is so broad, the language must not be so vague. Groset was free to make a new cone baker, which might successfully compete with the plaintiff, so long as it was not an improvement "to" the disclosure of his first patent.

It must be confessed that there is still great latitude open; we agree with the plaintiff that an "improvement" need not necessarily be a physical addition to the machine, leaving all its parts unchanged.

Now, it is true that it might be hard, once some reorganization is admitted as possible within the word "improvement," to draw a satisfactory definition dialectically between one improvement and another. But we are concerned with affairs, not logic, and we look to their circumstances to understand what the parties meant. The necessities of the art fixed many of the elements of a cone baker. It must be made to receive viscous batter in a thin layer between two conical surfaces, mold and cone former, of which one, and preferably both, must be kept hot. The batter might perhaps in theory be run between the faces of fixed members, but the cone is extremely thin, and we think it apparent from common sense that their separability when the batter was poured in was an essential part of any such machine. Thus we have as inevitable features separable conical members, movable to and from a batter reservoir, and connected with, or movable to and from, a heating apparatus.

There are, no doubt, points of resemblance between the two patents besides these; in each the mould separates to drop the baked cone and the movement of both members to and from the batter reservoir is circular, instead of being reciprocal as might perhaps have been. Beyond these we see no similar features, except those already mentioned, which seem to us inherent in any machine of the kind. The heating system is radically different; the means to lift the cone former and the mechanism to divide the mold; there is nothing else in the machine. That some of the features are the same is not we think enough; it must appear that the old machine remains enough the same to preserve its identity. Under just what changes that identity would be lost, we cannot say and we need not. Any decision must appear arbitrary, where the test is the vague language of business, and not the precise terminology of logic. We must try rather to assume the posture of the parties at the time, and consider what most men would have thought such language covered. Their test would in some measure have certainly depended upon the extent of the change; they would have recognized that to recast the details of the whole machine might make it a different one, though some features remained in common. Perhaps we can do no more than to say that the extent of these changes in our judgment passes beyond the standard of identity which we think they would have accepted.

If the test may be whether the new machine will read on the claims of the old, it does not trouble us. Two features of the claims are not realized; i. e., that the mechanism to open the mold shall be at one side of the cone formers, and that the cone formers shall be pivoted. We agree with Judge Veeder that the patent in suit presents too great a departure from the earlier disclosure to fall within the contract.

Decree affirmed, with costs.

DICKS PRESS GUARD MFG. CO. et al. v. AMERICAN HARDWARE CORP.

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

No. 33.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—SAFETY ATTACHMENT FOR PRESSES.

The Dicks patent, No. 618,065, for a safety attachment for power presses, as limited, if not wholly anticipated by the Oppler German patent, No. 58,289 of 1890, *held* not infringed.

Appeal from the District Court of the United States for the District of Connecticut.

Suit in equity by the Dicks Press Guard Manufacturing Company and others against the American Hardware Corporation. Decree for defendant, and complainants appeal. Affirmed.

Albert F. Nathan, of New York City, for appellants.

John P. Bartlett, of New York City, for appellee.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

HOUGH, Circuit Judge. This patent (now expired) was before us in Dicks, etc., Co. v. Bowen, 229 Fed. 573, 143 C. C. A. 611. The description of the mechanism shown by the patentee as embodying his claims, there made by Lacombe, J., renders any further statement of the kind superfluous, and claim 1 is printed on page 574.

The other claim now in suit (3) needs no separate or special treatment; it merely states the combination of the first claim in greater detail, and with some subdivision of elements. The new questions here raised are not only whether the device of the defendant herein infringes, but the more fundamental inquiry, whether the first (and more general) claim of the patent is entitled to a range of equivalents broad enough to reach defendant, or is, indeed, valid at all, in the light of prior art now for the first time in evidence. In the case cited, it was said that:

"No such prior art [was] shown as would require a strained construction to be given the claim in order to save it."

We have now before us German patents to Oppler, Nos. 55,311 and 58,289 (1890), and to Hirschmann, No. 64,711 (1892). The earlier Oppler patent and that to Hirschmann display, the latter a positive stoppage or prevention of plunger descent by plugs or bolts which the workman must manually release before starting his machine, and the former an inclosure or delimitation of the working area under and around the plunger by a gate or gates which the workman's hands must (in order to put the subject of work even near the die) advance or open against spring tension, until what is called a "support" is so placed as to prevent the descent of the plunger far enough to injure the hand not timely retracted, while hands quickly withdrawn let the

gates and "supports" swing back to normal and out of the plunger's path.

Whether these disclosures did not so limit the field of invention open to this patentee as to justify defendant's contention that it follows the prior art is a question that need not be considered, because we hold the second Oppler patent (58,289) conclusive against plaintiff. In this second application the German inventor shows the gates of his first patent, but dispenses with the integrally connected "supports" which positively halted the plunger, when the gates were opened to give access to the working area; instead thereof he shows a treadle, which by simple mechanism closes the gates, sweeping before them the workman's hands. The same treadle, when sufficiently depressed, reaches and moves the lever that starts the plunger mechanism; but such contact cannot be made unless the downward motion of the treadle has completed closure of gates. Hands or other obstructions of gates stop treadle movement.

We do not overlook the fact that Oppler's drawings are imperfect; they show his gates swinging the wrong way. The mistake is one any mechanic could correct, and does not affect the extent of his disclosure to the skilled man. Here is every essential element of the claims in suit: The plunger; the detector independent thereof, moving before the plunger begins its own effective movement; and a stop mechanism controlled by the detector, preventing the effective movement of the plunger whenever the normal detector movement does not take place—i. e., whenever the detector detects anything in its path that does not get out of the way.

But two differences can be pointed out: Oppler's detector does not "move toward the die," and it is horizontal, not perpendicular, in movement; that is to say, Oppler never starts his plunger if his detector fails to brush away offending hands, while this patentee does not start his plunger if his detector finds hands or the like under it. Such differences are not substantial; and it cannot be doubted that, broadly or literally read, the first claim in suit covers Oppler's second device; therefore, so read, it was anticipated by Oppler.

The plaintiff's position is fairly stated by its expert witness, who said that:

> The "principal difference between the Oppler machine and that of the patent was that the safety device [of Oppler] was positively moved by the treadle, but there was nothing *in the machine* preventing the application of the shop power to the punch; there was no interference with the starting of the punch by the sweeps" (i. e., gates).

That nothing *in the machine* prevented Oppler's plunger or punch from descending is true; but it is equally true that the lever releasing the plunger could not operate, unless and until the normal movement of the safety device was completed. This is a control or prevention of the "effective movement of punch" by substantially the same means as those of the patent in suit. Further, the word "machine" should be taken to apply to the whole apparatus, not merely the punching mechanism. Whether, with that more restricted interpretation mentioned by Lacombe, J., the claim can be "saved," need not be considered, since

the patent has expired. So far as this defendant is concerned, it is enough to say that nothing but the broadest range of equivalents can find infringement.

As that cannot be accorded, the decree below is affirmed, with costs.

EMBOSO SALES CO. v. WOOD, NATHAN & VIRKUS CO. et al.

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

No. 24.

PATENTS ⊂328—INVENTION—PROCESS OF DRYING AND VARNISHING PRINTS. The Crump patents, No. 644,281, for a process of drying and varnishing prints, and No. 644,282, for the product of such process, *held* void for lack of patentable invention, in view of the Clark British patent, No. 3,357, of 1867.

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

Suit in equity by the Emboso Sales Company against the Wood, Nathan & Virkus Company and Frederick A. Virkus. Decree for defendants, and complainant appeals. Affirmed.

Appeal by the plaintiff from a decree declaring void for lack of invention two patents to Crump, Nos. 644,281 and 644,282, for process and product, respectively, of the following invention: The patentee described a method of printing upon paper, fabric, or other absorbent surface a design or text with size, ink, or color. While still wet, a dry powder resin was sprinkled on, which adhered to the wet size. The powder not adhering was then shaken off, and the surface heated till the particles of resin fused. The result, when it cooled, was "a crust or veneer of varnishing material."

In 1867 one Clark obtained a British patent, 3,357 of that year, describing a similar process applicable to fabrics. He spread powdered resin or sealing wax on a table, laid upon it the fabric, and pressed the pattern through the meshes of the fabric from behind, so that the resin adhered on those parts where the size came through. When dry, he then heated the fabric till the resin became fixed and assumed a brilliant colored effect.

In 1832 one Breeze took out another British patent, No. 1,714 of that year, for etching upon metal or glass. One of his methods was to make his pattern upon paper by printing in ink, covering the ink with powdered resin, and heating the combination to form a varnish on the paper. The design so made was then transferred to the metal, which might then be etched. It was proved that transfer paper to be successful must be nonabsorbent. The patents in suit were granted on February 27, 1900, and did not come into use till 1911 when one Westlake, who had discovered a similar system, which he used for an imitation of embossed printing, learned that they stood in the way of his getting a patent. He then bought the patents and organized the plaintiff in 1914. Westlake's process has had wide sale, but involves the use of a secret gum or resin. How far this has contributed to the success of the later use of the process does not appear.

Alexander & Dowell, of Washington, D. C., and John H. Hazelton, of New York City (Arthur E. Dowell, of Washington, D. C., of counsel), for appellant.

Louis W. Southgate, of New York City, for respondents.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). The best reference appears to us to be Clark's British patent, in which, although the size or mordant is put through the fabric from behind, it adheres to the resin which lies upon the table. The result when this is heated is to form a crust or varnish, which Clark properly describes as "a brilliant colored effect." As the patent in suit was by its definition applicable to a fabric as well as to any other absorbent material, it is difficult to see how Clark's product was not, at least qua fabric, a precise anticipation of the product patent, and we so decide it to have been.

As to the process patent, it is, of course, obvious that Clark's patent was not a complete anticipation, just as Judge Augustus N. Hand found, yet we think that it was too close for patentable distinction. The differences are that Crump impressed the size or ink of the pattern on the face of the paper or other absorbent surface, and then sprinkled the resin over that, while Clark pressed the size through the fabric, so that it would combine with the resin beneath. We see nothing inventive in the details of either process, once one has grasped the central idea of making the resin stick to the size, which in turn has been imposed upon the absorbent material, and then fusing them both together into "a crust or veneer." Clark, it is true, used a fabric; but Crump specified fabric among his absorbent surfaces, and paper would be only another use, the necessary modifications for which would at once occur to any one. Moreover, Clark at least gives an indication in his patent that he himself had the very details of the process in mind, which differentiates from Crump, though perhaps the passage is not clear enough to constitute an anticipation if it stood alone. The language is as follows:

> "I may also employ transparent wax in grains, which I sprinkle or otherwise apply on the fabric to be ornamented; these grains or powder are then melted by the application of heat and form a transparent bead."

It seems hardly possible to interpret this in any other way than as a process by which wax is put on the front of the fabric after the size has been put on. We may agree that the size is put through from the rear; but surely, if the resin or wax is sprinkled on, it would immediately suggest the possibility that the size should be put upon the front, instead of behind.

Breeze's British patent seems to us further removed from Crump than Clark's. It is true that, if the process takes place by means of a transfer sheet, there is a stage at which, were the transfer upon absorbent paper, the product and the process would be reproduced. In fact, however, absorbent paper would not serve, and we should hesitate to hold that it was legitimate to cut in half a completed process designed to reach one result and take it as a complete anticipation of a process aimed at a different one. Yet the intermediate product was closely approached by steps substantially the same as that of Crump's process, and it seems hard to say that, if any one had wanted to make

hard and varnished letters, he would have had the least difficulty in doing it with Breeze before him. That question, however, we pass.

As in all such cases we should hesitate easily to conclude that even the variations between Crump and Clark, to say nothing of those between Crump and Breeze, could not constitute invention, if the art presented an instance of many prior efforts followed by success in the differentiating steps. Here there is nothing of the sort. Crump's patent, which did not at all suggest the use of his process for embossing, had lain quite unused for nearly all of its term, and came to any recognition whatever only when the plaintiff found it across the path of its own putative invention. It had not been of any use whatever, and it is open to question whether the extent of its exploitation during the years just before its expiration was not due to the secret gum which Westlake invented. It seems to us that we should attribute originality rather to Westlake in the discovery, if not of his gum, then of the new use to which Crump's process could be put for the imitation of die embossing by this cheap and easy substitute. That may indeed have been an inventive idea, but it could not be patented, and in any case Crump had nothing to do with it.

We agree with the District Court that the patent is void, and the decree is affirmed, with costs.

H. D. SMITH & CO. v. SOUTHINGTON MFG. CO.

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

No. 38.

1. PATENTS ⟸283(1)—SUIT FOR INFRINGEMENT—DEFENSES—ESTOPPEL.
A contract by which a defendant has estopped itself from denying the validity of a patent does not preclude it from denying a charge of infringement, and in support of such defense it may refer to the prior art and to the file wrapper.

2. PATENTS ⟸328—INFRINGEMENT—SCREWDRIVER.
The Ward patent, No. 737,179, for a screwdriver, construed, and *held* infringed.

Appeal from the District Court of the United States for the District of Connecticut.

Suit in equity by H. D. Smith & Co. against the Southington Manufacturing Company. Decree for defendant, and complainants appeal. Reversed.

For opinion below, see 235 Fed. 160.

Archibald Cox, of New York City, and Henry E. Rockwell, of New Haven, Conn., for appellants.

George D. Seymour, of New Haven, Conn., for appellee.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is a suit in equity for infringement of letters patent No. 737,179, for screwdrivers. There are but two claims, which read:

"1. As a new article of manufacture, the herein described screwdriver, consisting of the blade, the round shank, conoidal bolster, handle web, and butt, all formed in one piece, and the handle scales secured to the said handle web; the handle portion being elliptical in cross-section for the most part, but gradually merging with the conoidal bolster by a gentle taper into the circular toolshank, thus providing for a firm grasp, while facilitating a nice control by pressure of the finger and thumb upon the shank of the tool.

"(2) As a new article of manufacture, the herein described screwdriver, consisting of the blade, the round shank, conoidal bolster, handle web, and butt, all formed in one piece of drop-forged metal shaped as described; the handle portion being elliptical in cross-section for the most part, but gradually merging with the conoidal bolster by a gentle taper into the circular tool shank, thus providing for a firm grasp, while facilitating a nice control by pressure of the finger and thumb upon the shank of the tool."

[1] The defendant in 1912 made screwdrivers exactly like the complainant's, and as the result of a notice to desist entered into a written agreement which contained the following article:

"3. The parties of the second part further agree to respect the validity of said letters patent No. 737,179, and to hereafter avoid any and all infringement, directly and indirectly, thereof, either by the manufacture of screwdrivers of the forms particularly complained of by the party of the first part and sold by the parties of the second part to the party of the first part or otherwise."

This covenant compels the defendant to admit in this case the validity of the patent and that the screwdrivers made by it before the settlement were infringements; but it may show, if it can, that the screwdrivers now made by it are not infringements, and for that purpose may refer to the prior art and to the file wrapper. American Specialty Co. v. New England Enameling Co., 176 Fed. 557, 100 C. C. A. 193.

[2] The patented screwdriver consists of an integral solid drop-forging, beginning at the top with an oval butt having a flat hammer face, and continuing into a flat handle web, into which scales of an elliptical shape gradually decreasing in width are riveted, continuing into a conical (incorrectly called conoidal in the patent) tapering bolster, continuing into a round shaft, ending up in the flat blade. There was nothing in the prior art like the combination of the article. It was very useful and a considerable demand has arisen for it. The screwdrivers complained of are integral drop-castings with wooden scale handles, exactly like the complainant's, except in one particular, viz. a projecting bead or collar at the junction of the conical bolster with the round shank. This is said to strengthen the tool, and also to prevent the hand from slipping down upon the shank.

The District Judge regarded the exclusive patentable feature of the complainant's screwdriver to be the conical bolster tapering gently into the round shaft, and he held that the defendant did not infringe, because it put a projecting bead at this point. Assuming the construction of the claims to be correct, we think the defendant's screwdriver does infringe the complainant's patent, because it has the tapering conical

bolster merging into the circular shank. It avoids the abrupt break or shoulder between the handle and shank common in previous screwdrivers, for which the patentee substituted the tapering conical bolster. The bead, if it is not a mere evasion and has any utility, which we very much doubt, is an addition which does not prevent infringement.

Decree reversed.

VAN KANNEL REVOLVING DOOR CO. v. UHRICH et al.

(District Court, D. Kansas, Third Division. June 8, 1916.)

No. 37-N.

1. PATENTS ⟸301(4)—SUIT FOR INFRINGEMENT—RELIEF—DISCONTINUANCE OF INFRINGEMENT BEFORE SUIT.
   That defendant in an infringement suit had ceased making the alleged infringing devices before the suit was brought does not deprive the court of jurisdiction to grant injunctive relief and accounting if infringement is found.
2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—REVOLVING DOOR.
   The Van Kannel patent, No. 656,062, for a revolving door, claims 1, 2, and 8, *held* valid on prior adjudications, and infringed by structures in which mechanically equivalent parts were substituted for some of those of the patent.
3. PATENTS ⟸328—VALIDITY—REVOLVING DOOR.
   The Van Kannel patent, No. 836,843, for a revolving door, claim 3, *held* void for lack of invention, in view of the prior patent, No. 656,062, to the same inventor.

In Equity. Suit by the Van Kannel Revolving Door Company against Oscar W. Uhrich and Burns H. Uhrich, doing business as the Atchison Revolving Door Company. Decree for complainant in part, and for defendants in part.

Appeal dismissed, 245 Fed. 991, — C. C. A. —.

Titian W. Johnson, of Washington, D. C., for plaintiff.

Helm & Helm, of Louisville, Ky., for defendants.

POLLOCK, District Judge. This is a suit to restrain infringement of letters patent No. 656,062, granted T. Van Kannel, August 14, 1900, and also letters patent No. 836,843, granted same person, November 27, 1906, covering methods of construction of collapsible revolving doors.

[1] As to the alleged infringing devices heretofore manufactured by defendants and designated as plaintiff's Exhibits A, B, and C, defendants disclaim they were making the same at the date this suit was instituted; hence said structures need not here be further considered, except it may be said such disclaimer, it is thought, will prevent neither the granting of the injunctive relief prayed by plaintiff nor the recovery on an accounting against defendants if one be ordered. Deere & Webber Co. v. Dowagiac Mfg. Co., 153 Fed. 177, 82 C. C. A. 351, and cases cited.

This narrows the contested matters necessary to be investigated to the single question whether the revolving doors manufactured by

defendants designated in the record as plaintiff's Exhibits D and E infringed upon rights granted to plaintiff as assignee of the above numbered patents.

Again, as shown by the record, it is only claims Nos. 1, 2, and 8 of patent No. 656,062, and claim 3 of patent No. 836,843 on which plaintiff relies.

[2] While by way of defense both the validity of the above-mentioned claims of plaintiff's patents and the alleged infringement by defendants is denied, yet the validity of claims 1, 2, and 8 of plaintiff's patent No. 656,062 have been so often placed in issue and upheld by the courts as to render further dispute stale and unprofitable, as will be seen by reference to the following cases: Van Kannel Revolving Door Company v. Nathan Strauss et al., 235 Fed. 135, 148 C. C. A. 629, Second Circuit; Louisville Trust Co. v. Van Kannel Door Co., 231 Fed. 166, 145 C. C. A. 354, Sixth Circuit, decided March 1, 1916; Van Kannel Revolving Door Co. v. Revolving Door & Fixture Co., Second Circuit, 219 Fed. 741, 135 C. C. A. 439. These claims read, as follows:

"(1) The combination in a revolving door, of a structure having wings mounted so as to be revoluble around a central axis in fixed radial relation thereto, said wings having also independent hinges so disposed that all of the wings may be folded and lie side by side so as to project in one direction from the center.

"(2) The combination in a revolving door of a structure mounted so as to rotate about a central axis, a series of wings mounted so as to swing independently of their joint rotating movement about said axis, and self-releasing locking devices, whereby said wings are normally retained in fixed radial relation to said central axis.

"(8) The combination in a revolving door, of a center post, with radiating wings normally locked to said center post, but mounted so that they will be automatically unlocked therefrom and swung forwardly to project side by side when pressure is exerted upon them in other than a normal direction."

As under the adjudicated cases the validity of the foregoing claims must be upheld and as in their nature they are combination claims, they must be held to cover not alone the precise form of construction therein contemplated, but also all mechanical devices and equivalents substituted by defendants in construction. Machine Co. v. Murphy, 95 U. S. 120, 24 L. Ed. 935; Paper Bag Patent Case, 210 U. S. 415, 28 Sup. Ct. 748, 52 L. Ed. 1122; United States v. Anciens Etablissent, 224 U. S. 328, 32 Sup. Ct. 479, 56 L. Ed. 778.

A comparison of the doors manufactured by defendants at the time this suit was instituted with the above-quoted claims of plaintiff's patent No. 656,062 renders it entirely clear from the proofs, while there appear certain differences in form and shape of parts employed, yet it may not be doubted such differences constitute mere mechanical equivalents designed to accomplish the same result in method of operation and purpose to be accomplished. It follows said claims of plaintiff's patent must be held to be infringed by defendants' structure manufactured at the date of the institution of this suit.

[3] Again, while I do not find the validity of claim No. 3 of plaintiff's patent No. 836,843 covering the method of hinging the door to have been passed upon and determined by any court to which it has been

submitted, a comparison of the peculiar hinging device employed by defendants in their structure now under consideration is covered by said claim if valid. Hence the only remaining question to be considered concerns itself with the validity of said claim. This claim reads, as follows:

"(3) A revolving door having a suitable casing, a spindle centered therein with hanger-disks near its opposite ends, and a series of wings having fulcrum-pins movable upon such fulcrum-disks for folding all of the wings together upon one side of the spindle."

Claims 1, 2, and 13 of this patent were held void by the Circuit Court of Appeals for the Second Circuit in Van Kannel Revolving Door Co. v. Revolving Door & Fixture Co., 219 Fed. 741, 135 C. C. A. 439, and claims 1 and 2 of said patent by the Circuit Court of Appeals for the Sixth Circuit in Louisville Trust Company v. Van Kannel Revolving Door Company, supra.

The invalidity of the claims of patent No. 836,843 which have been heretofore adjudged by the courts is predicated largely upon the broad general claims of the prior Van Kannel patent No. 656,062. From a reading and consideration of the claims of patent No. 656,062, I am persuaded there is nothing in principle new in claim No. 3 of patent 836,843, not covered by the several correlated claims of patent No. 656,062. It follows, for like reason given in the above-cited cases, said claim must be held invalid.

It follows a decree must enter adjudging defendant guilty of infringing claims numbered 1, 2 and 8 of plaintiff's patent No. 656,062, and for an accounting, and injunctive relief restraining further infringement of plaintiff's rights secured by said claims. The relief prayed as to claims of patent No. 836,843 is denied.

It is so ordered.

HINMAN et al. v. STARCH BROS. CO.

(District Court, W. D. Wisconsin. November 9, 1917.)

No. 45.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—MILKING MACHINE.
   The Hinman & Hinman reissue patent, No. 13,876 (original No. 1,097,803), for a milking machine, was not anticipated, and is not invalid for abandonment of the invention. Claims 11, 12, 16, and 17 also *held* within the scope of the invention and infringed.

2. PATENTS ⟸174—VALIDITY OF CLAIMS—SCOPE OF INVENTION.
   The rule that a claim which is broader than the described invention is void is not applicable in its full form, where the patent is for an improvement on the device of an earlier patent to the same patentee, which broadly describes the invention.

In Equity. Suit by Arthur V. Hinman and others against the Starch Bros. Company. On final hearing. Decree for complainants.

Bagley & Reed, of Madison, Wis., Howard P. Denison and E. A. Thompson, both of Syracuse, N. Y., and R. H. Woolver, of Oneida, N. Y., for plaintiffs.

Fred Gerlach, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on reissue No. 13,876, Feb. 9, 1915 (original No. 1,097,803, May 26, 1914). The reissue patent was sustained by Judge Ray, of the Northern district of New York, in Hinman v. Visible Milker Co. (D. C.) 231 Fed. 174, affirmed 239 Fed. 896, 153 C. C. A. 24, in which a device similar in some respects to that of defendant here was held an infringement. Judge Geiger, of the Eastern district of Wisconsin, has also issued an injunction upon a device made by defendant here, similar to the one in suit.

[1] The patent in suit is an improvement on the Hinman patent, No. 907,236, of which 2,000 were sold from 1908 to 1912. This was replaced by the type of the reissue, of which 25,000 have been sold since 1912. The suction chamber in question is fully described by Judge Ray in the first case cited, and it is not necessary to repeat the description here. The validity of the reissue as a whole is clear, as was held by the New York cases.

I do not think that plaintiffs abandoned any part of their real invention, either in their original or reissue application, and that therefore Melber v. School District, 243 Fed. 196, is inapplicable. I find from the evidence that the Hinman invention was reduced to practice September 5, 1907, long before the Peik & Lehman patent, No. 995,804, dated June 20, 1911. The latter, therefore, is not available as an anticipation of any part of the Hinman invention. Plaintiffs did not actually abandon the discovery reduced to practice September 5, 1907, when Exhibit 28 was shown to the witness Stringer, and the same is not to be held an abandoned experiment.

This leaves the question of infringement, involving also the validity of the particular claims sued on. Defendant manufactures a milk chamber having some of the features of the Hinman reissue, and which is also somewhat different from the visible milker device before Judge Ray. The four claims in suit contain the following elements only: (1) A milk chamber having a valveless inlet; (2) an air exhaust connection; (3) an air-tight exit for the removal of milk from the chamber, closed by gravity and by the vacuum, and which is supported by means outside the chamber. All these elements are found in defendant's two forms of milk chamber put in evidence by plaintiff as Exhibits 3 and 8. The milk inlet of Exhibit 8 has a valve, it is true; but a hole is bored through the valve, so the effect is substantially the same as if the inlet was open, as in Exhibit 3. Infringement is therefore clear, if the four claims in suit, being 11, 12, 16, and 17, are within the scope of the invention, and are valid claims.

The question was raised on the trial whether claims in suit were not so broad as to be unauthorized by the specification, as well as by the prior art, and the Peik & Lehman patent was particularly relied on by defendant. But, as plaintiff has clearly shown the date of invention to be prior to Peik & Lehman, that disclosure is not material. Aside from Peik & Lehman, there is only one other earlier patent whose exit valve is hung outside the milk chamber, and that is Colvin, No. 28,351; but this has valved milk inlets, so the disclosure may be disregarded. No prior art, therefore, interferes with the validity of the four claims in suit.

[2] Regarding the scope of the Hinman invention, the question is whether the four claims in question are warranted by the true purpose and spirit of the invention. "Any claim which is broader than the described invention is void." State Bank of Chicago v. Hillman, 180 Fed. 732, 104 C. C. A. 98. The same rule was applied in Burroughs Adding Machine Co. v. Felt & Tarrant Mfg. Co., 243 Fed. 869, —— C. C. A. ——. As the Hinman patent is for improvements on their earlier invention, No. 907,236, of 1908, the rule of these decisions is not so pertinent as it would be in respect to the original one, although the Felt patent in the Burroughs Case was for an improvement. In the first Hinman patent the statement of the object of the invention is quite general, admitting of a great latitude of claims, so long as the type of a milk chamber device was not departed from. In the improvement specification the following objects are stated:

"This invention relates to improvements in vacuum cow-milking machines of the valved milk chamber type; its object being to improve and simplify their construction and to provide an exceedingly simple, readily operated, easily cleaned, noiseless, and highly efficient apparatus of that class for milking one cow, or a number of cows simultaneously. At present in machines of this type there is no way of automatically controlling the vacuum, so that with each pulsation of the piston of the air pump the entire contents of the wilk chamber are emptied; and there is no way to prevent the milk from entering at some point the center of the milk chamber during the milking stroke of the pump, and no way of preventing a portion of the milk being drawn from the milk chamber into the flexible tube connected with the pump, and even into the pump itself. Our invention is mainly designed to overcome these defects, by providing an improved and simpler apparatus and accessories."

It will be seen from the quotation that the objects of the improvement are varied, and that the claims in question, while they do not cover the tangential and two-part features, are still addressed to improving the device along the lines stated in the description, so that the rule of the decisions referred to is not clearly applicable. The presumption is that the claims are valid, and is not so clearly overcome as to make the rule applicable.

A decree should be entered for complainants, finding infringement in making and selling Exhibits 3 and 8, and equivalent devices, and for an injunction and accounting, with costs.

THE 6 S.

(District Court, S. D. New York. May 28, 1917.)

1. NAVIGABLE WATERS ⊂=26(½)—ILLEGAL DUMPING—LIBEL—MAINTENANCE. Under Act June 29, 1888, c. 496, 25 Stat. 209 (Comp. St. 1916, § 9933 et seq.), relating to illegal dumping in New York Harbor, and which in section 4 (section 9937) declares that any boat or vessel used or employed in violating any provisions of the act shall be liable to the pecuniary penalties imposed, and may be proceeded against summarily by way of libel in any District Court, the libel provided for may be maintained, in view of the use of the word "summarily," without any preceding criminal prosecution fixing liability; this being true despite the ordinary rule that

a civil action for penalties, which is in the form of an action for debt, the qui tam action at common law, lies only when the penalty is fixed in amount.

2. NAVIGABLE WATERS ⟸3—HARBORS—ILLEGAL DUMPING—STATUTE—"SECTION."

Act June 29, 1888, declares that the placing, discharging, or depositing by any process or in any manner of refuse, dirt, cinders, dredging, mud, etc., or any other matter, other than that flowing from street sewers and passing therefrom in a liquid form into the tidal waters in the harbor of New York, is forbidden, and that every person who shall aid, abet, authorize, or instigate a violation of this section shall be punished by fine or imprisonment, or both; such fine to be not less than $250 nor more than $2,500. Act Aug. 18, 1894, c. 299, § 3, 28 Stat. 360 (Comp. St. 1916, § 9935), amending section 3 of Act June 29, 1888, and providing penalties for certain enumerated offenses, declares in the last paragraph of that section that any person violating the provisions of the section shall be liable to a fine of not more than $500 nor less than $100. *Held*, that the word "section" was used in the last paragraph synonymously with "paragraph," and did not reduce the minimum penalty for illegal dumping in violation of Act June 29, 1888, to $100.

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

In Admiralty. Libel against the tug Leonard Richards and the scow 6 S for illegal dumping in New York Harbor. Dismissed upon trial as to the tug. Decree on libel for minimum penalty.

This is a libel in rem against the tug Leonard Richards, dismissed upon the trial, and the scow 6 S, for illegal dumping in New York Harbor under Act June 29, 1888, as amended by Act Aug. 18, 1894. The fact of dumping within the limits of the harbor is admitted, but the claimant relies upon two points: First, that under section 4 of the act of June 29, 1888, no libel lies against the scow until the fine or penalty has been assessed against the owner or master in criminal proceedings; second, that under section 3, as amended by the act of August 18, 1894 (Comp. St. 1916, § 9935), the minimum penalty is $100 and not $250.

John Hunter, Jr., of New York City, for the United States.
A. Leo Everett, of New York City, for claimant.

LEARNED HAND, District Judge (after stating the facts as above). [1] The jurisdiction of this court depends upon the following language of section 4 of the act of June 29, 1888 (Comp. St. 1916, § 9937):

"Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against, summarily by way of libel in any district court."

Normally, a civil suit for penalties is in the form of an action for debt, the qui tam action at common law; it lies only when the penalty is fixed in amount, except for a certain latitude for easy calculation. Stockwell v. U. S., 13 Wall. 531, 542, 20 L. Ed. 491; Carrol v. Green, 92 U. S. 509, 513, 23 L. Ed. 738; Hepner v. U. S., 213 U. S. 103, 108, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas.

960. That a civil proceeding will lie for the collection of an unliquidated penalty, if the purpose be plain, is of course true enough. United States v. Atlantic Fruit Co., 206 Fed. 440, 124 C. C. A. 322. In that case the decision seems to have turned upon the fact that any criminal prosecution under the statute was at least doubtful; besides, the suit was in personam, and it does not follow that a libel in rem would have lain, before the fine had been assessed.

In The Strathairly, 124 U. S. 558, 8 Sup. Ct. 609, 31 L. Ed. 580, it was pretty clearly indicated, however, that the lien was a security only for the fine, and that no libel would lie until it had been assessed. On page 572 of 124 U. S. (8 Sup. Ct. 609, 31 L. Ed. 580) the court spoke of an unliquidated penalty as though it must first be directly liquidated, and the final disposition of the cause on page 580 of 124 U. S. (8 Sup. Ct. 609, 31 L. Ed. 580), though perhaps not actually involving a decision, clearly shows that the court considered the criminal prosecution as a condition precedent. Were the section here in question drawn like Revised Statutes, § 4270, I should therefore feel bound to hold under that case that a criminal prosecution was such condition. It is a doubtful question, but I incline to think that the language used in section 4 of the act of June 29, 1888, was intended to be more drastic. That section does not in terms impose only a lien, though of course a lien arises; it imposes the penalties—i. e., the fines—upon the boat de novo, a change of expression, perhaps, not without significance.

Moreover, it provides that the boat "may be proceeded against summarily." I cannot quite see what the meaning of the word, "summarily" can be, if it does not include a libel without the condition precedent of a criminal prosecution. The statute is not, it is true, drawn with scientific paucity; but I must still give to all its words some significance, so long as I can, and if I hold that a criminal prosecution must precede a libel, it seems to me to fly in the face of the purpose so expressed. Whether the clause was intended to change the rule in The Strathairly, supra, which had just been decided, no one, of course, can say; but I think it did.

Judge Dodge, in The Scow No. 9 (D. C.) 152 Fed. 548, reached the same result upon the authority of The Scow 36, 144 Fed. 932, 75 C. C. A. 572. While that point was not expressly raised in The Scow 36, the statute (section 16 of the Act of March 3, 1899 [Comp. St. 1916, § 9921]), was in the same language as that at bar. In that case the court disposed of the case on the merits, as well as in The Anjer Head (D. C.) 46 Fed. 664, The Emperor (D. C.) 49 Fed. 751, and The Bombay (D. C.) 46 Fed. 665, where a recovery was awarded. It has been the uniform practice in this district since 1888 to entertain such libels, and this is the first case in which the question has been raised. If the court has no jurisdiction before conviction, I think the matter should be settled by the Supreme Court, to which I will certify the point, as the claimant asks.

[2] As to the amount of the fine, it is apparent that in the act of August 18, 1894, the word "section" is loosely used for "paragraph," and that there was no intention to change the penalties here in question.

Decree on the libel for the minimum penalty, $250, with costs.

MARQUETTE MFG. CO. v. OGLESBY COAL CO.

(District Court, N. D. Illinois, E. D. January 9, 1918.)

No. 955.

1. COURTS ⊜351—FEDERAL COURTS—CONSTRUCTION OF EQUITY RULE.
A party interrogated under Equity Rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) cannot be required to disclose the names of his witnesses nor his evidence.
2. COURTS ⊜351—FEDERAL COURTS—CONSTRUCTION OF EQUITY RULE.
Under such rule, discovery may be had of the nature of the case or defense and of the facts supporting it, but not of the evidence to sustain such case or defense or how the facts supporting it are to be proved.
3. COURTS ⊜351—FEDERAL COURTS—CONSTRUCTION OF EQUITY RULE.
It was not the purpose of the rule to compel discovery by plaintiff of the particulars of his own cause of action, where such particulars do not relate to any pleaded defense or to compel the defendant to disclose facts material only to his defense; but if the discovery relates both to plaintiff's case and the defense it must be given.
4. COURTS ⊜351—IN EQUITY—RELEVANCY OF INTERROGATORIES.
Interrogatories propounded by a defendant under equity rule 58 *held* to relate to the defense pleaded, and to be proper.

In Equity. Suit by the Marquette Manufacturing Company against the Oglesby Coal Company. On application to defendant for an order requiring complainant to answer interrogatories. Granted.

Tenney, Harding & Sherman, of Chicago, Ill., for plaintiff.
Adams, Crews, Bobb & Westcott, of Chicago, Ill., for defendant.

SANBORN, District Judge. This is an application for an order requiring the plaintiff to answer two interrogatories proposed by the defendant under Equity Rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv).

The suit is brought for an injunction restraining defendant from removing the vertical support of plaintiff's cement mine by defendant's mining of coal. Plaintiff manufactures cement from rock which it mines, and defendant excavates coal from a stratum some 500 feet lower. Plaintiff alleges that defendant so carries on its mining as to remove the natural support of plaintiff's rock, and that it is feared that the continued prosecution of the coal mining will undermine its manufacturing plant. Defendant answers that it carries on its mining properly and safely, that the roof of its mine has not sunk, and, though it admits that plaintiff has been damaged by the sinking of its rock, it says that such damage has been caused by plaintiff's own negligence in the carrying on of its operations and not by defendant. Each party has had an inspection of the other's mine.

The questions and objections follow:

"Now comes Oglesby Coal Company, by Adams, Crews, Bobb & Wescott, its solicitors, and asks leave of court to file the interrogatories appended hereto, and for an order to have said interrogatories answered by a certain designated officer of the complainant corporation.

"(1) Will you please state the location of the facings to your mine from time to time, giving the location of the facings of the mine on certain speci-

fied dates, the intervals between said dates not to exceed a period of one year?

"(2) Will you please state the locations and dates on which various caveins have occurred in your mine, from the beginning of your operations to the present date?

"Complainant objects to each of the two interrogatories filed by the defendant herein on December 17, 1917, and moves to strike out each of said interrogatories.

"In connection with the objections to each of the said interrogatories, complainant calls the court's attention to the following facts:

"On October 29th the defendant requested in writing that the complainant allow the defendant, with its witnesses, access to the complainant's mine, with all means of traversing and examining it, and examining the surface of the ground, the plant of the complainant, and to make an inspection of the mine and premises on successive days until the examination was completed.

"November 5th complainant notified defendant that it would allow the examination of the mine, limiting the number of persons to make the inspection to four or five and requiring five days' notice of the time for the examination in order that the proper preparation could be made, and stating that a week, with reasonable extension, would be the proper time for completion of the examination.

"On November 14th the defendant accepted the conditions, requesting that the number of witnesses who were to inspect the mine be increased to seven, to which the complainant assented.

"The defendant afterwards notified the complainant that it would make the examination beginning on December 1st. On that day the defendant, through its counsel, an officer of its company, and four other witnesses, visited the complainant's mine and were allowed to inspect every part which they requested, to make photographs and notes of their inspection, etc. This inspection occupied a period of five days and continued until the defendant stated that they had completed it.

"The complainant specified the following objections to the several interrogatories:

"To interrogatory No. 1: (1) The information sought is not material to the defendant's defense. (2) The information sought relates to a mere evidentiary fact. The inquiry relates to matters which are either within the defendant's knowledge or ascertainable so far as material by the taking of depositions of witnesses acquainted with the fact. (3) The inquiry is too broad and general and does not show that any fact material to the defendant's defense is called for, nor any fact not ascertainable by taking depositions. The inquiry is a mere attempt to ascertain and compel a statement of facts and evidence relating to the complainant's cause of action.

"Objection to interrogatory No. 2: Complainant objects to interrogatory 2 upon each of the several grounds above stated as objections to interrogatory 1."

[1] Rule 58 provides that the court may "enforce answers to interrogatories * * * material to the cause of action or defense of his adversary." This language seems to authorize the compulsory answering of questions relating either to the plaintiff's cause of action or the defendant's defense, but has been somewhat narrowed by construction. All the decisions agree that the answering party need not disclose the names of his witnesses or his evidence, because this would enable an unscrupulous opponent to gain a dishonest advantage. This has been the construction of rule 1 of English Order 31, from which rule 58 was taken, as well as of our own rule. Knapp v. Harvey, 2 K. B. 730, C. A. (1911); Marriott v. Chamberlain, 17 Q. B. 154; J. H. Day Co. v. Mountain City Mill Co. (D. C.) 225 Fed. 622; Luten v. Camp (D. C.) 221 Fed. 424; Kinney v. Rice (D. C.) 238 Fed. 444 (a bill of discovery);

Rodman Chemical Co. v. E. F. Houghton Co. (D. C.) 233 Fed. 470; Batdorf v. Sattley Coin-Handling Machine Co. (D. C.) 238 Fed. 925.

[2] Discovery may be had of the nature of the case or defense and of the facts supporting it, but not of the evidence to sustain such case or defense or how the facts supporting it are to be proved. P. & M. Co. v. Ajax Rail Anchor Co. (D. C.) 216 Fed. 634; O. So Ezy Map Co. v. Channel Chemical Co. (D. C.) 230 Fed. 469; Luten v. Camp, supra. Thus plaintiff in a patent suit must establish infringement, and he may therefore interrogate defendant whether he had made, used, or sold a certain form of device, and to furnish a copy of the drawing or blue print from which it was made. A. B. Dick Co. v. Underwood Typewriter Co. (D. C.) 235 Fed. 304. Defendant who claims that plaintiff's patent is anticipated by a prior use, patent, or other disclosure, may ask plaintiff for the date of his own invention; not how he is going to prove that date, but what it was. A. B. Dick Co. v. Underwood Typewriter Co., supra.

This exception to the general language of rule 58 has been established by the decisions, but it is not the only one. A party need not give discovery which would tend to subject him to a criminal prosecution, penalty, or forfeiture (F. Speidel Co. v. N. Barstow Co. [D. C.] 232 Fed. 617), which will unnecessarily disclose a trade secret (Federal Mfg. Co. v. International Bank Note Co. [C. C.] 119 Fed. 385), or which would be against public policy or professional privilege. The English decisions on these points are cited in English Annual Practice 1917, pp. 504–513.

[3] Since the broad and general language of the rule has been established by the decisions to be subject to these exceptions (which are also covered by the former practice as to inspection, discovery, bills of discovery, and bills of particulars), it seems entirely consistent that another exception may be also made, though opposed to the language of the rule. This is, that it was not the purpose to compel discovery by plaintiff of the particulars of his own cause of action where such particulars do not relate to any pleaded defense, or to compel the defendant to disclose facts material only to his defense. This was the well-established rule of the former practice, and a number of courts have decided that it is not changed by rule 58, though opposed to its language. Judge Story said:

"The plaintiff is not entitled, as a matter of right, to the discovery and production of any documents or papers called for by the bill except those which appertain to his own case, or the title made by the bill. Documents and papers which wholly and solely respect the defendant's title or defense he is not compellable by his answer to discover or produce." Story's Equity Pl. (10th Ed.) § 858.

But if the discovery relates both to plaintiff's case and the defense, it must be given. J. H. Day Co. v. Mountain Mill Co., supra. Most of the decisions construing rule 58 which have discussed the point have held that it was not the purpose of the new rule to change the preexisting law of discovery, but merely to extend the right to the defendant and regulate the practice, leaving the general principles and rules as they were before. J. H. Day Co. v. Mountain City Mill Co. (D. C.) 225 Fed. 622; F. Speidel Co. v. N. Barstow Co. (D. C.) 232 Fed. 617;

Wolcott v. National El. Sign Co. (D. C.) 235 Fed. 224; Kinney v. Rice (D. C.) 238 Fed. 444; Window Glass Mach. Co. v. Brookville Glass & Tile Co. (D. C.) 229 Fed. 833; Pressed Steel Car Co. v. Union Pac. R. Co. (D. C.) 241 Fed. 964. Other decisions have not observed this distinction, but have held, without discussion of the point, that plaintiff may be required to state the date of his invention, or defendant the date of his prior use. A. B. Dick Co. v. Underwood Typewriter Co. (D. C.) 235 Fed. 300; Bronk v. Charles H. Scott Co., 211 Fed. 338, 128 C. C. A. 17, Seventh Circuit; P. & M. Co. v. Ajax Rail Anchor Co. (D. C.) 216 Fed. 634; Batdorf v. Sattley Coin-Handling Mach. Co. (D. C.) 238 Fed. 925.

[4] It seems clear that the two interrogatories quoted relate only to the defense, and should be answered. Defendant pleads two defenses, a denial of negligence on its part and negligence of the plaintiff as the cause of the injury. In order to prove the latter defense it asks plaintiff to state the locations of the facings of its mine from time to time, giving the location of the facings on certain specified dates, not more than a year apart; and the locations and dates of cave-ins which have occurred. It does not ask how these facts are to be proved by evidence, whether by maps, mine records, or the testimony of the superintendent or miners; simply dates and locations. Having these facts, defendant may compare them with the progress of its own mining operations on the same dates and in the same vertical locations, and thus perhaps be able to show that the cave-ins could not have been caused by it, but must have been due to some other cause. Even though these facts called for may also be material to plaintiff's case, it makes no difference, so long as they are material to the defendant's denial or countercharge of negligence, as they seem to be.

Objection to the first interrogatory is made because it is said plaintiff's operations have extended over a period of 15 years, the mine consists of several hundred rooms, and that an answer locating all these facings at different intervals would be unreasonably long and difficult. But I do not understand the interrogatory to call for all the facings, but the location and date of one of them in each year. The plaintiff may so answer in the first instance, and unless further application shall be made by defendant.

UNITED STATES v. FOUR PACKAGES OF CUT DIAMONDS.

(District Court, S. D. New York. December 19, 1917.)

No. 165.

1. CUSTOMS DUTIES ⇐130—FRAUDULENT VALUATION—FORFEITURE.

Where a consignor makes a fraudulent valuation in a foreign country, and on such false invoice the goods are shipped and arrive in the United States, the fraud attaches to the goods themselves, and they may be forfeited therefor, even though the consignee is innocent of the fraud and the consignor is beyond the jurisdiction of the laws of the United States and its courts.

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

2. CUSTOMS DUTIES ⟸133—PROCEEDINGS FOR FORFEITURE.
A forfeiture of goods for fraudulent entry or undervaluation is wholly penal, and should only be granted upon strict proof.

3. CUSTOMS DUTIES ⟸130—FRAUD—FORFEITURE.
Where the correspondence between the consignor, who lived in Holland, and one to whom the cut diamonds were consigned in the United States, the shipment being made through an agent in Cuba, together with the difference between the commercial and consular invoices, indicated an attempt to undervalue the diamonds, they are, under Tariff Act Oct. 3, 1913, c. 16, § 3, par. H, 38 Stat. 183 (Comp. St. 1916, § 5526), declaring that if any consignor, seller, owner, importer, consignee, agent, or other person or persons shall enter, introduce, or attempt to enter or introduce, into the United States any imported merchandise, by means of any fraudulent or false invoice, etc., 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 part thereof, embraced in such invoice, the merchandise, or the value thereof, shall be forfeited, subject to forfeiture, even though the purchaser of the goods, who was the ultimate consignee, was guilty of no fraud.

4. CUSTOMS DUTIES ⟸130—FRAUD—FORFEITURE.
In such case, three of the four parcels of cut diamonds were sent from Cuba to the United States by registered mail; Postal Convention, art. 11, dated June 16, 1903, between Cuba and the United States, provides that all matters connected with the exchange of the mails between the two countries not therein provided for shall be governed by the Universal Postal Convention and regulations now in force or which may hereafter be enacted for the governance of such matters in the exchange of mails between countries of the Universal Postal Union generally. Article 16 of the Universal Postal Convention, dated May 26, 1906, under the head "Prohibition," declares that it is forbidden to insert in ordinary or registered correspondence consigned to the post articles liable to customs duty. Rev. St. § 3082 (Comp. St. 1916, § 5785), declares that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, conceal by sale, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been contrary to law, such merchandise shall be forfeited. *Held* that, even though the postal conventions cannot be deemed treaties, because not adopted by the Senate, and are not statutes, because Congress alone has power to enact statutes, nevertheless the importation, being in violation of the postal conventions rule, was a fraudulent practice under the section and Tariff Act, warranting forfeiture.

5. POST OFFICE ⟸2—TREATIES ⟸3—POSTAL CONVENTIONS—RATIFICATION —NECESSITY—"TREATY."
Postal conventions are not treaties, not being ratified by the Senate; nor are they statutes.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Treaty.]

In Admiralty. Libels by the United States against Four Packages of Cut Diamonds, claimed by Max Goldstein. Decree for the United States.

Francis G. Caffey, U. S. Atty., of New York City (John Walker, of New York City, of counsel), for the United States.

Crim & Wemple, of New York City (William L. Wemple, of New York City, of counsel), for claimant.

MANTON, District Judge. A libel was filed against four packages of cut diamonds by the government under a claim of forfeiture. A stipulation has been filed by Max Goldstein, claimant, for the aggregate value of the property as stated in the libel, and the property has been released to the claimant. Three of the four parcels of diamonds, for which these four libels of forfeiture have been filed, were a portion of a single shipment by registered mail from Havana, Cuba, to the United States, and the fourth parcel was sent by American Express.

One Cypres, who lived and did business at Scheveningen, Holland, sent the diamonds to Boyer, at Havana, Cuba, with instructions to export them from Cuba into the United States, addressing the package by registered mail to one Jacobson. Jacobson was an acceptor of the shipper. Claim is made by the government that there has been a violation of the postal laws, and that the packages themselves are fraught with fraud and deceit in their transmission, and for this reason there must be a forfeiture. The claimant's connection seems to be as purchaser of the diamonds in question, and he became such by reason of a letter written by Cypres to Goldstein, telling him to get in touch with Jacobson if he wanted to get the diamonds. By a letter dated November 9, 1915, addressed to Jacobson, Cypres inclosed a list for Jacobson's information, and various ultimate consignees for whom the merchandise was actually intended, one of which was Max Goldstein, the claimant. A comparison of this list with the items on the consular invoices disclosed the identity of the merchandise referred to and the valuation thereof in American money. A commercial invoice was sent by Cypres to the claimant on November 9, 1915. The cost or selling price set forth in the commercial invoice is in Dutch florins and in part in francs. It is not disclosed, however, whether these are Belgian or French francs. A comparison, using the regulation of the Treasury Department, between the consular invoices and the private invoices, indicates a difference in value in favor of the consular invoices in each of the four packages, and it is upon this the government claims that fraud attaches to the imported merchandise. When the registered packages were received in New York, Jacobson employed custom house brokers to clear the packages, but all efforts were stopped by the special agents of the Treasury Department.

The government makes no charge of fraud as against Goldstein. Therefore the theory of the government is that Cypres, the agent in Havana, sent into the United States these diamonds, wrongfully stating their value at the time and place of shipment. The consular invoice was dated Havana, December 17, 1915, and contained other packages besides those four consigned to Goldstein. Goldstein's packages alone were seized. The other packages were released, with the statement that nothing was found which indicated fraud. Goldstein being relieved of the claim of fraud, I cannot infer that there was any arrangement between Goldstein and Cypres by which more was to be paid than that stated in the consular invoice. Therefore we have nothing but the statement contained in the commercial invoice sent to Goldstein, and counsel for the defendant contends that the difference in figures can be explained upon the theory of a currency reduction at the

par of exchange, and says that the actual relation of the dollar on the one hand, and the franc and florin on the other, which relation would, of course, be the basis of commercial dealings between America and Europe, was in the case of the florin higher than the par of exchange, and in the case of the franc lower. And it is further contended that the differences shown by Mr. Williams' computation on behalf of the government arises out of Cypres' charging into his commercial invoice, his compensation for transmitting the diamonds by the route of Cuba, and his commission for making the purchase, and it is argued, further, that such items are not dutiable, and the omission of such items from the invoices would therefore not constitute undervaluation.

[1-3] Where the consignor makes a fraudulent valuation in a foreign country, and on such false invoice the goods are shipped and arrive consigned to a merchant in New York, the merchandise is within the protection and subject to the penalties of the commercial regulations of this country, even though the consignor was beyond the jurisdiction of this court and of this country for criminal punishment. United States v. Twenty-Five Packages of Hats, 231 U. S. 358, 34 Sup. Ct. 63, 58 L. Ed. 267. The holding in the cited case seems to be that the fraud attaches to the res, and that the res may be forfeited because of the fraud, even though the consignee is innocent of the fraud; and still it was held in Caldwell v. United States, 8 How. 366, 12 L. Ed. 1115, that, where a forfeiture is sought under a statute providing that the goods or their value may be recovered, the goods and specie cannot be attached in the hands of a bona fide purchaser.

This forfeiture is wholly penal, and should only be granted upon strict proof. Using the treasury values of florins and francs as promulgated by the rule of the department at the time of the arrival of the merchandise, Mr. Williams' figures seem to be correct as to differences in values and duty. The correspondence between Cypres and Jacobson having to do with this merchandise, together with the difference between the commercial and consular invoices, indicate an attempt to undervalue the merchandise, and is not explainable on the theory advanced by the claimant's counsel. I therefore conclude that there was an attempt to defraud which attached to the res, and this attempt on Cypres' part was a violation of section 3, par. H, of the Tariff Act of October 3, 1913 (38 Stat. 183, c. 16 [Comp. St. 1916, § 5526]).

[4, 5] Section 3082 of the Revised Statutes (Comp. St. 1916, § 5785) provides that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, conceal by sale, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to the law, such merchandise shall be forfeited. Article 11 of the Postal Convention, dated June 16, 1903, between Cuba and the United States, provides:

"All matters connected with the exchange of the mails between the two countries, which are not herein provided for, shall be governed by the provisions of the Universal Postal Convention and regulations now in force or which may hereafter be enacted for the governance of such matters in the exchange of mails between countries of the Universal Postal Union generally,

so far as articles of such Universal Postal Convention shall be obligatory upon both of the contending parties."

Article 16 of the Universal Postal Convention, dated May 26, 1906, under the title "Prohibition," provides:

"It is forbidden to * * * insert in ordinary or registered correspondence consigned to the post (b) articles liable to customs duty."

When these packages of diamonds were inserted or consigned to the post, it was a violation of the terms of this Postal Convention which has been adopted by the United States as well as by Cuba. Section 3, paragraph H, of the Tariff Act of October 3, 1913, provides for forfeiture of consignments of merchandise into the commerce of the United States which violated any of its provisions. The reading of this section does not state how the importation may be made, whether by express, freight, or mail. Then, again, the adoption of these Postal Convention laws does not make a violation of any of its provisions a violation of the law. The Postal Conventions cannot be deemed treaties, because they are not adopted by the Senate, and they cannot be deemed statutes, because Congress alone has power to adopt statutes, and that power cannot be delegated. They cannot be considered treaties, because the treaty-making power is confined in the President and the Senate by the Constitution. They are but provisions which determine what merchandise may be received in the mail, but in this case it was a medium for introduction into the commerce of the United States. If it was a violation of the Universal Postal Convention's rules, it is a means of introduction which is accomplished by a forbidden fraudulent practice, such as is condemned by the statute under which forfeiture is claimed. I therefore think that the contention of the government as to three of these packages must be sustained upon this ground.

A decree may therefore be entered for the libelant.

THE TIJUCA (two cases).

(District Court, E. D. New York. January 3, 1918.)

1. SALVAGE ⊂=19—CLAIMS—RIGHT OF SALVORS.

Where fire on bulkhead and piers, on which large quantities of war munitions were awaiting transportation, endangered a vessel lying beside the pier, a tug which moved the vessel to a berth across the channel, and then, it being found she was still in great danger from not only the explosion of shrapnel and bombs, but of swinging across the channel, removed the vessel to a place of comparative safety, such tug is alone entitled to compensation as a salvor against other tugs, which thereafter moved the vessel from the anchorage, at which it had been left and where it was subject to some danger, to an anchorage of absolute safety.

2. SALVAGE ⊂=38—AMOUNT—APPORTIONMENT AMONG SALVORS.

A steamship was lying bow in on the westerly side of a pier at the time of an explosion of war munitions awaiting transportation. During the morning she was taken from the pier to a berth across the channel about abreast of the pier. The anchorage was in such a spot that the

vessel was in danger of swinging into the slips between the pier from which she had been removed and another adjacent pier. The danger was great, owing to the frequent explosion of bombs and shrapnel, and the conduct of the tug, which alone claimed salvage for moving the vessel from the two dangerous berths, was most courageous; the services being extraordinary. *Held*, that $30,000 deposited by consent of the parties for salvage claims should be awarded, $12,500 to the owner of the tug, $12,500 to the crew, including the captain, and $5,000 to the captain individually.

In Admiralty. Libels by Edward M. Timmins, David Roche, James Kennedy, and others against the steamship Tijuca, together with libels by Frederick Bouchard and others against the same vessel. Decree for Frederick Bouchard and others.

Foley & Martin, of New York City, for libelant Bouchard.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark and Geo. W. P. Whip, both of New York City, of counsel), for Pilot Roche, tugs Mutual, Kennedy, and Hercules, and their masters and crews.

MANTON, District Judge. On July 30th last, at 1 a. m., a fire broke out on the bulkhead and piers at Black Tom, Jersey City, and at about 2 a. m. an explosion occurred, resulting in disastrous loss to property in the immediate vicinity and far removed from the scene of the explosion. At the time there were bombs and shrapnel awaiting transportation to the scenes of the great war. Extensive damage was sustained by adjacent buildings, and water craft of various kinds in close proximity were ignited by the explosion and sustained serious losses by reason of the fire. Railroad cars in close proximity were destroyed or badly damaged.

The steamship Tijuca, an ocean-going vessel of 4,801 tons gross, 3,066 net registered, 375 feet long, 46.2 beam, 27.5 feet depth of hold, was lying bow in on the westerly side of Pier 6, Black Tom, at the time of the explosion. During the morning she was taken from the pier to a berth across the channel and about abreast of Pier 6. She was anchored on this side of the channel, after having been removed from the piers where the most dangerous part of the fire was, and where frequent explosions of bombs and shrapnel were continuing to occur. The tug C. Gallagher then made fast to her stern and towed her to a berth off Pier 7, which has been referred to as the "Borax" pier. The exact position in which she was placed in this berth is seriously disputed by the litigants. However, after this, the tugs Mutual, Emma J. Kennedy, and Hercules, together with Pilot Roche, took her from this position, claimed to be a dangerous and unsafe anchorage, to a concededly safe anchorage at Bay Ridge. The Gallagher, Capt. Bouchard, and the tugs Mutual, Kennedy, and Hercules, have each filed libels against the Tijuca, claiming salvage. By agreement of all parties $30,000 has been deposited in court for the services rendered the Tijuca, and the contest is over the division of this fund for such services as may appear to have been rendered.

[1] Unless the evidence satisfactorily shows that the vessel was unsafe, and in danger of being struck by bursting bombs or flying

shrapnel, or other missiles, while she lay off the "Borax" dock, the services rendered by Pilot Roche and the masters, owners, and crews of the tugs Mutual, Kennedy, and Hercules should not be compensated out of this fund. That the master and crew of the Gallagher were rendering efficient and heroic services under most dangerous and trying circumstances cannot be disputed. If she did not take this vessel from her berth at Pier 6, as claimed by her master, she did assist, and appears here as the sole claimant for such services, and all the services rendered to the Tijuca, until she was placed at anchorage off the "Borax" pier. Unquestionably, this was the most efficient service rendered to the vessel—an accomplishment fraught with danger, but resulting in the saving of the vessel from total loss. Her heroic services have been recognized heretofore in her claim against the Congress by Judge Veeder, and by Judge Chatfield in her claim against the Elzey. (D. C.) 242 Fed. 318. It is the claim of the Gallagher that the claims of the tugs Mutual, Kennedy, and Hercules are not well founded, and that the services rendered were unnecessary for the safety of the vessel and that these tugs should not participate in the distribution of this fund.

The Tijuca was hauled out of the pier at about 3:30 a. m., and anchored at about 6:10 a. m. There was a fire aboard, but it was extinguished. She was anchored on the opposite side of the channel, and it is claimed by the Mutual that she was at a safe anchorage there; but I am of the opinion that her safety there depended entirely upon the tugs remaining alongside of her, for there was danger of her being swept over against Pier 6. Her anchors were at the bow and this would not keep her stern away from the pier, or at least from swinging across the channel and partly in between the slips of Piers 6 and 7. Therefore the Gallagher was justified in seeking another anchorage for her. The testimony further indicates that at the time the Gallagher went to the rescue of the vessel, two heavy explosions had occurred with the likelihood of similar explosions occurring shortly thereafter. The Gallagher's work and that of the other tugs which assisted in extinguishing the fire was, indeed, the greatest service and the most beneficial rendered to the vessel. She was ablaze amidships, and brought to a position where the fire could be successfully fought with fire apparatus, and the Gallagher was the most helpful and took the greatest chances in this service. It was while she lay at anchorage off "Borax" pier from 6 a. m. until 8:15 a. m. that Pilot Roche and the Mutual, Kennedy, and Hercules started for the first time to render assistance to her.

The claim is made that at this time, although she was lying in high water, she was within 60 or 70 feet of the pier, and the claim is that there was likelihood that she might strike the pier or in some way ground upon the rocks. The evidence of her being hit by exploding bombs while resting at this anchorage is not clear or satisfactory, although, of course, there was some danger of shrapnel and other missiles flying this distance. Fire Chief Worth, Capt. Lyons, of the New York City Fire Department, Gully, Goss, Reilly, Hudson, and Phillips, who were at the scene on various boats, all testified that she

could not strike the docks, and, indeed, some of these witnesses navigated in and around between the dock in a steamer, indicating that there was ample room. They, too, testified that there were no missiles or explosives flying in the direction of the steamer. Then, too, there were a number of other tugs in close proximity to the Tijuca, which did not go to her aid, as they would likely have done had she been in immediate danger. But the claim has been made that there was danger of floating barges, that might be on fire, striking the vessel or in some way causing a fire upon the Tijuca. But the testimony is that after 7 o'clock there were no floating barges in the vicinity.

I do not think the vessel was on fire, as Roche testified, at the time he took charge of her. If it was, it is not shown what efforts or means were pursued to extinguish the fire. The libel filed in behalf of the Mutual, Kennedy, and Hercules stated that bombs and shrapnel were continually flying about her and the steamer was on fire and burning badly, and that the master requested the removal of the steamer to another anchorage, and that pursuant to this request the libelants helped and got up steam on the donkey boiler. The steamship was in flames, a lifeboat had already been launched from the steamship's port side, and the master and crew had loaded their personal effects, together with the ship's dog, into the lifeboat, and were prepared to abandon the ship. The believable testimony in the record does not substantiate these claims, and, indeed, at the trial the effort was made to fix liability upon the ground of the dangerous position of the vessel by reason of the change of tide and wind and her close proximity to the piers. Roche testified that in conversation with the commander, the following occurred: "Q. Is your anchor up? A. In a half an hour." This does not indicate any thought on the part of the commander of immediate danger, nor is it such an answer as would be likely with a vessel on fire.

Motion pictures were taken by an alert independent motion picture concern, which were exhibited in court, thus granting an opportunity of seeing what occurred. They were taken at a time between daylight and before Roche is alleged to have rendered service to the vessel, and consequently do not show what he did; but they do show, however, that while there was a severe fire on the piers, and the result of fire to the Walcott, they do not indicate any flying missiles or shrapnel which might endanger this vessel, and they do indicate that the danger had passed at a time prior to the arrival of Pilot Roche and his assisting tugs.

I therefore am of the opinion that the services rendered by Pilot Roche and his assistant tugs are not such as should be rewarded on the theory of services for salvage. Whatever arrangements the Gallagher made or had with assisting tugs in taking the vessel out of Pier 6 is a matter I have no concern with now, but saving the vessel was due to the efficient service in bringing and hauling her from Pier 6 and placing her at the anchorage, where she was picked up and towed away by Pilot Roche and his assisting tugs. It is for these services that salvage allowance should be made.

[2] The libelant may have a decree awarding $30,000 to the master, crew, and owners of the tug Gallagher, of which $12,500 may go to the owners of the Gallagher, $12,500 to the crew, including the captain, and $5,000 to the captain individually.

UNITED STATES v. CASEY et al.

(District Court, S. D. Ohio, E. D. January 11, 1918.)

No. 976.

1. CRIMINAL LAW ⟸304(10)—JUDICIAL NOTICE.
An indictment charging a conspiracy to violate Selective Service Act May 18, 1917, c. 15, § 13, and the regulation of the Secretary of War promulgated thereunder, need not set forth the regulation of the Secretary, for the courts will take judicial notice thereof.

2. INDICTMENT AND INFORMATION ⟸125(5½)—OFFENSES—DUPLICITY.
An indictment charging that defendants conspired to set up and keep a house of ill fame, bawdyhouse, and brothel within five miles of a military post, in violation of Selective Service Act May 18, 1917, § 13, and the regulation of the Secretary of War promulgated in pursuance of the section, charges a single offense, for a conspiracy is an offense entirely distinct from the crimes the parties intended to commit, and hence, though the conspiracy was to commit several offenses, only one offense was committed by so conspiring.

3. INDICTMENT AND INFORMATION ⟸125(8)—OFFENSES—"HOUSE OF ILL FAME"—"BAWDYHOUSE"—"BROTHEL."
The terms "house of ill fame," "bawdyhouse," and "brothel" are synonymous, all denoting a resort of prostitutes, the only distinction being that the former term refers to the fame of the place, and hence an indictment charging a conspiracy to keep all three resorts charges but one offense (citing Words and Phrases, First Series, House of Ill Fame; Second Series, Brothel; see, also, Words and Phrases, First and Second Series, Bawdyhouse).

4. CONSTITUTIONAL LAW ⟸62—SEPARATION OF POWERS—DELEGATION OF AUTHORITY.
Selective Service Act May 18, 1917, § 13, authorizing the Secretary of War to do everything necessary to suppress and prevent the keeping or setting up of houses of ill fame within such distance as he may deem needful of any military camp, station, fort, post, cantonment, or training or mobilization place, and declaring that any person, corporation, partnership or association, receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, etc., within such distance of military stations as may be designated, shall be deemed guilty of a misdemeanor and punished, is not unconstitutional, as delegating legislative power to the Secretary of War as the head of an executive department of the government, for the statute itself defines the offense, and merely makes the Secretary of War the agent of Congress to determine and declare the zone within which the will of Congress shall take effect.

5. WAR ⟸4—AUTHORITY—POLICE POWER.
Such statute is not unconstitutional, as an assumption of and an attempt to interfere with the police power of the states to regulate the morals of their citizens, thus invading the reserved powers of the states, for while the states have power to control the morals of their citizens, and may prosecute the keepers of bawdyhouses, Congress may under the war power prohibit the keeping of such immoral resorts within a prescribed territory surrounding military camps.

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6. CRIMINAL LAW ⟸201—FORMER JEOPARDY—WHAT CONSTITUTES.
A conviction under the state laws for maintaining a brothel located so near a military post, camp, etc., as to fall within the prohibited zone prescribed by the Secretary of War under Selective Service Act May 18, 1917, § 13, does not prevent a conviction under such act.

7. WAR ⟸4—POWERS—WAR POWERS.
The execution of the unrestricted war powers conferred upon Congress by Const. art. 1, § 8, falls within the line of duties of the national government, and its control over matters pertaining to war is plenary and exclusive.

8. ARMY AND NAVY ⟸40—WAR POWERS—CONSTRUCTION.
Const. art. 1, § 8, empowers Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces, while the last clause of that article declares that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States. Selective Service Act May 18, 1917, § 13, makes it an offense to keep or set up brothels within a zone around military camps or posts to be prescribed by the Secretary of War. *Held*, that the act was within the powers of Congress, for the war power resides in the nation's right of self-preservation, not only of itself, but of all of its citizens, and the war power of Congress being plenary, it can pass acts to protect soldiers from the results of dissipation, for not only would such dissipation lead to a lessening of their efficiency as soldiers, but might render them unfit as citizens.

Thomas Casey and others were indicted for conspiracy to violate Selective Service Act May 18, 1917, § 13, and the regulation of the Secretary of War promulgated in pursuance of that section, by keeping and setting up a house of ill fame within five miles of a military post or station used for military purposes. On motion to quash and demurrer. Motion to quash and demurrer overruled.

Stuart R. Bolin, U. S. Dist. Atty., of Columbus, Ohio.
C. D. Saviers, of Columbus, Ohio, for defendants.

SATER, District Judge. The indictment charges that Casey and others, on or about July 31, 1917, knowingly, willfully, unlawfully, and feloniously entered into a conspiracy, which continued down to November 5th, to violate section 13 of the Selective Service Act of May 18, 1917, and the regulation of the Secretary of War promulgated in pursuance of that section, by keeping and setting up a house of ill fame, bawdyhouse, and brothel within five miles of the military post or station used for military purposes and known as the Columbus Barracks, and by receiving and permitting to be received at such house for immoral purposes various named persons. Six overt acts are alleged to have been committed to effect the object of such conspiracy. Motions to quash have been filed, and, that the court may consider at one time all the objections raised to the indictment, demurrers also have been tendered, to be filed after the order on the motions to quash has been entered, should such motions be overruled.

[1] It is not necessary, as claimed by the defendants, that the regulation promulgated by the Secretary of War should be set forth in the indictment. Byrne, Fed. Crim. Proc. § 147, and cases cited. A

regulation of that character receives judicial notice, and each of the defendants was chargeable with knowledge of it.

[2, 3] The statute and the Secretary's regulation make it an offense either to set up or to keep a house of ill fame, brothel, or bawdyhouse within the prohibited zone. The contention that the indictment is duplicitous, in that the language "keeping and setting up" charges two offenses, and the use of the words "house of ill fame, bawdyhouse, and brothel" amounts to a charge of committing three offenses, must be decided adversely to the defendants, for the reason that a conspiracy is an offense entirely distinct from the crimes the parties intended to commit thereby. 4 Ency. Pl. & Pr. 719; John Gund Brewing Co. v. United States, 206 Fed. 386, 124 C. C. A. 268; State v. Sterling, 34 Iowa, 443, 444; State v. Kennedy, 63 Iowa, 197, 200, 18 N. W. 885; Noyes v. State, 41 N. J. Law, 418, 420, 421. The offense charged is not that the defendants set up and kept such places, but that of conspiracy to set them up and keep them, and the commission of overt acts in furtherance of that conspiracy. The fallacy in the defendants' position is that it confounds the crime, which is the conspiracy, with the objects of the conspiracy. A combination to commit several crimes is a single offense, and the offense can always be laid according to the truth. If, therefore, it is a fact that the defendants conspired to violate the law in question in two or more distinct particulars with respect to such combination, the criminal act was single, and such it appears to be on the face of the indictment. According to the decisions of the courts, the lexicographers and text-writers on the law, the terms "house of ill fame," "bawdyhouse," and "brothel" are synonymous. State v. Boardman, 64 Me. 523, 529; State v. Smith, 29 Minn. 195, 12 N. W. 524; Worcester's Dict.; Century Dict.; Bouvier's Law Dict.; Wharton, Crim. Law (11th Ed.) § 1720. See also cases cited in Words and Phrases Jud. Def., vol. 4, First Series, 3359, and vol. 1, New Series, 507. The only distinction between "bawdyhouse" and "house of ill fame" is that the former term has no reference to the fame of the place, but denotes the fact that it is a resort for the purposes of prostitution. State v. Smith; Wharton, Crim. Law (11th Ed.) § 1720, note.

[4] The insistence that the act is unconstitutional, as delegating legislative power to the Secretary of War as the head of an executive department of the government, is unavailing. The applicable rule is thus stated in Field v. Clark, 143 U. S. 649, 694, 12 Sup. Ct. 495, 505 (36 L. Ed. 294):

> "The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

The Secretary did not make the law under consideration. He was the mere agent of Congress to ascertain and declare the zone within which the statute, which expresses the will of Congress, should take effect. The prosecution would fail, if the law empowered and directed

the Secretary of War by regulation to make the keeping of a house of ill fame within five miles of a military station criminal. All that he was empowered and directed to do was to make the regulation. The regulation promulgated by him does not declare its violation a punishable offense. It is the act of Congress which declares that the violation of such regulation after its promulgation shall constitute a misdemeanor by the person transgressing it, and that he shall be fined or imprisoned, or both, as a penalty therefor. United States v. Breen, (C. C.) 40 Fed. 402; Railroad Co. v. Commissioners, 1 Ohio St. 77, 88, 89; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Dastervignes v. United States, 122 Fed. 30, 58 C. C. A. 346 (C. C. A. 9); United States v. Ormsbee (D. C.) 74 Fed. 207.

[5, 6] It is charged that the act is unconstitutional, as an assumption of and an attempt to interfere with the police power of the state to regulate the morals of its citizens, and as an invasion of the reserved powers of the state. That the state in the exercise of its police power has the right to legislate, and in pursuance of that right has legislated, to control the morals of its citizens, and may prosecute the keepers of bawdyhouses, is freely conceded; but their conviction and sentence for that offense in the state court, had action been taken against them there, would not bar their prosecution in this court. Cross v. North Carolina, 132 U. S. 131, 139, 10 Sup. Ct. 47, 33 L. Ed. 287; Sexton v. California, 189 U. S. 319, 323, 23 Sup. Ct. 543, 47 L. Ed. 833; Byrne, Fed. Crim. Proc. § 211. The attitude of the government is that Congress, not in the exercise of the police power, but in the exercise of the war power conferred upon it by the federal Constitution, may also, as a matter of right, prohibit the presence of such places within the prescribed territory without encroaching on the jurisdiction of the state. The extent of such war power is therefore the interesting and important question for decision. If the statute is a valid exercise of that power, then it is a part of the supreme law of the land, and all persons are subject to it.

[7, 8] The war power resides in the nation's right of self-preservation—the preservation not only of itself, but of all of its citizens. Vattel, Law of Nations (Chitty's Ed.) star pp. 5, 6, 154, 291; United States v. Pierce (D. C.) 245 Fed. 878, 883; Tod v. Fairfield Common Pleas, 15 Ohio St. 377, 390. The federal Constitution specifically confers the right of national self-preservation and intrusts the means of enforcing such right to the discretion of Congress. Article 1, § 8, empowers Congress "to declare war" (clause 11), "to raise and support armies" (clause 12), "to provide and maintain a navy" (clause 13), and "to make rules for the government and regulation of the land and naval forces" (clause 14). The execution of these unrestricted powers falls within the line of duties of the national government, its control over all matters pertaining to war being plenary and exclusive. Tarble's Case, 13 Wall. 397, 408, 20 L. Ed. 597; Tod v. Fairfield Common Pleas, 15 Ohio St. 389. The power to declare and wage war carries with it the power to conduct it successfully. The business of the United States, as a warrior, is to conquer, to restore peace and to

maintain the government. Mechanics' & Traders' Bank v. Union Bank, 25 La. Ann. 387. It is not necessary, in order to prove the particular authority to enact the specific statutory provisions against vice, which are now under consideration, to show a particular and express constitutional grant. The design of the Constitution was to establish a government to direct and administer the affairs of a great and growing nation and at the same time to fix by sufficiently distinct lines the sphere of its operations. To accomplish this purpose it was only necessary to make express grants of general powers, coupled with the grants of such incidental and auxiliary powers as might be necessary or proper in the exercise of the powers expressly granted. These necessarily extensive incidental or implied powers, to which a large part of our existing national legislation is due, are found in clause 18 of article 1, § 8, which confers on Congress the authority "to make all Laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." The word "necessary," occurring in such clause, was held in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, not to be used in the strict and rigorous sense of indispensably necessary, but in the more mitigated sense which common usage justifies, and as in the common affairs of the world or in approved authorities, and to import no more than that one thing is convenient, or useful, or essential to another. "To make all laws which shall be necessary and proper for carrying into execution" the war powers of the Constitution, which are complete within themselves, must be understood as empowering Congress, as an incident to them, to employ any appropriate means calculated to wage war successfully. In McCulloch v. Maryland, Mr. Chief Justice Marshall said (4 Wheat. 420, 4 L. Ed. 579):

"We think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The line of distinction between what constitutes an exercise of war power and what is a legitimate police regulation may at times appear to be dim and shadowy, but the two powers are separate and distinct. In Bierly, Police Power, Federal and State, pp. 6 and 7, it is said that:

"The war power is sovereign, and yet it is not the police power, for it is exercised to preserve the sovereignty itself, rather than the health, or economy, or morals of a community."

Congress has the undoubted right to go beyond general regulations for the conduct of a war and descend to the most minute directions, if it shall deem it advisable so to do. Its right to exercise power in that behalf is as great, at least, as its power under the commerce clause of the Constitution, as declared in Hoke v. United States, 227 U. S. 308, 323, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, in which the legislation there under

consideration (White Slave Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1916, §§ 8812–8819]) partook of the quality of a police regulation. See, also, Glouster Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 5 Sup. Ct. 826, 29 L. Ed. 158. It is the exercise of the existing implied powers which enables Congress to legislate to meet the exigencies resulting from new conditions and new methods of business (McCulloch v. Maryland, 4 Wheat. 415, 4 L. Ed. 579), and which frequently, but erroneously, gives rise to the application of the term "flexibility" or "elasticity" to the Constitution. The novelty of the legislation here in question affords no proof of its want of constitutionality or of a straining of our fundamental law. The wisdom of the framers of the Constitution in committing to the discretion of Congress the choice of appropriate means for executing the great powers (including the war power) on which the welfare of the nation essentially depends, was thus tersely and vigorously stated in the last-named case (4 Wheat. at page 415, 4 L. Ed. 579):

"To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the Legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

The Constitution does not define the measures to be taken in carrying on war, but authorizes Congress, to whom the war power is confided, to make all such laws to carry into effect the expressly granted powers relating to that subject, as that body in the exercise of its sole discretion may deem proper. Stewart v. Kahn, 11 Wall. 493, 506, 507, 20 L. Ed. 176. Were the power to conduct war and to maintain efficiency in the army dependent in any degree upon the pleasure of the states, it would in all probability be unequally exerted and the government might suffer disaster by obstruction to an adequate exercise of such power on the part of unfriendly states. Tarble's Case, 13 Wall. 397, 408, 20 L. Ed. 597; Re Debs, 158 U. S. 564, 578, 15 Sup. Ct. 900, 39 L. Ed. 1092.

Does the act in question contemplate national self-preservation? To ascertain its purpose, other pertinent provisions may be considered. It provides by voluntary enlistment and conscription for the raising, organizing, and equipping of a great army to prosecute against a powerful enemy a war provoked by repeated wrongs inflicted on us as a nation. Good order, subordination, and efficiency are nowhere so necessary to national protection as in the army. To insure these qualities section 12 of the act declares that the President may make such regulations governing the prohibition of alcoholic liquors in or near military camps, and to the officers and enlisted men of the army, as he from time to time may deem necessary or advisable; that no person, natural or artificial, shall sell or supply or have in his possession any intoxicating or spirituous liquors at any military station, can-

tonment, camp, fort, post, officers' or enlisted men's club, in use at the time for military purposes under the statute, but that the Secretary of War may prescribe regulations permitting the sale and use of intoxicants for medicinal purposes; and that it shall be unlawful and a punishable offense to sell any intoxicating liquors, including beer, ale or wine, to any officer or member of the military forces while in uniform, except as in the act provided. Section 13 authorizes, empowers, and directs the Secretary of War during the present war to do everything by him deemed necessary to suppress and prevent the keeping and setting up of houses of ill fame, brothels, and bawdyhouses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, or training or mobilization place, and declares that any person, natural or artificial, receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution, within the distance so designated, or shall permit any such person to remain for immoral purposes in any of such places, so designated, or who shall violate the regulation promulgated by the Secretary of War to carry out the object and purpose of such section, shall be guilty of a misdemeanor, and be punished by fine or imprisonment, or both.

The statute was framed in recognition of the fact that the greatest efficiency attainable by an army depends upon the sobriety, healthfulness, and high moral tone of the soldiers composing it. Soldiers addicted to the use or under the influence of liquor are less orderly, less obedient, less competent to discharge their duties, and more prone to disease than when in their normal condition. If afflicted by any of the loathsome diseases which may be contracted in bawdyhouses, they are not only unfitted temporarily at least for the performance of duties, but in some instances, on account of the communicability of such diseases, become a menace to those with whom they are associated. The nation, for its safety, is entitled at all times to the best service of which its soldiers and all of its soldiers are capable. This praiseworthy statute also operates for economy and for the safety of our soldiers and is a pledge to their relatives and friends that they shall be so cared for as will not only best protect their country, but also themselves in times of peril, and that they will not be returned home, dissolute in habits, addicted to drink, or victims of foul and infectious disease. Congress, in the legitimate exercise of the war powers vested in it by the Constitution, has declared that, inasmuch as the efficiency, good health, and sound morals of the army are conducive to the preservation of the nation, restrictions upon the sale of intoxicants, and the discontinuance of houses of ill fame, bawdyhouses, and brothels, as a means to that end, are necessary within given territorial limits during the existence of the present war, and its enactment is the supreme law of the land. In answer to the argument that the power to establish the ordinary regulations of police has been left to the individual states, and cannot be assumed by the national government, it is sufficient to say that the statute here assailed rests, not upon the police power, but upon the war power, conferred on Congress and recognized by the law of nations.

No case determining the validity of section 13 of the statute here under consideration has been cited, excepting United States v. Smith, decided by Judge Newman, apparently without his filing a written opinion; but many decisions, the advance sheets of which are in my possession, have been handed down sustaining various sections and clauses of the act. Helpful and pointed utterances are found in McCormick v. Humphrey, 27 Ind. 144, 154, Tod v. Fairfield Common Pleas, 15 Ohio St. 377, and Knoefel v. Williams, 30 Ind. 1, all of which involve the constitutionality of war measures enacted pending the Civil War; but an extended review of those cases, illuminating as they are, is not deemed necessary.

It follows that an order may be entered overruling the motion to quash, after which the demurrer may be filed. It also is overruled.

In re D. F. HERLEHY CO.

(District Court, N. D. New York. January 22, 1918.)

1. BANKRUPTCY ⟸88(2)—INTERVENTION—ANSWER—RIGHT TO FILE—NOTICE.
An ex parte order, allowing one creditor of an alleged bankrupt to answer an involuntary petition filed by others after the time to file such answer has expired, should not be granted, but notice should be required to be given to a creditor, who had come into the proceeding and become an actual party, but who filed no answer and did not object to the sufficiency of the petition.

2. BANKRUPTCY ⟸88(2)—PROCEEDINGS—ANSWER.
Bankr. Act July 1, 1898, § 18b, c. 541, 30 Stat. 551, as amended by Act Feb. 5, 1903, c. 487, § 6, 32 Stat. 798 (Comp. St. 1916, § 9602), declares that the bankrupt or any creditor may plead to the petition in involuntary bankruptcy within five days after the return day, or within such further time as the court may allow, while section 59f declares that creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition. An involuntary petition was filed on July 17th. On July 30th a creditor filed an answer denying insolvency, and the commission of any act of bankruptcy, and an attorney for a second creditor filed a petition and obtained an order to show cause why the issue framed by the answer should not be tried or the petition dismissed. Prior to the filing of such petition, the attorney for the second creditor, representing certain creditors, had recovered default judgments against the bankrupt, on which execution had been issued and levies made. On return and hearing of the order to show cause, no objection was raised to the sufficiency of the petition, and the court ordered that the answer interposed, and which had been referred to the referee, be proceeded with. Thereafter the bankrupt offered a composition, and the first answering creditor withdrew his answer, whereupon the second creditor by its attorney on October 22d applied ex parte for an order permitting it to intervene and file an answer. *Held*, that it was improper, after that lapse of time, to allow the second creditor to answer the petition, section 59f not being intended to allow creditors to come in and answer at any time, this being particularly true in view of the fact that judgment liens against the property of the bankrupt might become by lapse of more than four months invulnerable to attack in case the petition should be denied.

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3. BANKRUPTCY ⊜81(4)—"ACT OF BANKRUPTCY"—WHAT CONSTITUTES.
Under Bankr. Act, § 3a, subd. 3 (Comp. St. 1916, § 9587), declaring that acts of bankruptcy of a person shall consist of his having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preferences, an involuntary petition in bankruptcy filed against a New York corporation, which alleged that the corporation had suffered and permitted a number of its creditors to obtain preferences through legal proceedings in form of judgments entered and docketed against it, and upon which executions had been issued to the sheriff, who had levied upon the property of the corporation and threatened to sell the same because the corporation has not vacated or discharged such preferences, although more than five days have elapsed since the same were obtained, does not allege an act of bankruptcy, not showing advertisement of the property levied upon for execution, or that the day fixed for sale was not more than five days distant.

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

4. BANKRUPTCY ⊜59—ACT OF BANKRUPTCY—EXECUTION SALE.
Under such section, where a judgment creditor delays more than four months in advertising or directing a sale under execution, no act of bankruptcy is committed, even though the judgment lien then becomes invulnerable to attack under the Bankruptcy Act.

5. BANKRUPTCY ⊜84—PETITION.
Though an involuntary petition in bankruptcy against a corporation did not allege an act of bankruptcy, yet, where the corporation was in fact insolvent, it may by resolution confess its insolvency and inability to pay its debts, and declare its willingness to be adjudicated a bankrupt on that ground, and, if that be done, a new petition can be filed.

6. BANKRUPTCY ⊜81(4)—COURTS OF BANKRUPTCY—JURISDICTION.
The jurisdiction of the bankruptcy court in involuntary bankruptcy proceedings is not general, but is limited to certain specified classes of cases, and the record must show that one or more of the specified acts of bankruptcy was committed, and, if the petition does not allege an act of bankruptcy, the court has no jurisdiction, and the proceedings are void.

In Bankruptcy. In the matter of the D. F. Herlehy Company, an alleged bankrupt. On motion of petitioning creditors to strike from the files the answer of the Lewis-Weller Manufacturing Company, a creditor. Motion sustained, but petition held insufficient.

Bronner & Ward, of Little Falls, N. Y., for petitioners.
Fred D. McIntosh, of Little Falls, N. Y., for answering creditor.

RAY, District Judge. July 17, 1917, three petitioning creditors filed a petition in involuntary bankruptcy against the D. F. Herlehy Company. That company has not answered the petition, or questioned its sufficiency in any way, or denied insolvency. On the petition and papers presented, showing necessity therefor, this court appointed a receiver of the property and estate of such alleged bankrupt, who qualified July 23, 1917, and took possession of the property and continued the business by authority of this court. Appraisers were duly appointed, the property appraised, and the inventory filed August 16,

1917. August 24, 1917, the alleged bankrupt filed its schedules in due form as required by law.

July 30, 1917, A. M. Mills, representing a creditor, Willcox, Watts & Co., filed an answer denying insolvency and the commission of any act of bankruptcy. Fred D. McIntosh, as attorney for the Lewis-Weller Manufacturing Company, the same creditor he now represents, filed a petition and obtained an order to show cause, returnable September 11, 1917, why the issue framed by the answer should not be tried or the petition in bankruptcy dismissed. Prior to the filing of such petition the said McIntosh, representing certain creditors of the said D. F. Herlehy Company, had brought suit against that company and obtained several judgments by default, which were duly docketed in Herkimer county, the residence of such company. Execution had been issued thereon and levies made before the petition in bankruptcy was filed. On the return and hearing of the said order to show cause, no objection was raised to the sufficiency of the petition in bankruptcy by said McIntosh, and the court ordered that the issue framed by such answer interposed by said Mills, and which had been referred to the referee in bankruptcy for trial, be proceeded with, that the receiver file an account, and that a meeting of creditors be called to consider an offer of composition before adjudication, which the alleged bankrupt alleged and represented it was desirous of making. To all this no objection was made by said McIntosh. A meeting of creditors was called later for such purpose, and a proposed composition offered in writing, to which objections were made. Thereupon October 3, 1917, said Mills, representing said creditor, Willcox, Watts & Co., withdrew the said answer interposed by him.

[1, 2] At the meeting to consider the offer of composition Mr. McIntosh, representing the said judgment creditors and a large number of other creditors who had no judgments, objected to the proposed composition.

October 22, 1917, said McIntosh, in behalf of the said Lewis-Weller Manufacturing Company, applied ex parte for an order permitting it to intervene in the proceeding and file an answer to the petition. The court signed such an order, which was duly filed and entered. It appears that such an answer had already been filed by Mr. McIntosh. No answer was served on the petitioning creditors or their attorneys, Bronner & Ward, nor were they served with a copy of such ex parte order.

October 29, 1917, the receiver applied on notice for an order to all creditors for authority to sell the personal property of the bankrupt, and an order to show cause was issued and served on all creditors, including those represented by Mr. McIntosh, and on the return day the order to sell prayed for was granted without objection, and the sale was made on notice and reported to the court and November 20, 1917, duly confirmed. The proceeds of sale are now in the hands of such receiver.

November 27, 1917, the alleged bankrupt filed an amended offer in such composition proceedings, and after a full hearing, December 26, 1917, the referee to whom the matter had been referred filed his report and certificate, finding that claims proved and allowed amount-

ed to $9,707.70; that 32 creditors, representing $5,584.41 of indebtedness, voted to accept the composition offered; and that 73 creditors, representing $4,123.29 of indebtedness, voted against. He therefore recommended that the composition offer be not confirmed. Mr. McIntosh represented and voted 70 of these claims of creditors who opposed. The entire estate of the alleged bankrupt will not exceed $4,500. It thus appears that the alleged bankrupt was and is insolvent. This is admitted. The answer interposed by Mr. McIntosh denies that any act of bankruptcy had been committed. The only act of bankruptcy alleged in the petition reads as follows:

"That D. F. Herlehy and Company heretofore and on or about the 28th day of June, 1917, and other dates since that time, suffered and permitted a number of its creditors to obtain a preference through legal proceedings in the form of judgments entered and docketed against it, upon which executions have been issued to the sheriff of Herkimer county, who has levied upon the property of said alleged bankrupt and threatens to sell the same, and because said alleged bankrupt has not vacated and discharged said preferences, although more than five days have elapsed since the same were obtained."

There has been no motion to vacate the receivership, and there was no objection to his continuing the business until the sale was made, and there was no objection to the sale, although all parties and creditors were duly notified. This would be a good point to stop legal proceedings, except such as are necessary to close the estate, pay legitimate and reasonable expenses, and divide the balance of the money on hand amongst the creditors. Should Mr. McIntosh succeed in defeating the bankruptcy proceedings, he will obtain payment in full for the judgment and execution creditors represented by him, to the detriment and disadvantage of about 60 general creditors, or creditors at large represented by him, as they have no judgments, or liens. If by amendment to the petition and proof the proceedings can be saved, this result will not follow necessarily, but considerable litigation is imminent. It is not wise in any legal proceeding that an attorney should represent a large number of clients, the interests and rights in the subject-matter of some of whom conflict. This court ought not to have granted the order ex parte permitting the Lewis-Weller Manufacturing Company to intervene and file an answer to the petition at the time it did, October 20, 1917. Notice ought to have been given Bronner & Ward. That creditor came into the proceeding and became an actual party as early as September 11, 1917, and did not answer or object to the sufficiency of the petition. When Mr. McIntosh, representing Lewis-Weller Manufacturing Company, applied to intervene and file an answer, his time to answer had long since expired. Section 18b of the Bankruptcy Act provides:

"The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow."

The act originally fixed the time for pleading to the petition at ten days, but the amendment of 1903 reduced this to five days. The provisions of section 59f (Comp. St. 1916, § 9643) were not intended to allow creditors to come in and answer at any time. In re Mutual Mercantile Agency (D. C.) 111 Fed. 152; 6 Am. Bankr. Rep. 607.

When five weeks had elapsed after the filing of the petition, it has been held *not* an abuse of discretion to refuse permission to answer. First Natl. Bank of Belle Fourche (C. C. A. 8th Circuit) 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355, 18 Am. Bankr. Rep. 265.

[3, 4] This point is not of great or controlling materiality in this case, however, as it appears on the face of the papers that to give this court jurisdiction in this matter to make an order of adjudication the petition must be amended. As now framed, no act of bankruptcy is sufficiently alleged. Citizens' Banking Co. v. Ravenna Nat. Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352; In re Rosenblatt (C. C. A. 2d Circuit) 193 Fed. 638, 113 C. C. A. 506, 28 Am. Bankr. Rep. 401; Matter of Rung Furniture Co. (C. C. A. 2d Circuit) 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; In re Vastbinder (D. C.) 126 Fed. 417, 11 Am. Bankr. Rep. 118, 121; Folger v. Putnam (C. C. A. 9th Circuit) 28 Am. Bankr. Rep. 173; Collier on Bankruptcy (11th Ed.) 106, 112.

All three of the elements specified in subdivision 3 of section 3a of the Bankruptcy Act must be present to constitute the act of bankruptcy. The language is specific:

"Sec. 3. Acts of bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

A reference to the decision of the Supreme Court in Citizens' Banking Company v. Ravenna National Bank, supra, makes it clear that the words "before a sale or final disposition of any property affected by such preference" make it possible that in New York, when judgment is obtained and docketed, whether execution is issued thereon or not, and time is allowed to run, and no sale is actually advertised or made thereunder, no matter if the property affected thereby is all the creditor has, and consists of real estate, and the judgment so docketed and thereby made a lien is greater than the value of such property, and more than four months elapse, so that the judgment becomes a fixed lien, which cannot be attacked in bankruptcy thereafter, that then the judgment creditor may sell and "sweep the deck," so to speak, as no act of bankruptcy was committed by the judgment creditor, as no sale was advertised, and if a sale thereafter constitutes an act of bankruptcy the four months has run, and the judgment must stand as a valid lien under the provisions of section 67 of the act.

Neither the judgment creditor nor any creditor at large can compel a sale under such a judgment, and all the creditor with such a judgment against an insolvent person has to do, in the case of real estate, is to obtain and docket his judgment and refuse or neglect to issue execution and sell. After the expiration of four months his lien becomes fixed and cannot be attacked. After that time he may advertise and sell with impunity, so far as other creditors are concerned, as the lien is more than four months old. But all this is of no consequence in, and is to one side of, the instant case. The decisions are that, to constitute an act of bankruptcy in the case of a judgment, execution issued thereon, and levy made on personal property, there

must be a sale of such property advertised, and the day fixed for the sale must be not more than five days distant, before an act of bankruptcy is committed. If no sale is advertised, the condition does not occur, and there is no act of bankruptcy.

[5, 6] In the instant case there is an allegation that execution had been issued and levy made, and that the judgment creditor threatens to sell, and that the judgments were obtained more than five days before the filing of the petition; but there is no allegation that a sale had been authorized or fixed for any time, or proposed for a day not five days distant, or for any time. Therefore on this petition this court has no jurisdiction to adjudicate the D. F. Herlehy Company a bankrupt. The petition may be amended by filing an amended petition within ten days, and if the truth be that no sale was advertised, inasmuch as the company is in fact bankrupt, it may by resolution confess its insolvency and inability to pay its debts, and declare its willingness to be adjudged a bankrupt on that ground. If that is done, a new petition can be filed. The defect in the petition has now been called to the attention of the court and cannot be ignored. The jurisdiction of the bankruptcy court in involuntary proceedings to adjudge a person, a firm, or a corporation a bankrupt is not general, but limited to certain specified classes of cases, and the record must show that some one or more of the specified acts of bankruptcy was committed. If this is not so, then the petition shows on its face that an act of bankruptcy was not committed, as the act alleged does not constitute an act of bankruptcy. See In re Hammond (D. C.) 163 Fed. 548; In re Pressed Steel, etc. (D. C.) 193 Fed. 811, 27 Am. Bankr. Rep. 44; 1 Remington on Bankruptcy (2d Ed.) 239. In such case, want of jurisdiction to make an adjudication affirmatively appears, and the proceedings will be void.

The ex parte order granting leave to file an answer will be vacated, on the ground no notice was given, but without prejudice to a new application. The answer served is stricken from the files.

UNITED STATES, FOR USE OF CARNEGIE INSTITUTE OF TECHNOLOGY v. C. A. RIFFLE CO. et al.

(District Court, W. D. Pennsylvania. November Term, 1917.)

No. 1872.

1. UNITED STATES ⇐67(2)—ACTIONS—CONTRACTORS' BONDS.
Where a contractor engaged on work for the United States, through alleged negligence in blasting, injured the building of a third person, the United States cannot, suing for the use of such third person, maintain action on the contractor's bond under Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811, amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (Comp. St. 1916, § 6923), requiring bonds for the protection of persons furnishing materials and labor for the construction of public works.

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2. UNITED STATES ⊂=78—NEGLIGENCE OF CONTRACTOR.
The United States is not liable to a third person for damages to his building, occasioned through the negligence of a contractor engaged in public work.

3. NEGLIGENCE ⊂=14—ACTIONS—RIGHT TO MAINTAIN.
Where a contractor engaged in public work for the United States was guilty of negligence which damaged the building of a third person, such third person has a right of action against the contractor.

4. INDEMNITY ⊂=9(1)—CONSTRUCTION—BOND.
Where the contract of one engaged in work for the United States provided that the contractor should be responsible for all damages to person or property which might occur in connection with the prosecution of the work, and a bond given was conditioned that the contractor should fulfill all covenants of the contract, the provisions of the contract were intended for the benefit of the United States alone, and a third person, whose property was injured through the negligence of the contractor, has no rights under the contract.

5. INDEMNITY ⊂=15(2)—ACTIONS—RIGHT OF ACTION.
In such case, as neither the bond nor the contract contained any agreement that the United States might, in event of the contractor's failure to pay persons damaged, no recovery could be had against the contractor or bond by the United States, suing for the use of the third person whose property was damaged; such person in no way being a party to the agreement.

6. INDEMNITY ⊂=15(2)—ACTIONS—RIGHT TO MAINTAIN.
In such case, as the United States suffered no injury by reason of the contractor's negligence, it had no right to maintain an action on the contract and bond.

At Law. Action by the United States, for the use of the Carnegie Institute of Technology, a corporation, against the C. A. Riffle Company, a corporation, and another. Action dismissed.

E. Lowry Humes, U. S. Atty., and Van A. Barrickman, Asst. U. S. Atty., both of Pittsburgh, Pa., for use plaintiff.

A. J. Barron and McKee, Mitchell & Alter, all of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. The American Fidelity Company, in its affidavit and supplemental affidavit of defense, alleges as a matter of law that the plaintiff's statement of claim discloses no cause of action against it, which question of law so raised must be decided by the court under section 20 of the Pennsylvania Practice Act of 1915, which takes the place of a demurrer.

The facts, briefly, are these: The defendant, C. A. Riffle Company, a corporation, on April 10, 1915, entered into a contract with the United States government to do certain work of general excavating and filling, in connection with the experimental station for the Bureau of Mines at Pittsburgh, Pa. The corporation gave its bond, with the American Fidelity Company as surety, in the sum of $14,000, with the condition, inter alia, that the obligor "shall well and truly fulfill all the covenants and conditions of the said contract above referred to." The contract itself, on page 5, provided that the contractor will "be responsible for all damages to person or property which may occur in connection with the prosecution of the contract." It is alleged that,

while engaged in the prosecution of the work, the contracting company, through negligence in blasting, injured the roof and broke certain windows in the machinery hall building of the Carnegie Institute of Technology, the repair of which cost the said Institute $129.55; that the Institute made demand from the contracting company and also from the surety company for payment, which payment they neglected and refused to make. To recover the cost of repair, this action is brought by the United States, for the use of the Institute; the plaintiff claiming in its statement the amount of the bond.

[1] It is perfectly clear that this suit could not be maintained under the act of Congress of February 24, 1905, amending the act of August 13, 1894, "for the protection of persons furnishing materials and labor for the construction of public works." The claim is for repairs made on the building of the use plaintiff, and not for any building erected or work done under the contract. No attempt was made to bring this action in accordance with the provisions of the acts of Congress above cited; and besides such action would have been barred by the time limit prescribed in the act itself.

[2-6] I think these propositions may be safely asserted:

First. The right to recover in this action stands as if the above-recited acts of Congress had never been passed.

Second. The United States is not liable to the Institute for the damages occasioned by its contractor in the negligent execution of the work which the latter contracted to perform.

Third. For such negligence, resulting in injury, the Institute could maintain an action against the contractor.

Fourth. The provisions in the contract between the United States and the Riffle Company were intended for the benefit of the United States and no other person. If the action were on the contract, and not on the bond, the Institute, not being a party to that contract, would have no standing.

Fifth. The action being brought upon the bond securing the faithful performance of the conditions of the contract gives the Institute no other or higher rights. There is no covenant or promise in that instrument, made by the United States, to pay third parties any damages suffered, if the contractor fails to pay. It follows that, not being a party to the obligation, the Institute could maintain no action on the bond in its own name, and making itself use plaintiff did not change its status. These principles are sustained in First M. E. Church v. Isenberg, 246 Pa. 221, 92 Atl. 141; Foundry Co. v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526; Eberhart v. United States, 204 Fed. 884, 123 C. C. A. 180.

Sixth. The United States, having sustained no damage, could maintain no action in its own name, and this action, being for the benefit of the Carnegie Institute of Technology on a contract to which the latter was not a party, and in which it has no legal interest, cannot be maintained.

The action should therefore be dismissed; and it is so ordered.

In re 35% AUTOMOBILE SUPPLY CO.

(District Court, S. D. New York. December 8, 1917.)

1. BANKRUPTCY ⟸318(2)—EFFECT—FIXED LIABILITY.
While an adjudication in bankruptcy, whether voluntary or involuntary, creates an anticipatory breach of the bankrupt's contracts, it does not make an agreement to pay out of an uncertain fund, which may never come into being, a fixed liability, which can be proven under Bankr. Act, Act July 1, 1898, c. 541, § 63, 30 Stat. 562 (Comp. St. 1916, § 9647).

2. ESTOPPEL ⟸58—EQUITABLE ESTOPPEL—GROUNDS.
Where claimant, who owned 97 per cent. of the stock of a bankrupt corporation, and had a large claim against it, signed an agreement with the corporation to extend the time of payment and receive his pay out of the actual and net earnings, and the agreement further recited that, by reason of claimant's inability to properly manage and operate the business of the corporation, he had procured and induced other persons to purchase one-half of the capital stock owned by him, claimant is not, as against those who acquired one-half his stock, estopped from setting up his original claim, where the company, on subsequent bankruptcy, was so insolvent that nothing would be left for stockholders, even if the claim was not proved; this being particularly true where it did not appear that those taking the stock did so in reliance on claimant's agreement with the corporation, or what, if anything, they paid therefor.

3. CONTRACTS ⟸187(1)—CONTRACTS FOR BENEFIT OF THIRD PERSON.
In such case, where there was no agreement by claimant, the stockholder and creditor, that he would waive his rights as a creditor, if others would take over a portion of his stock, there was no promise by him for the benefit of a third person which those who took over a portion of his stock could assert on behalf of the corporation, despite claimant's agreement with the corporation as to payment of his claim.

4. GIFTS ⟸29—CORPORATE SHARES—ENFORCEMENT.
The delivery of a certificate of stock with intention of making a gift of the shares evidenced thereby is ordinarily treated as a valid completed gift, and the courts will enforce the transfer in a suit in equity.

5. PAYMENT ⟸35—INDEBTEDNESS—CANCELLATION.
An indebtedness may be canceled by a surrender of the bond or notes, or by an execution of a receipt in full, if such is the intention of the parties.

6. NOVATION ⟸3—CONSIDERATION—SUFFICIENCY.
The principal stockholder of a corporation, who was also a creditor, signed an agreement with the corporation extending the time of payment and agreeing to receive his pay out of the actual and net earnings. The agreement provided for a return of the original notes evidencing the stockholder's claim, and pursuant thereto those notes were delivered to the corporation. *Held* that, as it was the intention of the parties to cancel the old indebtedness and to substitute a new form of indebtedness, the agreement was supported by a consideration, and was enforceable as against the stockholder, even though a new indebtedness in the same amount as the old was created immediately on cancellation of the old.

7. CONTRACTS ⟸310—RESCISSION—BANKRUPTCY.
In such case, though the corporation subsequently became a voluntary bankrupt, the filing of the voluntary petition cannot be treated as a breach of the contract, warranting complete rescission by the creditor; there being no agreement by the corporation to remain in business, but only an agreement to make payment out of future earnings, if there were any.

In Bankruptcy. In the matter of the bankruptcy of the 35% Automobile Supply Company. The proof of claim of L. A. Shatz was expunged by the referee, and claimant petitions for review. Affirmed.

Heyn & Covington, of New York City, for receiver of Shatz's Estate.

Rosenberg & Ball, of New York City, for trustee.

AUGUSTUS N. HAND, District Judge. One Shatz owned 97 per cent. of the stock of the bankrupt corporation and had a claim against it amounting to $34,847. Under these circumstances he signed an agreement with the company to extend the time of payment and to receive his pay out of "actual and net earnings." The agreement recited that the company would be unable to meet its obligations to Shatz at the time of maturity, and that by reason of Shatz's "inability to properly manage and operate the affairs and business" of the corporation he had "procured and induced other and various persons to purchase one-half of the capital stock owned by him." The company, some time after the agreement was executed, filed a voluntary petition in bankruptcy, and was subsequently adjudicated a bankrupt without having made any net profits applicable to the payment of the claim of Shatz under the terms of the above agreement. The receiver in bankruptcy of Shatz seeks to prove the face of his claim, and the referee has rejected it on the ground that it was not a fixed liability at the time of the filing of the petition. Section 63 of the Bankruptcy Act. The claim was rejected as a matter of law upon the above facts to which the trustee in bankruptcy in effect demurred.

[1] I think the referee was right in holding that the claim could not be allowed if the agreement I have mentioned was valid. That instrument attempted to substitute something resembling a bond payable only out of income for an absolute obligation; and while the Supreme Court in Central Trust Co. v. Chicago Auditorium Association, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, held that an adjudication in bankruptcy, whether involuntary or voluntary, creates an anticipatory breach of the bankrupt's contracts, it did not hold that an agreement to pay out of an uncertain fund which might never come into being was a fixed liability. Colman v. Withoft, 195 Fed. 250, 115 C. C. A. 222; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270.

[2, 3] The claimant, however, raises a much more serious point in his contention that the agreement was without consideration, and therefore did not cancel the absolute obligation of the company to pay Shatz the $34,847 due him before the instrument was executed. It is to be noted that there has been no proof that the persons who took one-half of the stock of Shatz did so upon his promise to them to extend the time of payment of his claim and to receive payment only out of the net earnings of the company, nor was it shown what, if anything, they paid for the stock. Even if this were shown, the rights of these stockholders to insist that he adhere to his agreement in proving his claim against the company would rest upon estoppel, and would hardly be operative in a case where the company was so insolvent that

nothing would be left for stockholders, even if the Shatz claim were not proved. But no element of estoppel has been shown. Nor can I discover any agreement by Shatz with the company that Shatz would waive his original rights if the stockholders should take stock from Shatz. I therefore find no promise made for the benefit of a third party, and no opportunity to invoke the rule in Lawrence v. Fox, 20 N. Y. 268.

[4-6] The argument of lack of consideration is not, however, persuasive. The agreement provides for a return of the original notes, and this agreement was carried out. The return was obviously intended to operate as an extinguishment of the old indebtedness, and was a discharge of the chose in action by means of a symbolic delivery of the evidence thereof; that is to say, the return of the notes. The delivery of a certificate of stock with the intention of making a gift of the shares evidenced thereby is in most jurisdictions in the United States treated as a valid, completed gift, and the courts will enforce the transfer in a suit in equity. Westerlo v. De Witt, 36 N. Y. 340, 93 Am. Dec. 517; Ridden v. Thrall, 125 N. Y. at page 577, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758; Gilkinson v. Third Avenue R. R. Co., 47 App. Div. 472, 63 N. Y. Supp. 792. In the same way an indebtedness may be canceled by a surrender of the bond or notes, or by a receipt in full, if such is the intention of the parties. Brink v. Stratton, 112 App. Div. 299, 98 N. Y. Supp. 421, affirmed 188 N. Y. 620, 81 N. E. 1160; Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181.

The discharge of the indebtedness evidenced by the old series of notes was sufficient consideration to support the new agreement to pay out of income. The proof of claim for a general indebtedness was therefore of an extinguished obligation and could not be made.

Counsel for the creditor urges upon reargument of this motion that the cases which I have cited relate to discharges of an entire obligation. Here the entire obligation was discharged. It is immaterial that a new one to pay the same amount was substituted, because it was to be paid from an entirely different source, if that source ever came into being, and consequently was a new and different obligation.

[7] The second point urged by counsel for the creditor is equally untenable. It is based apparently upon the theory that the agreement to take payment out of future income can be rescinded because the corporation did not continue in business, but went into voluntary bankruptcy. It is certainly true that if the bankruptcy had been involuntary the point would not be well taken, and I cannot regard a voluntary petition, which, under the circumstances, was evidently justifiable, as a breach of contract which would entitle the corporation to rescind the entire transaction from the beginning. There was an obligation to pay, but no obligation to remain in business under circumstances which rendered payment hopeless.

The motion to expunge the proof of claim was properly granted, and the decision of the referee is affirmed.

UNITED STATES v. NINETEEN BALES AND SIXTEEN BUNDLES OF RUGS.

(District Court, S. D. New York. December 18, 1917.)

1. CUSTOMS DUTIES ⟸133—FORFEITURE—PROCEEDINGS.
Under Act June 22, 1874, c. 391, § 17, 18 Stat. 189 (Comp. St. 1916, § 10132), declaring that whenever, for an alleged violation of the customs revenue laws, any person who shall be charged with having incurred any fine, penalty, forfeiture, or disability other than imprisonment, or shall be interested in any vessel or merchandise seized, when the appraised value of such vessel or merchandise is not less than $1,000, shall present his petition to the judge of the district in which the alleged forfeiture occurred, etc., setting forth the facts of the case and praying for relief, such judge shall, if the case in his judgment requires, proceed to inquire in a summary manner into the circumstances of the case, a decision in a summary proceeding thereunder that there was no fraud in connection with the importation of merchandise is not a binding adjudication, preventing the subsequent maintenance of a libel to forfeit the merchandise; the purpose of the summary proceeding being merely to secure clemency of the Treasury Department, whose power to remit forfeitures is purely administrative.

2. CUSTOMS DUTIES ⟸125—IMPORTATION—VALUE.
Under Act Oct. 3, 1913, c. 16, § III, par. "I," 38 Stat. 184 (Comp. St. 1916, § 5527), declaring that the owner, consignee, or agent of any imported merchandise may "at the time when he shall make entry of such merchandise * * * make such addition in the entry to, or such deduction from, the cost or value given in the invoice * * * as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from which the same has been imported," where the consignee, at the time of entry and before examination, raised the value of merchandise to correspond with the market value in the country from which it was imported, the step will prevent forfeiture for undervaluation; the consignee having the legal title, even though fraud was attempted by the consignor.

In Admiralty. Libel by the United States against Nineteen Bales and Sixteen Bundles of Rugs. Claim by the Beloochistan Rug Weaving Company. On motion for release of merchandise upon the pleadings. Libel dismissed as to certain items, and merchandise released; but, as to others, motion denied.

Francis G. Caffey, U. S. Atty., of New York City (Harold Harper, of New York City, of counsel), for the United States.

Barber, Watson & Gibboney, of New York City, for claimant.

AUGUSTUS N. HAND, District Judge. The United States brought this action to forfeit certain rugs for fraudulent entry. The rugs were consigned by one Maller, in India, to the Beloochistan Rug Weaving Company, the claimant. The first group of rugs, 1 and 2, are sought to be forfeited for an attempted fraudulent entry by consignor and consignee, and the second group of rugs, 3 to 6, for an attempted fraudulent entry by the consignor.

There are two defenses: First. That Judge Manton, in a summary proceeding had before him, has already decided that there was no such

fraud in either case. Second. That in the second group, items 3 to 6, if there was any fraud attempted by the consignor, the consignee, who had the legal title, corrected the undervaluation and made a truthful entry.

The claimant moves for a release of the merchandise upon the pleadings.

[1] The summary proceeding I have referred to was held pursuant to section 17 of the act of June 22, 1874, which reads as follows:

"Whenever, for an alleged violation of the customs revenue laws, any person who shall be charged with having incurred any fine, penalty, forfeiture, or disability other than imprisonment, or shall be interested in any vessel or merchandise seized or subject to seizure, when the appraised value of such vessel or merchandise is not less than one thousand dollars, shall present his petition to the judge of the district in which the alleged violation occurred, or in which the property is situated, setting forth, truly and particularly, the facts and circumstances of the case, and praying for relief, such judge shall, if the case, in his judgment, requires, proceed to inquire, in a summary manner into the circumstances of the case, at such reasonable time as may be fixed by him for that purpose, of which the district attorney and the collector shall be notified by the petitioner, in order that they may attend and show cause why the petition should be refused."

The Supreme Court in Dorsheimer v. United States, 7 Wall. 166, 19 L. Ed. 187, held that the power of the Secretary of the Treasury under the act of March 3, 1797, c. 13, § 1, 1 Stat. 506 (Comp. St. 1916, § 10130), to remit forfeitures was not a judicial, but a purely administrative function. In The Cotton Planter, Fed. Cas. No. 3,270, the Secretary refused to remit the penalty after an adjudication of forfeiture, though there were favorable findings by the court upon a summary proceeding brought under the act of 1797. The court held this did not prevent the court from reviewing the validity of the original adjudication. The claimant urges that this case is not in point, because the summary proceeding followed a judicial adjudication upon a libel for forfeiture. I think it clear, however, that the whole object of the proceeding under section 17, supra, is to secure the clemency of the Treasury Department, though it incidentally involves a recovery of possession of the libeled merchandise. It involves in no sense a judicial act, and consequently the findings are in no sense res adjudicata, and the present libel can, so far as Judge Manton's findings go, still be maintained.

[2] As for the second point urged, I think the case of United States v. One Case, No. 1577, 234 Fed. 856, 148 C. C. A. 454, is conclusive. At the time of entry, and before examination of items 3 to 6 of the importation by the appraiser, the value was raised by the consignee to correspond with the market value in the country from which they were imported, pursuant to section III of paragraph I of the act of October 3, 1913. This step taken by the consignee and owner distinguishes the case from United States v. Twenty-Five Packages of Panama Hats, 231 U. S. 358, 34 Sup. Ct. 63, 58 L. Ed. 267 (see, for report in court below, 195 Fed. 438, 115 C. C. A. 340), for in that case there was nothing before the court but a fraudulent invoice by the shipper, without any attempt on the part of any one to correct it before entry. I find no evidence in the language of the present statute that the owner

who corrects the valuation at the time of entry must be the consignor. I think the section covers any owner, whether consignor or consignee. It reads thus:

"That the owner, consignee, or agent of any imported merchandise may, at the time when he shall make entry of such merchandise, * * * make such addition in the entry to, or such deduction from, the cost or value given in the invoice * * * as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from which the same has been imported."

As there is no fraudulent entry in respect to group 2, items 3 to 6, the libel should be dismissed as to these rugs, and the merchandise released; but the motion must be denied, and the cause proceed to final decree, as to the remainder of the libeled goods.

ANDERSON v. PATTEN, Postmaster.

(District Court, S. D. New York. November 30, 1917.)

1. POST OFFICE ⟸14—NONMAILABLE MATTER—OBSCENE LITERATURE.
In a suit to restrain defendant, a postmaster, from denying the use of the mails to a publication on the ground that it violated Criminal Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129 (Comp. St. 1916, § 10381), declaring that every obscene, lewd, or lascivious, and filthy book or other publication is nonmailable matter, evidence *held* to warrant exclusion showing that the excluded publication contained stories and articles salacious in their character and having a tendency to incite lust, even though a mere description of irregular things in relation to sex may not fall within the statute.

2. POST OFFICE ⟸14—NONMAILABLE MATTER—EXCLUSION.
The exclusion of publications from the mails by the Postmaster General as obscene, lewd, or lascivious, under Criminal Code, § 211, is not a question reviewable by the court, except in cases where the judgment of the Postmaster General has been wholly arbitrary and without foundation, for his discretion must be regarded as conclusive, unless clearly wrong.

In Equity. Suit by Margaret C. Anderson against Thomas C. Patten, Postmaster of the City of New York. On motion to restrain the postmaster from denying use of mails to the October issue of the Little Review. Motion denied.

John Quinn, of New York City, for complainant.

Francis G. Caffey, U. S. Atty., of New York City (Joseph A. Burdeau, Asst. U. S. Atty., of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. [1] This is a motion to restrain the postmaster of New York from denying the use of the mails to the October issue of the Little Review. This publication was suppressed upon the advice of the solicitor of the Post Office Department on the ground that it was nonmailable under section 211 of the

United States Criminal Code (Comp. St. 1916, § 10381), which provides:

"Every obscene, lewd, or lascivious, and every filthy book, pamphlet * * * writing * * * or other publication of an indecent character * * * 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."

The publication which is particularly objected to by the Postal Authorities is a short story about a soldier in the British army, who reflects upon the topsy-turvy condition of the world and feels that gigantic forces, which he is pleased to call those of nature, are arrayed against the individual—forces that in most cases will overpower him. He regards his own destruction in the present European conflict as more than likely, and under all these conditions feels at war with the world. With satirical satisfaction he seduces a young girl, and disregards her appeals when she becomes a mother. In his revolt at the confusion and injustice of the war, he feels justification at having wreaked his will and obtained his satisfaction, thus, as he says, outwitting nature.

It may be urged that this story points various morals. One may say it shows the wickedness of selfishness and indulgence. Another may argue that it shows the degradation of camp life and the demoralizing character of war. It naturally causes a reflecting mind to balance the heroism and self-abnegation that always shines forth in war with the demoralization that also inevitably accompanies it. The very old question suggests itself as to the ultimate values of war.

But no outline of the story conveys its full import. The young girl and the relations of the man with her are described with a degree of detail that does not appear necessary to teach the desired lesson, whatever it may be, or to tell a story which would possess artistic merit or arouse any worthy emotion. On the contrary, it is at least reasonably arguable, I think, that the details of the sex relations are set forth to attract readers to the story because of their salacious character. I am, of course, aware that mere description of irregular things in relation to sex may not fall within the statute. Such was the case when a similar New York statute was discussed by the Court of Appeals of that state in People v. Eastman, 188 N. Y. 478, 81 N. E. 459, 11 Ann. Cas. 302. Here, however, there is ground for holding that portions of the short story in question have a tendency to excite lust, and, if this is so, it falls within the prohibition of the statute. People v. Muller, 96 N. Y. 408, 48 Am. Rep. 635; Swearingen v. United States, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765.

There is also in this publication a translation of a document stated to have been found on a soldier. This document is supposed to have emanated from a German committee on increase of population. It bears the serial number 138,756, is a kind of commission containing instructions to the addressee to beget children of all women available in a designated district. The witticism indulged in in this document, promising promotion in case the addressee takes on a second district, as well as the general style of the publication, is an indication that it is not genuine, and would not appear to be so to an intelligent reader.

I think the Department's position that its tendency is to corrupt is not unreasonable. I can hardly regard it as a publication giving information, for it seems prima facie designed to attract readers because the subject-matter and the treatment are salacious, and not because it gives information, or in design or in fact teaches the reader how dangerous or demoralizing is the Teutonic foe.

[2] The whole subject involved in this case is beset with difficulties, and the duty of the Postmaster General in administering the act is a most delicate one. Few would, I suppose, doubt that some prevention of the mailing of lewd publications is desirable, and yet no field of administration requires better judgment or more circumspection to avoid interference with a justifiable freedom of expression and literary development. I have little doubt that numerous really great writings would come under the ban, if tests that are frequently current were applied, and these approved publications doubtless at times escape only because they come within the term "classics," which means, for the purpose of the application of the statute, that they are ordinarily immune from interference, because they have the sanction of age and fame, and usually appeal to a comparatively limited number of readers. It is very easy, by a narrow and prudish construction of the statute, to suppress literature of permanent merit. These considerations of administration, however, are not for the courts, except in cases where the judgment of the Postmaster General has been wholly arbitrary and without foundation.

While it has been urged with unusual ingenuity and ability that nothing under consideration can have the tendency denounced by the statute, I do not think the complainant has made out a case for interfering with the discretion lodged in the Postmaster General, whose "decision must be regarded as conclusive by the courts, unless it appears that it was clearly wrong." Masses v. Patten, 246 Fed. 24, —— C. C. A. ——; Smith v. Hitchcock, 226 U. S. 58, 33 Sup. Ct. 6, 57 L. Ed. 119.

The motion is denied.

MURPHY v. McLOUGHLIN et al.

In re WOULFE.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1918.)

No. 3153.

1. HUSBAND AND WIFE ⟸248—PROPERTY OF WIFE—INTEREST.
The bankrupt and claimant, who became his wife, both of whom were residents of Louisiana, executed an antenuptial contract reciting that the future wife brought into the marriage certain property which she constituted her dower. The husband acknowledged receipt, and took possession of such property for account of his future wife. The contract provided that as to any remaining property of the wife there should be no community of acquêts and gains, but a separation of property between them, and that the future wife should retain the full ownership and administration of all her other property, however and whenever acquired. Rev. Civ. Code La. art. 3319, declares that the wife has a legal mortgage on the property of her husband for restitution of her dower and for the reinvestment of dotal property sold by her husband, which she brought in marriage, reckoning from the celebration of the marriage; likewise for restitution of the dotal property which came to her after marriage, and for the restitution and reimbursement of her paraphernal property. Article 2347 declares that the dowry is given to the husband for him to enjoy as long as the marriage shall last, while articles 2349 and 2350 declare that the income of the dowry belongs to the husband for support of the family, and that the husband alone has the administration of the dowry, and his wife cannot deprive him of it. *Held*, that under the contract the property brought by the wife, which was described as constituting her dowry, could not be treated as paraphernal property for the purpose of charging the husband with interest thereon, despite the provisions of the contract for a separation of property between the spouses.

2. HUSBAND AND WIFE ⟸144—ESTATE OF WIFE—INTEREST.
Under Rev. Civ. Code La. art. 2396, declaring that when the wife, who is separate in property, has left the enjoyment of her property to her husband without any procuration, he is not answerable for the fruits, until a demand is made for them by the wife, or, if it is not made, until the dissolution of the marriage, and that he is not accountable for the fruits which have been consumed, a husband is not liable to his wife for interest on her property, either dotal or paraphernal, delivered into his custody under an antenuptial contract, which did not make him agent for the wife, until after demand for return.

3. JUDGMENT ⟸828(3)—CONCLUSIVENESS—MATTERS CONCLUDED.
The wife of a Louisiana bankrupt, on intervention in a proceeding in the Louisiana state courts to foreclose a mortgage, was by the state court decreed entitled to a surplus as against her husband and the trustee in bankruptcy, who was made a party. The wife's claim was based on the husband's liability for his receipt of her property under an antenuptial contract. The property delivered by the wife to the bankrupt was several times greater in amount than the amount of the surplus. The Louisiana court allowed the wife interest for property held by the husband during the marriage. *Held* that, as an adjudication is binding upon parties and privies as to questions which were in fact in controversy and determined, and those which should have been raised, though they were not, the determination of the Louisiana court cannot, in a subsequent proceeding in bankruptcy, be treated as a conclusive adjudication entitling the wife, as against the trustee, to interest on account of property re-

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

ceived by the bankrupt husband, for no mention of the question of interest appears in the opinions of the state court, other than the amended judgment of the Court of Appeals, which allowed interest, and the question whether the wife was entitled to interest, in order for her to claim the surplus, was not necessary for determination, as the surplus was far less than the amount of property which she had delivered to the bankrupt.

4. JUDGMENT ⊂=828(3)—CONCLUSIVENESS—MATTERS FOR DETERMINATION.

In such case, as the Louisiana court was confronted with only two inquiries, whether it had jurisdiction to distribute the surplus or balance as against the bankruptcy court, and, if so, to which of the two claimants it should be paid, the determination by that court as to interest is not conclusive.

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

In the matter of the bankruptcy of James J. Woulfe. The claim of Mrs. Mary Murphy, wife of James J. Woulfe, bankrupt, which was opposed by James J. McLoughlin, trustee, and others, was disallowed in part, and claimant appeals. Affirmed.

See, also, 137 La. 1087, 69 South. 847.

John J. Reilley, of New Orleans, La., for appellant.

John Dymond, Jr., A. Giffin Levy, and M. M. Boatner, all of New Orleans, La., for appellees McLoughlin and Dymond.

W. J. & H. W. Waguespack, of New Orleans, La., for appellee Trousdale.

Parkerson & Parkerson, of New Orleans, La., for appellee Succession of W. S. Parkerson.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This was an appeal from an order of the District Court, sitting in bankruptcy, settling the account of the trustee in bankruptcy of the estate of James J. Woulfe. The decree allowed the appellant the principal of her claim against her husband's estate, as a prior claim, but denied her interest on the principal of the claim, and it is from this feature of the decree that the appeal is taken.

The appellant contends for the allowance of interest: (1) Because of a judgment in her favor in the state court, which provided for interest, and which she claims conclusively adjudicates her right to it; and (2) because she claims interest is justly due her under the law of Louisiana.

[1] The appellant's claim against her husband arose out of an antenuptial contract. Among other property that the appellant brought to the marriage was the sum of $5,000. Of this property, and the reason of its contribution, the contract recited:

"Third. That the said future wife brings into the marriage the following described movable and immovable property, which she hereby constitutes as her dowry."

As to this property the husband acknowledged receipt, and that he took charge of it for account of his future wife, and became responsible to her for it. As to any remaining property of the wife, the contract

provided that there should be no community of acquêts and gains, but a separation of property between them, and that the wife should retain the full ownership and administration of all her other property, however or whenever acquired. The question is whether for the money received by the hubsand under this contract, he became liable for payment of interest to his wife.

The Supreme Court of the United States, in the case of Fleitas v. Richardson, 147 U. S. 550–553, 13 Sup. Ct. 429 (37 L. Ed. 272), said:

"The separate property of the wife is that which she brings into the marriage by inheritance, or by donation made to her particularly, and is divided into dotal or extradotal. Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Civil Code, art. 2337. Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry."

For each class "the wife has a legal mortgage on the property of her husband," given by the provisions of Civil Code, art. 3319. The wife has the right at any time during the marriage to sue for and retake possession of paraphernal property. Her dotal property is not generally recoverable from the husband while the marriage lasts. Civil Code, art. 2347. The husband alone administers the dowry, and the wife cannot deprive him of it. Civil Code, art. 2350. The income or proceeds of the dowry belong to the husband, and are intended to help him support the charges of the marriage, such as the maintenance of the husband and wife, that of their children, and other expenses which the husband deems proper. Civil Code, art. 2349.

The appellant contends that the property brought by her into the marriage was paraphernal and not dotal property, and that upon paraphernal property of the wife the husband is chargeable with interest. That he is not chargeable with interest upon dotal property is apparent from the quoted articles of the Civil Code. Appellant's contention that the contract creates paraphernal and not dotal property is based upon the provisions of the contract which make the wife separate in property as to her property generally, and also those that recite the husband's receipt of the property brought into the marriage for account of his wife and his acknowledgment of liability to her therefor. If there had been no express recital in the contract that the property, contributed by the wife, constituted her dowry, the argument might prevail. In view of the express characterization of the fund and property as the wife's dowry, it would be giving too much weight to the fact that there was to be no community of acquêts and gains and a separation of property and administration as to her general property, to accord it the effect of nullifying the express term of the provision relating to the contribution of the specific property which the wife brought into the marriage. The contract should bear this construction, especially in view of Civil Code, art. 2338, which provides that:

"Whatever in the marriage contract is declared to belong to the wife, or to be given to her on account of the marriage by other persons than the husband, is part of the dowry, unless there be a stipulation to the contrary."

[2] Conceding that the property so contributed was the wife's paraphernal property, it does not follow that the husband would be

chargeable with interest, when the possession and administration of it was intrusted to the husband by her, until after a demand for its return had been made by the wife, or a judgment therefor obtained by her, or until a dissolution of the marriage. Civil Code, art. 2396, is as follows:

"When the wife, who is separate in property, has left the enjoyment of her property to her husband without any procuration, he is not answerable for the fruits, until a demand of them be made by his wife, or if it is not made, until the dissolution of the marriage. He is not accountable for the fruits which have been * * * consumed."

While, under the terms of the marriage contract in this case, the husband received the property as that of his wife and became responsible for its custody, and return of the unexpended corpus to her, we do not understand that his use and enjoyment of it, pending the marriage relation, and his possession, was as agent for his wife. Whether the money be deemed dotal or paraphernal property, we do not think the appellant was entitled under the law of Louisiana to interest on it while the marriage relation endured, and the husband was permitted to possess and enjoy it, under the contract.

[3] The appellant, however, contends that, whatever may be the law of Louisiana in this respect, she is entitled to interest because of a judgment rendered in her favor by the Court of Appeal for the Parish of Orleans, awarding her interest, and which was affirmed by the Supreme Court of Louisiana on appeal, and that thereby her right to interest has been conclusively adjudicated as between her and the trustee in bankruptcy, who was a party to the suit in the state court, and the other appellees, whom she claims were in privity with him.

Conceding, without deciding, the jurisdiction of the state court to render the judgment relied upon by the appellant, we think there is another sufficient reason for not giving to it the effect of an adjudication binding either upon the trustee or upon the other appellees, and regardless of whether the latter were or were not represented by the trustee and privy to him. An adjudication is binding upon parties and privies, as to questions which were, in fact, in controversy and determined, and as to those which should have been raised, though they were not. Werlein v. New Orleans, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. Ed. 817. It covers questions of both law and fact, upon which their (the parties') rights depend and those which might have been determined, as well as those which were. Handlan v. Walker, 200 Fed. 566, 119 C. C. A. 46. This rule applies in courts of bankruptcy equally as it does in other forums. The questions then are: (1) Was the matter of the allowance of interest a litigated question in the state courts? and (2) if not, was it a question of law upon which the rights of the parties in the state court depended?

1. The judgment of the Court of Appeal for the Parish of Orleans, which was affirmed by the Supreme Court, allowed the appellant interest. However, there was no contestation, either in the civil district court, or in the Court of Appeal, or in the Supreme Court, as to whether interest was properly allowable or not. It was not a controverted issue between the parties, before the rendition of judgment, and

in no true sense can it be said to have been actually litigated in the state court. No mention of the question of interest, other than in the amended judgment of the Court of Appeal, appears in the opinions of the state courts. We think the appellant fails to show that the parties to the litigation in the state court—the appellant and the trustee—ever there contested the appellant's right to interest. If the allowance of interest was immaterial to the rights of the trustee in that case, it would seem that he was under no duty to appeal from the judgment in that respect, to protect his future rights in other litigation, where the right to interest might become important. As the fund in the state court for distribution was much less than the principal of the appellant's claim, the trustee had no interest in contesting the allowance of interest in that case.

[4] 2. Did the rights of the parties in the state court litigation, in any way, depend upon the determination of appellant's right to interest on her claim? The litigation was in no sense a proceeding to establish appellant's claim, at least, except as it was incidentally involved in her right to the balance in the registry of the state court. The true amount of her claim, so far as it exceeded that balance, was of no consequence. The jurisdiction in which it would have to be established, in order to obtain payment, except for the balance in the state court, was the bankruptcy court. The suit in the state court was a proceeding to foreclose a mortgage. There was a surplus left in the registry of the court, after foreclosure sale, over and above the amount required to satisfy the mortgage. The appellant and the trustee intervened, claiming the surplus. The state court was confronted with two inquiries only: (1) Did it have jurisdiction to distribute the balance, as against the bankruptcy court? and (2) if so, to which of the two claimants should it be paid? The opinion of the Supreme Court (137 La. 1087, 69 South. 847) shows that these were the only two questions considered, and decided, in the state court. The state court ruled that it did have the right to make the distribution between the claimants, and ordered the balance paid to appellant. The balance was $875. The only issue in the state court was appellant's right to this balance. To decide this issue it was only necessary for the state court to determine that appellant had a valid claim against the bankrupt to the amount of the fund to be distributed; i. e., $875. The principal of appellant's claim was conceded to be five thousand dollars. The right of the appellant to the whole amount left for distribution did not depend upon whether her claim did or did not bear interest, and the decision of that issue was not involved in the litigation in the state court and did not concern the subject-matter of it.

Appellant's right to interest not having been actually a matter of contestation between the parties, and not having been necessary to a decision of any of the issues involved in the state court litigation, we hold that the appellant's plea of res adjudicata fails.

The order of the District Court appealed from is affirmed.

UNITED STATES v. HALSELL.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1918.)

No. 4965.

1. INDIANS ⊂=15(1)—INDIAN LANDS—CONVEYANCES.

Act July 1, 1902, c. 1375, 32 Stat. 716, ratified by the Cherokee Nation August 7th, of that year provides in section 11 that there shall be allotted to every citizen of the Cherokee Tribe land equal in value to 110 acres of the average allottable of the Cherokee Nation. Section 13 provides that every member of the tribe shall designate as a homestead out of his allotment land equal in value to 40 acres, which shall be inalienable during his life, not exceeding 21 years from the date of the certificate of allotment, and that a separate certificate shall issue for the homestead. Section 14 provides that lands allotted shall not be incumbered or alienated by the allottee or his heirs before the expiration of 5 years from the date of the ratification of the act, while section 15 provides that all lands allotted to members of the tribe, except such land at such time set aside for a homestead, shall be alienable in 5 years after issuance of patent. Section 20 provides that if any person, whose name appears on the roll of the members of the tribe shall have died subsequent to September 1, 1902, and before receiving his allotment, the lands to which such person would have been entitled, if living, shall be allotted in his name and shall descend to his heirs. *Held*, that homestead property allotted to a member of the Cherokee Nation is not, on her death shortly after allotment, alienable by her heirs until the expiration of at least 5 years after August 7, 1902, the date of ratification of the act, the 5-year restriction on alienation imposed by section 14 applying to the homestead of an allottee who dies after receiving an allotment.

2. INDIANS ⊂=15(2)—INDIAN LANDS—CONVEYANCES.

Before the expiration of 5 years after ratification of the Act of 1902, Congress by Act April 26, 1906, c. 1876, § 22, 34 Stat. 145, provided that the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made or to whom a deed or patent has been issued for his or her share of the land of the tribe, to which he or she belongs, may sell or convey the lands inherited from such decedent, but all conveyances made by heirs, who are full-blood Indians, shall be subject to the approval of the Secretary of the Interior. This act was modified by Act May 27, 1908, c. 199, § 9, 35 Stat. 315, declaring that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions on alienation of such allottee's lands, but that no conveyance of any interest of any full-blood Indian heir shall be valid, unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee. *Held*, that as Congress had power, the first restrictions on alienation by the heirs of allottees not having expired, to place new restrictions on alienation, a full-blood heir's conveyance of the homestead of a full-blood Cherokee allottee, made more than five years after ratification of the Act of 1902, is invalid, where not approved by the court having jurisdiction of the settlement of the allottee's estate.

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

Suit by the United States against E. L. Halsell. From a decree in part for the United States, and dismissing the bill as to part of the relief sought, the United States appeals. Modified, with directions, and otherwise affirmed.

W. P. McGinnis, U. S. Atty., and Paul Pinson, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

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

MUNGER, District Judge. The United States brought this suit to cancel certain conveyances made to appellee by an heir of Eliza Simpson. Eliza Simpson was a full-blood Indian of the Cherokee Tribe, duly enrolled, and there was allotted to her certain land as a homestead and certain land as surplus. About six months after receiving her allotment she died intestate on January 20, 1905, leaving surviving her as one of her heirs Mary Nelson, also a full-blood Cherokee Indian. Mary Nelson, on February 16, 1907, executed to appellee a warranty deed, conveying the homestead and surplus lands that had been allotted to Eliza Simpson. At the same time she entered into a contract with appellee whereby she agreed to convey this land to him, and in pursuance of the contract she executed a quitclaim deed to appellee on August 22, 1907, conveying the same lands. None of these conveyances was approved by either the Secretary of the Interior or by the court having jurisdiction of the estate of the deceased allottee. The decree adjudged void and canceled the deeds so far as they purported to convey the surplus lands, but dismissed the bill so far as it sought cancellation of the conveyance of the homestead to appellee, and the government appeals.

[1] By an act of Congress approved July 1, 1902 (32 Stat. 716) and ratified by the Cherokee Nation on August 7, 1902, it was provided as follows:

"Sec. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements.

"Sec. 12. For the purpose of making allotments and designating homesteads hereunder, the forty-acre, or quarter of a quarter section, subdivision established by the government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

"Sec. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

"Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

"Sec. 15. All lands allotted to the members of said tribe, except such land

as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent."

"Sec. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted."

Cases involving the restrictions found in these sections of this act of Congress have been frequently before the courts. In the case of Truskett v. Closser, 198 Fed. 835, 117 C. C. A. 477, it was regarded by this court as unquestionable that the language of section 14 of the act included homesteads in its scope, but that any implied permission deducible therefrom, allowing alienation of the homestead of a living allottee after five years, was negatived by the express prohibition of such alienation contained in section 13. It was also there held that any implied permission inferable from the language of section 14 that would allow alienation of the surplus lands of a living allottee after 5 years from the ratification of that act of Congress was clearly negatived by the language of section 15, which fixed its 5-year period as running from the date of the patent. In Sunday v. Mallory, 237 Fed. 526, 150 C. C. A. 408, it was held that land allotted in the name of a deceased Cherokee Indian was not subject to the restriction on alienation imposed by sections 13, 14, and 15 of this act of Congress, as these three sections related only to lands allotted to living members of the tribe, and that section 20 of the act governed. Section 14 is thus left a restricted field of operation, but, by its terms it includes the homestead lands of an allottee who dies after receiving an allotment. Any implied right that may be drawn from the language of section 13, allowing heirs of an allottee who dies after the allotment to alienate the homestead at once after the death of the allottee because it is there declared to be inalienable before his death, but not exceeding 21 years, is met by the specific negative of section 14, declaring that lands allotted to citizens shall not, in any manner whatever or at any time, be alienated by the allottee's heirs before the expiration of 5 years from the date of the ratification of that act. This prohibition is clear and positive, and to give it full force gives meaning and consistency to each portion of the act of Congress, and it is in accord with the settled policy of the government to protect the Indians against their hasty and improvident conveyances. The act shows a special consideration towards the homestead selected by the Indian. He was allowed to select as his homestead the lands upon which his improvements were situated, and the homestead was made inalienable by his conveyance during his lifetime, not exceeding 21 years, whereas he could dispose of his surplus lands after 5 years. The restriction of alienation of the

homestead for a period of 5 years after the ratification of this act of Congress, in case an allottee died soon after receiving an allotment, granted to the family of the deceased the continued benefit of the land and buildings that had constituted the family home, allowed time for deliberation and counsel before the heirs should exercise the new freedom of conveying their lands, and before the family should make the natural separation that would result, and also prevented the disturbance arising from an immediate conveyance by a portion of the heirs who might have left the family home and who might be ready to convey.

[2] We conclude that homestead lands such as that belonging to Eliza Simpson were not alienable by her heirs at least before 5 years from the ratification of the act of Congress, or, in other words, until after August 7, 1907. The second conveyance of Mary Nelson to appellant was executed after that date, on August 22, 1907. Before the homestead land had become free from the restrictions referred to, Congress passed an act approved April 26, 1906 (34 Stat. 137), a portion of which is as follows:

"Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

This act was afterwards modified by the act of Congress approved May 27, 1908 (35 Stat. 315) as follows:

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

That Congress had power at the time of the passage of these acts and while the alienation of this land was still prohibited, to place this further restriction upon conveyances by heirs of the deceased allottee of the homestead, no longer admits of doubt. Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; United States v. Western Investment Co., 226 Fed. 726, 141 C. C. A. 482; Parker v. Riley, 243 Fed. 42, 155 C. C. A. 572. As there was no approval by the proper authority of the conveyance by Mary Nelson, the decree of the lower court will be modified, with directions to enter a decree canceling the conveyances from Mary Nelson to appellee of the homestead lands of Eliza Simpson; otherwise to be affirmed.

DAVIS et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 31, 1917.)

No. 4558.

1. CRIMINAL LAW ⟸635—TRIAL—"PUBLIC TRIAL"—WHAT CONSTITUTES.
Under Const. U. S. Amend. 6, declaring that in all criminal prosecutions the accused shall enjoy the right to a public trial, it is error to exclude all persons excepting relatives of the defendants, members of the bar, and newspaper reporters, because feeling between the partisans of the prosecution and defense had risen to a high point, and it was reported that some of the witnesses were intoxicated; it appearing that, though the courtroom had become crowded, the court had previously merely cleared the aisles, and that many spectators who were decorous were excluded, only a few persons being admitted through the favor of the bailiff, and therefore such direction to clear the courtroom must be deemed to have deprived defendants of a public trial.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Trial.]

2. CRIMINAL LAW ⟸1163(2)—TRIAL—HARMLESS ERROR.
Where the order of the court directing that the courtroom be cleared of all spectators except relatives of the defendants, members of the bar, and newspaper reporters deprived defendants of a public trial guaranteed by the Constitution, prejudice will be implied, and an affirmative showing that defendants were harmed is unnecessary to justify reversal.

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

Jack Davis and others were convicted of crime, and they bring error. Reversed and remanded.

S. M. Rutherford, of Muskogee, Okl. (De Roos Bailey, of Muskogee, Okl., on the brief), for plaintiffs in error.

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

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

PER CURIAM. The only question in this case that merits discussion is whether the defendants who were convicted of a crime against the United States were given a public trial as required by the Sixth Amendment to the Constitution.

[1] Near the conclusion of the trial, which lasted several days, a night session of the court was held for the arguments to the jury. When the jurors were in the box, and just before the court convened, the courtroom, which had become crowded, was by the direction of the trial judge cleared of all spectators except relatives of the defendants, members of the bar, and newspaper reporters, and a bailiff at the door was instructed to admit none but those of the excepted classes. The bailiff thereafter admitted a few others, but it was by way of favor of the court officers. Some citizens against whom no objection appeared on account of character or condition afterwards sought and

were denied admission. The seats in the audience part of the courtroom back of the bar rail would have accommodated at least 100 spectators. About 25 were allowed to be present. Within the rail, besides the court officials and the defendants, a couple of women relatives of the latter, a few newspaper men, and about 10 members of the bar were present. The reasons for the action of the court were these:

The crime of which defendants were charged had connection with a train robbery, and the trial, which was held at Muskogee, Okl., excited more than ordinary interest. At previous sessions the courtroom was crowded with spectators, so much so that in one instance the court directed the bailiffs to clear the aisles, so that witnesses would not be impeded when called. Considerable ill feeling had developed between the defendants, their relatives and friends, and some of the witnesses for the prosecution, and the court had placed the latter in the custody and care of an officer. Precautions had also been taken that defendants should come unarmed into the courtroom. On the evening of the night session an encounter occurred in a restaurant, in which a relative of one of the defendants hit a witness for the prosecution across the face with a newspaper. This was reported to the court; also that one or more of the witnesses in the courtroom were intoxicated. It does not appear that the courtroom was crowded beyond its seating capacity when the order to clear it was made, or that any person was making a disturbance or threatening to do so, or that there was any well-founded apprehension that a disturbance would occur.

We appreciate the better position of the trial court to appraise the significance of surrounding conditions, but we cannot avoid the conviction that it acted upon the representations of those who did not adequately realize the great importance of keeping a place where the justice of the nation is judicially administered a public place for the admission of peaceful citizens. An intoxicated man could have been excluded or removed; the aisles and passageways could have been kept clear; when the seats were filled, other spectators could have been denied at the door; if the noise in the lobbies interfered with the proceedings, the lobbies could have been cleared; and individuals whose conduct outside the courtroom made their presence within a menace might have been excluded. But it is quite a different thing to exclude the public generally, regardless of their conduct or character.

The Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a * * * public trial." The provision is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England. The corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed. As the expression necessarily implies, a public trial is a trial at which the public is free to attend. It is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can those classes be taken as the exclusive representatives of the public. Men may have

no interest whatever in the trial, except to see how justice is done in the courts of their country.

The qualifications of the broad scope of the constitutional provision and of like provisions in the Constitutions of the states are few, and are based upon considerations of public morals and peace and good order in the courtrooms. They are definitely illustrated in cases in which the exclusion of some or all of the spectators has been upheld.

In Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630, the audience was temporarily excluded during the cross-examination of a young girl who was a witness in a trial for rape. The court certified that persons in the audience persisted by their laughter in disturbing the proceedings and embarrassing the witness, and it was impossible to distinguish them from the others.

People v. Kerrigan, 73 Cal. 222, 14 Pac. 849, was a case of violent and abusive conduct of the defendant, and disorder in the audience. The courtroom doors were not closed, and the defendant's friends and reporters were allowed to enter and leave at will.

In Benedict v. People, 23 Colo. 126, 46 Pac. 637, the trial involved a recital of disgusting details. Members of the bar, officers of the court, law students, and witnesses were allowed to remain.

State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487, was a prosecution for the rape of a girl under 14 years of age. The order excluding auditors excepted all jurors and litigants at the term, attorneys, witnesses for both parties, "and any other person or persons whom the several parties to the action may request to remain."

Reagan v. United States, 120 C. C. A. 627, 202 Fed. 488, 44 L. R. A. (N. S.) 583, was also a case of rape. Court officers, witnesses for both parties, and members of the bar were not excluded.

In State v. Callahan, 100 Minn. 63, 110 N. W. 342, during a part of the examination of the prosecutrix in a trial for rape, the courtroom was cleared of all persons excepting counsel, officers of the court, witnesses, and of course the defendant. The court held that, while a sweeping, unlimited order would have been erroneous, the situation was but temporary, and it appeared that the prosecutrix was so embarrassed by the crowd that counsel for the state was unable to elicit from her a definite statement of what occurred.

In Myers v. State, 97 Ga. 76, 25 S. E. 252, the court, in passing on defendant's complaint of an overcrowding of the courtroom, said that the requirement of a public trial did not prevent the exclusion of spectators for lack of seating capacity.

In Lide v. State, 133 Ala. 43, 31 South. 953, the clearing of the courtroom was because of applause by the spectators of remarks of counsel for the state. It was said:

"It was not only the power, but the duty, of the court to prevent demonstrations of approval or disapproval by spectators in the trials of causes, and if need be to this end to exclude the offending parties from the courthouse."

In People v. Swafford, 65 Cal. 223, 3 Pac. 809, all persons were excluded except the judge, jurors, witnesses, and persons connected with the case. It was held that the word "public" in the Constitution was

used in opposition to secret, and that defendant was not denied a public trial. This is an extreme case.

State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330. In the early stages of the selection of the jury bailiffs at the courtroom door refused to admit any one except jurors, witnesses, officers of the court, and those having business in court. When the court was informed of this, it said it was without its direction, and it ordered that all persons be admitted until the seats were filled. It was held on appeal that this was not a denial of a public trial, but that there might have been ground for the complaint, had the order not been made, or had a request for a re-examination of the jurors questioned during the time been asked and denied.

In State v. McCool, 34 Kan. 617, 9 Pac. 745, the trial court at the instance of the prosecuting attorney requested ladies to leave the courtroom, as the attorney was about to refer to some evidence unfit for them to hear. This was held proper. The complaint, however, was not that defendant was denied a public trial.

The above are most of the cases in which limited admissions have been upheld. We turn now to those in which they have been disapproved.

In State v. Osborne, 54 Or. 289, 103 Pac. 62, 20 Ann. Cas. 627, the charge was rape. Before the taking of testimony the court directed the sheriff as follows:

"You will please exclude everybody from the courtroom except the defendant, the attorneys engaged in the trial of this case, the jury, and officers of this court, and the witnesses while on the witness stand; and you will observe this order so to exclude the public from the courtroom during the taking of testimony upon this trial."

The carrying out of this order was vigorously condemned by the Supreme Court of the state. It will be observed that there was no selective exclusion with reasonable regard for the nature of particular phases of the trial or the testimony.

Tilton v. State, 5 Ga. App. 59, 62 S. E. 651, was a case of adultery with a 14 year old girl. The state Constitution required a public trial and a state statute authorized trial courts to clear the courtroom of "all or any portion of the audience" in cases where the evidence "relates to improper acts of the sexes and tends to debauch the morals of the young." As soon as the jury was impaneled the court ordered "the courtroom cleared of every one not connected with the case." It was held on appeal that the court might properly have excluded "all minors, all women, and all others who failed to behave decorously, or who interfered in any manner with the decent conduct of the case," but that its order was too sweeping and denied the defendant a public trial.

In State v. Hensley, 75 Ohio St. 255 79 N E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734 9 Ann. Cas. 108, the trial was adjourned from a large courtroom to a small one for the taking of testimony of an immoral or obscene nature, and the court directed the sheriff to admit none but the jury, defendant's counsel, members of the bar, newspaper men, and a named witness for defendant. It was held that the exclusion was too general for a public trial.

In People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108, the charge was assault with intent to commit rape. The action of the trial court in excluding all persons from the trial, except the officers of the court and the defendant, was said on appeal to be without justification in the law of modern times. The prior decision in People v. Swafford, supra, was held unsound. The court said:

"The trial should be 'public,' in the ordinary common-sense acceptation of the term. The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters, and youth of tender years, and to do other things which may facilitate the proper conduct of the trial."

People v. Murray, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294, was a case of murder. The attention of the trial court was directed to the fact that a policeman stationed at the courtroom door was denying admission to respectable citizens, but it refused to take action. It was shown by affidavits that there was ample accommodation in the courtroom, that but few were admitted, and that many were refused. The Supreme Court of Michigan held that defendant had not been accorded a public trial. It questioned whether respectability was a test of the right of access to a public trial, and, if so, whether it should be left to the knowledge or discretion of a police officer. After this decision was rendered a statute was enacted conferring discretion upon a trial judge to exclude from the trial or any portion thereof all persons "except those necessarily in attendance," whenever it appeared that "evidence of licentious, lascivious, degrading, or peculiarly immoral acts or conduct" would probably be given.

In People v. Yeager, 113 Mich. 228, 71 N. W. 491, the defendant was charged with assault with intent to commit rape, and the trial court, in applying the above-mentioned statute, allowed representatives of the press to remain in the courtroom, asked all others to retire, and directed an officer to admit any who were relatives or friends of the defendant. It finally announced:

"I have told the officer not to let anybody in here who is not either a friend of the complaining witness or of the defendant. He will ascertain that fact as they apply for admission. All such people will be admitted, and the public will be kept out."

The Supreme Court of the state held the trial not a public one. It said:

"Who is to decide who are the friends of the accused? The law makes no such test, but allows all citizens freely to attend upon any trial, whether civil or criminal."

We think these latter cases are well founded in principle and reason, and that in the case at bar the defendants did not have the public trial contemplated by the Sixth Amendment.

[2] It is urged that no prejudice to defendants was shown. A violation of the constitutional right necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite, per-

sonal injury. To require him to do so would impair or destroy the safeguard.

The sentences are reversed, and the cause is remanded for a new trial.

POLK COUNTY, IOWA, v. BURNS et al.

In re HOSMER.

(Circuit Court of Appeals, Eighth Circuit. December 27, 1917.)

No. 174.

1. BANKRUPTCY ⊜346—CLAIMS—TAXES.
   Bankruptcy Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (Comp. St. 1916, § 9648), declaring that taxes legally due shall be paid in advance of dividends to creditors, has reference to payment out of the general funds of the estate, and is not intended to disturb the priority of liens fixed by substantive law.
2. COURTS ⊜366(6)—PRECEDENCE—FEDERAL COURTS.
   A decision by the highest court of a state, interpreting a revenue law, is binding on the federal courts.
3. TAXATION ⊜510—PERSONAL PROPERTY TAXES—LIENS.
   Under Code Iowa 1897, § 1400, providing that taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person, or to which he may acquire title, and that taxes upon stocks of goods or merchandise shall be a lien thereon, and shall continue a lien when sold in bulk, a stock of goods is made a distinct entity, somewhat analogous to the rule of the civil law as to the estate of a deceased person, and such entity is charged with the lien of personal property taxes so long as it can be identified, even though the owner of the building in which the stock of goods was displayed for sale has a lien thereon for unpaid rent; his lien being inferior.
4. BANKRUPTCY ⊜346, 347—TAXES—PAYMENT.
   While expense of administration in proceedings in bankruptcy must be paid in preference to the claims of the state for taxes, nevertheless, as Bankruptcy Act, § 64a, makes it the duty of the trustee to pay taxes in preference to dividends to creditors, personal taxes should be ordered paid out of the general assets, where it appears that there were sufficient assets to pay expenses of administration and taxes.

Petition to Revise Order of the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

In the matter of the bankruptcy of Julius H. Hosmer, doing business under the name of the Hawkeye Buggy & Implement Company. Petition by Polk County, Iowa, against G. E. Burns, trustee in bankruptcy, and others, to revise a judgment (233 Fed. 318) giving priority to the liens of landlords over claims of the county for personal taxes. Reversed, with directions.

Don B. Shaw, of Des Moines, Iowa (George A. Wilson, Ward C. Henry, Arthur T. Wallace, and Oscar Strauss, all of Des Moines, Iowa, on the brief), for petitioner.

Neal M. Monroe, of Des Moines, Iowa (James L. Parrish, William E. Miller, and Charles F. Maxwell, all of Des Moines, Iowa, on the brief), for respondents.

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

AMIDON, District Judge. Julius H. Hosmer was engaged in the farm machinery and automobile business under the name of Hawkeye Buggy & Implement Company. He leased four different pieces of real property in the city of Des Moines, Iowa, for carrying on his business, in each of which he had personal property. June 3, 1915, he became a bankrupt, and at the time was owing rent upon each of his leaseholds. The landlords presented claims for this rent, and asked that the same be given priority over all other claims as to the personal property contained in each building, upon the ground that the landlord was entitled to a lien upon such property for rent under the laws of the state. The treasurer of Polk county presented a claim for $920.47 for personal taxes assessed against Hosmer for the years 1913, 1914, and 1915, and demanded that this claim be given priority over the landlords' claims for rent. The referee and the trial court gave priority to the landlords' liens, and the treasurer files this petition to revise.

The personal property in each of the four leased buildings has been sold, and the funds arising therefrom kept distinct. Following the referee's report we will designate the buildings by letters. The rent claim against building (a) was $624.48, which accrued between January 1 and June 3, 1915. The property in this building consisted of horses, harness, trucks, and wagons, which sold for $3,064.50, thus leaving a surplus over and above the claim for rent of $2,440.02. The rent claim on building (b) was $4,424.83 for rent accruing between January 1 and June 3, 1915. The property located in this building was part of the bankrupt's stock of goods and merchandise. It sold for $970, thus leaving a deficit of $3,454.83, for which a general claim has been allowed against the estate. The claim for rent against building (c) was for $707.11, which accrued between April 1 and June 3, 1915. The property located in this building sold for $55, leaving a deficit of $652.11, for which a general claim was allowed against the estate. It consisted of transfer property and equipment, warehouse trucks, and unloading planks. The claim for rent against the last building, (d), was $650, accruing between May 1 and June 3, 1915. The personal property here sold for $1,750, leaving a surplus of $1,100 over and above the rent. The property is not specifically described in the claim, but, considering the uses to which the building is limited by the lease, it may fairly be inferred that it was part of the bankrupt's stock of goods and merchandise. The uses of the building are set forth in the lease to be "as a showroom for all grades and kinds of farm machinery, carriages, automobiles, or anything in that line."

The personal property taxes, for which the county treasurer makes claim, are for the years 1913, 1914, and 1915. By the statute of Iowa personal property is assessed for purposes of taxation as of the 1st day of January each year. Code, § 1350. So the taxes are prior in time to the rent. The principal item in the personal assessment of the bankrupt was "merchandise and office fixtures." For the year 1913 that item amounted to $18,000 out of a total assessment of $19,400; for 1914, to $10,500 out of a total assessment of $13,900; for 1915, to $6,150 out of a total assessment of $8,090.

[1-3] The county treasurer bases his claim upon section 64a of the

Bankruptcy Law. That section, however, has reference to payment out of the general funds of the estate. It shows that purpose plainly by its language. It says that taxes legally due shall be paid in advance of dividends to creditors. This provision was not intended to disturb priority of liens as fixed by substantive law. The demands of the state for its revenue are so paramount that most private liens are made subject to the lien of public taxes, without regard to priority of time. This, however, is not invariably true as to personal taxes. To ascertain the right of priority as to them we must look to the revenue law of the state. Section 1400 of the Code of Iowa provides as follows:

"Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person, or to which he may acquire title. * * * Taxes upon stocks of goods or merchandise shall be a lien thereon, and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee."

This statute is substantially the same as section 1015 of the Code of 1897. Under this statute taxes upon personal property are a lien upon real estate; but the bankrupt owned no real estate in the present case, at least no such property is here involved. It will be seen, however, that personal taxes are also a lien upon stocks of goods or merchandise, and shall continue a lien thereon when sold in bulk. This revenue statute, as interpreted by the highest court of the state, treats a stock of goods or merchandise as a distinct entity, somewhat as the civil law treated the estate of a deceased person as a universitas juris. This entity is charged with the lien of the tax so long as it can be identified, regardless of changes in the items of which it may be composed. Iowa Mercantile Co. v. Blair, 123 Iowa, 290, 98 N. W. 789; Larson v. Hamilton Co., 123 Iowa, 485, 99 N. W. 133.

Under the facts disclosed by the record we think the personal property situated in buildings (b) and (d) constituted the bankrupt's stock of goods and merchandise, within the meaning of those terms as used in section 1400 of the Iowa Code, above quoted. That stock was the principal basis of the assessment for personal taxes. Those taxes are made by section 1400 a lien upon the stock of merchandise so long as it can be identified as such. That lien was prior and superior to the lien of the landlord for rent. It was not only superior in right, but it was also prior in time. The part of the stock contained in the first building referred to sold for $970, and that in the second building for $1,750, making a total of $2,720. This was ample to pay the claim of the county for taxes, and, under the law, as above explained, the county was clearly entitled to payment out of this fund in priority to the claims of the landlords. When a tax is levied upon specific property, it must be superior to all private claims or liens upon the property, for the tax is directed against the property itself. "The lien for taxes does not stand upon the same footing as an ordinary incumbrance, but attaches itself to the res without regard to individual ownership." Cooley on Taxation, p. 445. This is the sense in which Marshall, C. J., said in Osborn v. United States Bank, 9 Wheat. 738, 6 L. Ed. 204, that the power to tax is the power to destroy. See, also, Northern Pacific R. R. Co. v. Traill County, 115 U. S. 610, 6 Sup. Ct. 201, 29 L. Ed. 477. This is

the principle upon which Bibbins v. Clark, 90 Iowa, 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278, Bibbins v. Polk Co., 100 Iowa, 493, 69 N. W. 1007, and Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307, 79 N. W. 77, may, in our judgment, be explained. There the controversy was between a mortgagee of land and the claim of the county for a personal property tax of the mortgagor, levied long after the lien of the mortgage had attached. The personal tax was not levied against the land. It was made a lien upon it simply as a means of enforcing payment. The courts of Iowa ruled that the personal tax took the land as it found it at the time the levy was made, and could not displace prior rights. That holding is contrary to the decision of this court in Minnesota v. Central Trust Co., 94 Fed. 244, 36 C. C. A. 214, but, being the interpretation of a revenue law by the highest court of the state, is binding upon us. In our judgment, however, these decisions are not applicable to the present case, because, as already explained, the personal taxes here involved arose out of the assessment of the bankrupt's stock of goods and merchandise, and were levied upon that stock, and by the statute were made a specific lien upon it as long as it could be identified. Such being the origin of the tax, it has the same priority over private liens on the stock that a tax against a specific tract of land would have over private liens upon the land.

[4] The same result may be reached in another way. There is a surplus over and above the landlord's claim for rent arising out of the sale of the property contained in building (a) of $2,440.02, and building (d) of $1,100, making a total surplus of $3,540.02. This fund is a part of the general estate. Under section 64a of the Bankruptcy Law it is the duty of the trustee to pay all taxes legally due from the bankrupt out of such funds. The judgment of the trial court does not adequately recognize this duty. We do not question the rule that the expenses of administration must be paid in preference to the claims of the state for taxes. By giving effect to that rule it would seem probable that there would be funds sufficient arising out of the surplus to which attention has been drawn to pay both the taxes and the expenses of administration. In any case, however, the county, for reasons first explained, is entitled to payment out of the funds arising from the sale of the bankrupt's stock of goods and merchandise. It is not practicable to divide the claim for personal taxes, so as to take account of the small items which were not embraced in the assessment of merchandise.

The judgment is reversed, with direction to enter a judgment for the payment of the county's claim in full.

STUDEBAKER CORP. OF AMERICA v. WILSON.

(Circuit Court of Appeals, Third Circuit. January 21, 1918.)

No. 2257.

SALES ⊂=92—CONTRACT OF SALE—CONSTRUCTION.

A contract for the sale of motorcars to a dealer, who disposed of them to the trade, provided that either party might cancel the contract without cause on 10 days' written notice, and that termination should immediately cancel all unfilled orders, whether or not the time for shipment be past due. The contract further declared that defendant manufacturer should not be liable for damages, if for any cause it should fail or delay to make deliveries. The dealer, desiring to sell out his business, with the consent of defendant, which promoted the sale, canceled the contract, and the cancellation was accepted. *Held* that, though the cancellation was for the purpose of effecting an assignment of the contract, which was prohibited without defendant's consent, the dealer could not thereafter recover for defendant's failure to deliver him machines ordered prior to the date of cancellation.

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

Assumpsit by Orin S. Wilson against the Studebaker Corporation of America. There was a judgment for plaintiff (240 Fed. 801), and defendant brings error. Reversed.

Frank P. Prichard, Sheldon F. Potter, and Sheldon Potter, all of Philadelphia, Pa., for plaintiff in error.

J. B. Colahan, 3d, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. The question involved in this case is the construction of a written contract. If the construction adopted by the court below was right, the verdict and judgment below should stand. If that construction is wrong, then the defendant's prayer for binding instructions in its favor was erroneously refused.

Turning to the contract in question, we find it was one providing for the supply by a manufacturer of automobiles in Detroit to an automobile dealer in Philadelphia. From this agreement, the material parts of which we hereinafter quote (see the margin [1]), it will be seen

1 "This agreement, executed in triplicate at Detroit, Michigan, by and between the Studebaker Corporation of America, a New Jersey corporation, and Mr. Orin S. Wilson, of Philadelphia, Pa., hereinafter referred to as Company and Dealer, respectively, witnesseth:

"1. Subject to the conditions hereinafter expressed, Company hereby grants to Dealer the right, during the continuance of this agreement, to purchase from Company Studebaker automobiles (excluding commercial cars) for resale by Dealer within the following described territory, and none other, to wit: Philadelphia and Delaware counties, Lower Merion, Whitemarsh, Upper Dublin, Abington, Springfield, Cheltenham township in Montgomery county, including Boroughs of West Conshohocken, Conshohocken, and Ambler, all in state of Pennsylvania. Company agrees to protect Dealer in the right so granted to the extent that it will refer to Dealer inquiries for Studebaker

that, while it constituted Wilson a sole territorial agent for the manufacturer's goods, and fixed prices and terms of payment for all machines thereafter ordered, its general effect was to create a relation be-

automobiles received by it from Dealer's territory, and except as hereinafter provided, will not knowingly sell its automobiles to other persons in Dealer's territory during the continuance of this agreement.

"2. *Dealer's Schedule Order.*—Upon execution of this agreement, Dealer shall give to Company a written order on the form of Company provided therefor, at the prices and discounts and subject to the warranty therein stated, for a sufficient number of automobiles to cover the estimated requirements of Dealer's trade in said territory for the automobile season beginning July 1, 1915, and annually thereafter at least one month before July 1st of each year, during the continuance of this agreement, shall give Company a like order covering Dealer's estimated requirements for the succeeding automobile season, all of which orders are and shall be a part hereof.

* * * * * * * * * *

"16. *Reports of Sales and Prospects.*—At the end of each week during the existence of this agreement, Dealer agrees to forward to Company the names and addresses of all purchasers of Studebaker automobiles sold by Dealer during such week, with the model and serial number of each automobile sold, and shall respond promptly with all other information which Company may from time to time require, including the names and addresses of all persons making inquiry of Dealer relative to Studebaker automobiles, to the end that Company may, at its option, forward circulars and other advertising matter to such prospects.

* * * * * * * * * *

"21. *Delays and Damages.*—Company will use its best endeavors to deliver Studebaker automobiles to Dealer in accordance with his orders, but if for any cause Company shall fail to make such deliveries or shall fail to make them within the time stated in the order, Company shall not be liable for any damages by reason of such failure to deliver or delays in making deliveries, nor for any loss of profits. Company shall not be liable for any damages or loss arising from the sale or use of automobiles sold under this agreement.

"22. *Assignment.*—This agreement and orders accepted hereunder constitute an entire, indivisible and personal agreement, and Dealer agrees not to transfer or assign the same or any part thereof without Company's written consent. It is further mutually agreed that the death, assignment or bankruptcy of Dealer during the existence of this agreement shall be considered as terminating the same without further action of Company.

* * * * * * * * * *

"25. *Term and Cancellation Provisions.*—This agreement, when executed, shall supersede and annul all former agreements and orders between the parties hereto, relative to the sale of Studebaker automobiles, and the same shall become effective upon the 1st day of July, 1915, and continue and remain in force until canceled, it being mutually agreed that either party may cancel without cause upon ten days' written notice mailed to the other party: Provided, however, that for any violation hereof by either party, the other party may terminate this agreement immediately on mailed written notice. The termination or cancellation of this agreement, as herein provided, shall immediately cancel all unfilled orders whether or not time for shipment is past due for automobiles or parts thereof which may have been received by Company from Dealer, but nothing herein contained shall release Dealer from the payment of any sums which he may then owe Company for automobiles or parts delivered prior to such termination or cancellation. After the termination of this agreement, the sale of goods or the referring of inquiries by Company to Dealer shall not be construed as a renewal hereof, but any orders thereafter accepted by Company shall be governed by the terms and conditions of this agreement."

tween the parties which in reality neither obligated Wilson to order and buy any machines whatever from the manufacturer, nor did it obligate the manufacturer to deliver any machines to Wilson. Of course, if Wilson did not order any machines, the manufacturer had the right, and would naturally exercise it, to cancel and terminate the agreement. And if the Studebaker Company did not deliver machines Wilson ordered, the latter would naturally cancel the contract. If Wilson had scheduled his prospective sales at any number of machines, but did not see fit to order any deliveries, there was no provision in the contract by which the manufacturer, who had made machines to fill such prospective orders, could compel Wilson to take them. On the other hand, if Wilson went ahead and obtained any number of orders, and ordered machines to fill them, or if he ordered machines generally, there was no provision in the contract by which he could compel the manufacturer to deliver them.

Such was the anomalous condition these parties stipulated for themselves, for their agreement provided:

"Either party may cancel without cause, upon ten days' written notice, mailed to the other party," and "the termination or cancellation of this agreement, as herein provided, shall immediately cancel all unfilled orders, whether or not time for shipment is past due, for automobiles or parts thereof which may have been received by the company from dealers."

The parties continued to act under the agreement until October 11, 1915, when Wilson, in consideration of an advance forfeit payment of $500 made to him by one Colvin, gave the latter a seven-day written option to purchase his agency business for $13,250—"purchase price agreed upon by us as covering transfer of agency, good will, furniture, fixtures, cars and orders for cars now on our books, provided you accept the option to do so on or before October 18, 1915." The option also provided:

"The above-mentioned option and price are conditioned upon your obtaining from the Philadelphia agency of said company, and further on your obtaining from the owner of the building in which I am now conducting business, a lease for a period of three years," etc.

The option further provided that in case of acceptance Wilson agreed "that all unpaid orders for cars hereafter taken over, as well as those now on hand, are to be turned over to you," etc.

As clause 22 of the agency contract provided that "this agreement and orders accepted hereunder constitute an entire, indivisible, and personal agreement, and dealer agrees not to transfer or assign the same or any part thereof without company's written consent," it is clear that if the contract continued in force Wilson could not fulfill the terms of his option without the company's consent. And as the option matured before the ten-day notice for cancellation expired, it is evident he could not cancel the contract in time to comply with the terms of the option. Such being the situation, it is equally clear that Wilson could only have entered into such an option agreement with the expectation of the cancellation of the contract and the termination of his agency and the acceptance by the Studebaker Company of Colvin as their agent. That such was Wilson's attitude is shown by the

steps he promptly took. By written addenda to their contract, Wilson and the company on October 12, 1915, waived the foregoing ten-day requirement of notice of cancellation, and stipulated as follows:

"Referring to clause No. 25 of said contract, it is hereby mutually agreed that either party may cancel said contract without cause, immediately, on mailed written notice, thus waiving the ten (10) day notice provided for therein."

Following this the contract was canceled in writing on October 25, 1915, which was done by Wilson writing, "In accordance with our understanding, on account of my selling my business to Mr. George E. Colvin, will you kindly cancel my contract as of to-day?" which request the company complied with by writing "Accepted."

Following such action, Colvin accepted the option, and Wilson, on October 25, 1915, in consideration of some $13,000 paid to him, conveyed to Colvin as provided in the option. Wilson also gave to the company his check for the balance he owed them on the contract. It is clear, therefore, that both the acts and writings of the parties accord with a construction of the contract which gave to either party the power to cancel this contract at any time and for any reason.

Having thus canceled the contract for his own purposes and paid the Studebaker Company the indebtedness he owed under the contract, Wilson, some weeks later, seems to have changed his views on the meaning of the contract, and brought this suit against the company to recover alleged damages for failure of the company to deliver to him certain machines ordered prior to November 1, 1915, the date the contract was canceled. It will be observed the contract, touching the right to cancel and the effect of such cancellation, provides:

"Company will use its best endeavors to deliver Studebaker automobiles to Dealer in accordance with his orders, but if for any cause Company shall fail to make such deliveries or shall fail to make them within the time stated in the order, Company shall not be liable for any damages by reason of such failure to deliver or delays in making deliveries, nor for any loss of profits."

In view of these provisions, viz. the right of cancellation, which was exercised by Wilson, and the contract exemption for all damages for machines undelivered at that time, we are of opinion no right of action was vested in Wilson when he brought this suit. He could only have such right because of a liability under the contract, and as the contract specifically provided that there should be no liability for damages in such case, and as the contract itself had been rescinded and canceled, no right of action was vested in Wilson when he brought this suit. Both the contract itself, the act of Wilson in canceling it, and the payment by him of an indebtedness to the company negative a construction of the contract which contemplates the existence of a claim for damages or its survival of the contract's cancellation. Such being the case, it follows the court erred in refusing the defendant's request for binding instructions in its favor, and in charging:

"As a matter of law there was a contract upon the part of the plaintiff to take, and upon the part of the defendant to deliver, the automobiles specified in that contract, and at the times at which they were to be furnished."

The case is therefore reversed.

AUNT JEMIMA MILLS CO. v. RIGNEY & CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 42.

1. TRADE-MARKS AND TRADE-NAMES ⟸87—UNFAIR COMPETITION—ACQUIESCENCE.

After complainant's predecessor had, by extensive advertising, created a market for its flour, known as "Aunt Jemima's," which was sold under a trade-mark consisting of the words "Aunt Jemima's," accompanied by a picture of a negress laughing, defendants adopted that trade-mark, selling syrup under the same name. One day before filing an application for registration of such trade-mark for syrup and sugar cream, defendant, wrote, calling the attention of complainant's predecessor to the matter. When defendant's application for registration came to its attention, complainant's predecessor, which had already registered the trade-mark for flour, replied to defendant's letter, stating it presumed that defendant could use the name for syrup without violating any law. *Held*, that the letter which made inquiries as to defendant's registration of the trade-mark, etc., was not an acquiescence in defendant's use of such trade-mark, but was merely the expression of the opinion of plaintiff's predecessor as to the law governing the case, and hence did not estop complainant or its predecessor from thereafter relying on the law, which in reality protected the rights of complainant and its predecessor in the trade-mark.

2. TRADE-MARKS AND TRADE-NAMES ⟸23—RIGHT TO TRADE-MARK—NATURE OF.

The right to a trade-mark, though strictly appurtenant to the trade, becomes a property right as soon as it identifies the trade.

3. TRADE-MARKS AND TRADE-NAMES ⟸61—UNFAIR COMPETITION—INJUNCTION.

Where defendant knowingly adopted as a trade-mark and name for its syrup a trade-mark and name extensively advertised by complainant's predecessor for flour, and the adoption must have been either to get the benefit of the advertising of the flour or to forestall an extension of the trade, defendant has no equity which will prevent an injunction restraining the use of such trade-mark.

4. TRADE-MARKS AND TRADE-NAMES ⟸78—UNFAIR COMPETITION—RELIEF.

As complainant and its predecessor had the property right in the trade-mark, and as defendant's adoption was wrongful, and complainant was liable to be injured by the sale of inferior syrup, which the public might well conceive to be manufactured by it, defendant should be enjoined from the use of the trade-mark.

5. TRADE-MARKS AND TRADE-NAMES ⟸86—INJUNCTIONS—LACHES.

Though complainant and its predecessor delayed for eight years in asserting their rights, complainant is, defendant's taking having been wrongful, entitled to an injunction, though it is not entitled to an accounting for damages and profits.

Learned Hand, District Judge, dissenting.

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

Bill by the Aunt Jemima Mills Company against Rigney & Co. From a decree (234 Fed. 804) dismissing the bill, complainant appeals. Reversed.

Homer C. Underwood, of Detroit, Mich., Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., and Harry D. Nims, of New York City, for appellant.

F. F. Crampton, of Toledo, Ohio, for appellees.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is an appeal from a decree of the United States District Court for the Eastern District of New York dismissing the complainant's bill for infringement of trade-mark and for unfair competition on the ground that the goods manufactured by the parties respectively are different, viz. self-rising flour, by the complainant and pancake syrup by the defendants.

The Davis Milling Company, of St. Joseph, Mo., originated the trade-mark, which consists of the words "Aunt Jemima's," accompanying the picture of a negress laughing, in 1899, as we infer from the statement and declaration accompanying the registered trade-mark taken out in the United States Patent Office April 3, 1906, for self-rising flour. February 1, 1914, the Milling Company sold out its business, trade-marks, and good will to the Aunt Jemima Mills Company, the complainant in this case.

Since February 15, 1908, Rigney & Co., the defendants, have used a trade-mark precisely like the complainant's, which was registered December 29, 1908, in the Patent Office on an application filed March 6, 1908, for certain syrups and sugar creams. March 14, 1908, as soon as the application came to its attention, the Milling Company wrote to Rigney & Co. as follows:

"St. Joseph, Mo., March 14, 1908.

"Rigney & Co., Brooklyn, N. Y.—Gentlemen: We have your letter of the 5th. We are surprised to have you use the name 'Aunt Jemima' for your syrup, but presume you can do so without violating any law in the matter. Mr. Jackson wrote us about this, but we did not know that you were going to do it right 'hot off the pan' as one might say. We thought you were going to wait to hear from us. We note you say you have copyrighted 'Aunt Jemima.' Were you able to obtain a copyright of 'Aunt Jemima' for maple syrup, or did you simply register it as a trade-mark? The sample which you sent us has been received, and it is as far as we can see, a very fine article. The looks of the Aunt Jemima Pancake Cream, as you call it, is not as good as the taste. The looks we think could be improved perhaps. Do you make this in a syrup as well as in the cream? Do you work the trade entirely through brokers, or do you handle it with salesmen working the retail trade? Would you be interest (sic) in taking on a pancake flour proposition along with your maple syrup and other lines? If so, we might have something of interest for you. Yours truly, The Davis Milling Co.,

"Robert R. Clark."

It is perfectly clear that Rigney & Co. adopted the trade-mark (though with full knowledge of the complainant's prior use) upon the advice of counsel and in full belief that they had a right to use it for their specific products. They brought it to the attention of the Milling Company, the complainant's predecessor, a little over two weeks after they had selected it, and one day before they filed their application for registration in the Patent Office.

[1] The above letter is obviously no evidence of abandonment or of nonuser by the complainant, but the defendants say it is an acquiescence in their use of the trade-mark for syrups. We do not so construe it. The complainant was speaking of a matter of law, and said it "presumed" that the defendants could do so without violating any law.

But if, as matter of law, the defendants had no right to use the trade-mark, this expression of opinion by the complainant does not make the law other than it is, nor estop it from relying on the law as it really is. Bigelow on Estoppel, p. 634. Indeed, the complainant seems, in addition, to have been misled by the defendants as to the facts, because the letter goes on to say that the defendants had written they had copyrighted the trade-mark, and to ask whether they meant that they had registered it in the Patent Office. No reply to this letter was ever received. If the complainant had authorized the defendants to use the mark, or even had said it did not object to their doing so, mistake of law would not save it. When, however, it merely expressed a legal opinion, it did nothing to mislead the defendants, and they took the risk of acting on that opinion if it were erroneous. The bill was filed in December, 1915.

[2] This brings us to inquire what the law on the subject really is. We find no case entirely like the present. In Hanover Star Milling Co. v. Allen & Weeks, 208 Fed. 513, 125 C. C. A. 515, L. R. A. 1916D, 136, affirmed Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713, which was also said by Mr. Justice Pitney to be a most unusual case, it was held that a trade-mark is not a subject of property, and that even a technical trade-mark like the one under consideration will be protected only in markets where it has been established; that is, where it has come to indicate the origin or ownership of the goods it marks. In that case the trade-mark was adopted without any knowledge whatever of the prior use. The right to a trade-mark, though strictly appurtenant to the trade, becomes a property right as soon as it identifies the trade. When it gets this far, it is a mere question of words whether we say that the trade or the trade-mark is protected. Mr. Justice Pitney, in affirming this judgment, recognized an exception when he said:

"In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appears that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like."

[3] To use precisely the same mark, as the defendants have done, is, in our opinion, evidence of intention to make something out of it—either to get the benefit of the complainant's reputation or of its advertisement or to forestall the extension of its trade. There is no other conceivable reason why they should have appropriated this precise mark. The taking being wrongful, we think the defendants have no equity to protect them against an injunction, unless they get it from a consideration now to be examined.

[4] It is said that even a technical trade-mark may be appropriated by any one in any market for goods not in competition with those of the prior user. This was the view of the court below in saying that no one wanting syrup could possibly be made to take flour. But we think that goods, though different, may be so related as to fall within the

mischief which equity should prevent. Syrup and flour are both food products, and food products commonly used together. Obviously the public, or a large part of it, seeing this trade-mark on a syrup, would conclude that it was made by the complainant. Perhaps they might not do so, if it were used for flatirons. In this way the complainant's reputation is put in the hands of the defendants. It will enable them to get the benefit of the complainant's reputation and advertisement. These we think are property rights which should be protected in equity. We have held in Florence v. Dowd, 178 Fed. 73, 101 C. C. A. 565, that a manufacturer of hair brushes under the trade-mark "Keepclean," who did not make toothbrushes, is entitled to be protected against the unfair competition of one who manufactures toothbrushes under the trade-mark "Sta Kleen." So in Collins Co. v. Oliver Ames Co. (C. C.) 18 Fed. 561, a manufacturer of metal articles, which had never made shovels, was granted an injunction preventing the defendant from putting the complainant's trade-mark on its shovels.

The defendants are a partnership, and did not incorporate the words "Aunt Jemima's" into their firm name; but the complainant seems to think that appropriation of a trade-mark is to be treated in exactly the same way as appropriation of a trade-name. The latter is a trespass of the same nature as is committed by one who applies another man's name to his own goods. This is a wrong which equity will enjoin without reference to the character of the article, or to the question of competition or of prior occupation of the market in any particular territory. No one has a right to apply another's name to his own goods. If, for instance, one were to publish a book on banking under the name of a firm of bankers, it would be no answer to say that there was no competition between banking and publishing, or that the bankers had sustained no pecuniary damage, or that the book was a good book. The act would still be a trespass, for which the bankers would be entitled to at least nominal damages at law, and, that remedy being inadequate and the trespass being a continuing one, they would be entitled to relief in equity. Such is our decision in British American Tobacco Co. v. British American Cigar Stores Co., 211 Fed. 933, 128 C. C. A. 431, Ann. Cas. 1915B, 363, in which a company engaged solely in the wholesale tobacco business was protected against the use of a similar corporate name by a retailer of cigars, although there was no competition between them.

There are many decisions of the English courts to the same effect. In Eastman Company v. Kodak Cycle Co., 15 Reports Patent Cases, 105, the complainant was a manufacturer of cameras under the name Kodak. Defendant, under the name "Kodak Cycle Company," began the manufacture of bicycles, calling them "Kodak" cycles, and registered the name as a trade-mark for bicycles and other vehicles. The Eastman Company brought suit to restrain the use of the word "Kodak" and to rectify the register. The motion for injunction and the motion to rectify the register came on to be heard together. The motion to rectify was sustained, and the defendant's mark expunged, and an injunction was granted. Mr. Justice Romer said:

"Then I have to deal with the application for an injunction against the defendants in respect of what they are doing. They have just started business practically, and it appears to me that to allow them to use the word 'Kodak' as part of the title of the Kodak Cycle Company, Limited, would be to give them the benefit of what, in my opinion, substantially amounts to an improper dealing on their part. It would be to allow this company certainly to cause confusion between it and the plaintiff company. I think it would injure the plaintiff company, and would cause the defendant company to be identified with the plaintiff company, or to be recognized by the public as being connected with it, and I think, accordingly, the defendant, the Kodak Cycle Company, Limited, ought to be restrained from carrying on business under that name. Moreover, it appears to me that they ought not to be permitted to sell their cycles under the name of the 'Kodak Cycles' for similar reasons. I think it would lead to confusion, I think it would lead to deception, and I think it would be injurious to the plaintiff company. I therefore grant an injunction to restrain the defendant companies, or either of them, from carrying on business under the name 'Kodak Cycle Company, Limited,' or under any name comprising the word 'Kodak' likely to mislead or deceive the public into the belief that the defendant company is the same company as or is connected with either of the plaintiff companies, or that the business of the said companies, or either of them, is the same as, or is in any way connected with, the business of the plaintiffs, the Eastman Photographic Materials Company, Limited. I also grant an injunction to restrain the defendant companies, and each of them, from selling, or offering to sell, any of their cycles or goods as 'Kodak.' I think that will sufficiently protect the plaintiffs. Of course the respondents, the defendants, must pay the costs, including the costs of the comptroller."

Dunlop Pneumatic Tyre Co. v. Dunlop Lubricant Co., 16 Reports Patent Cases, 12: In 1888 the word "Dunlop" was first used by complainant's predecessors to designate goods manufactured by them. Complainant made bicycle tires, rims, pumps, etc. One Funt started in business as the "Dunlop Lubricant Co.," and dealt in oils and lubricants for bicycles, which he sold in packages bearing the word "Dunlop" in large letters. Complainant had never dealt in oils or lubricants. Held, that the use of the word "Dunlop" by defendant was deceptive, and it was enjoined.

In Valentine Meat Juice Co. v. Valentine Extract Co., 17 Reports Patent Cases, 673, the complainant used the word "Valentine" upon liquid meat extracts for medicine. Defendant used the word "Valentine" on beef extract used for food. An injunction was granted.

Dunlop Pneumatic Tyre Co. v. Dunlop-Truffault Cycle & Tube Manufacturing Co., 12 Times Law Reports, 434: This was a motion for a preliminary injunction to restrain the defendant from using the name "Dunlop" as a part of its corporate style. Complainant was the manufacturer of pneumatic tires, defendant the manufacturer of bicycles and steel tubes used in the manufacture of bicycles. An injunction was granted. Mr. Justice Chitty holding that the name "Dunlop" had been chosen by the defendants to create confusion in the minds of the public and make them think that the defendant company was connected with that of the plaintiffs.

Premier Cycle Company v. Premier Tube Company, 12 Times Law Reports, 481: This was a motion for a preliminary injunction to restrain the defendants from using the word "Premier" as a part of their business style. Complainant was a manufacturer of bicycles and tubes

used in their construction. The defendants stated that they were tube manufacturers and had no intention of competing with the complainant in the making of bicycles. An injunction was granted.

We do not think these authorities apply to the appropriation of a trade-mark.

[5] As the defendants' conduct was wrongful, the complainant is entitled to an injunction, notwithstanding the delay of some eight years in asserting its rights (McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828), but is not entitled to an accounting for damages and profits.

The decree is reversed.

LEARNED HAND, District Judge (concurring). The plaintiff's letter of March 14, 1908, does not seem to me an expression of an opinion on the law; the plaintiff does not profess to have examined its rights in the case, but to allow them to pass as between the parties, whatever they may be. Nor is there the least reason to suppose that if there was a mistake of law, it was mutual. The defendant consulted the plaintiff as to its position and the most that can be said of the reply is that the plaintiff explained its intention not to assert any rights upon the ground that it probably had none. If anything could better indicate that they meant not to examine the matter fully, I confess I cannot see what it was. Furthermore, I find in the letter not only complete acquiescence, but in substance an invitation to co-operate with the defendant in the very infringement itself. The plaintiff's subsequent letter of retraction of May 1, 1908, further corroborates this conclusion, at least it shows that it thought the defendant might interpret the earlier letter as I interpret it. This letter, after saying that the plaintiff had received no answer, added that the defendant had overstepped the bounds of "business courtesy" in getting the benefit of their years of advertising. Therefore they formally protested against any continuance and asked for advices that the defendant would discontinue so that they might take up the matter legally and find out what their rights were. I cannot see how in the face of this it can be said that they were misled as to those rights. Of course, if this letter had been received, there could be no claim of acquiescence, but the proof is only that it was regularly mailed and not received in due course. This does not make proof of its receipt.

Therefore, when the defendant after communicating with the plaintiff and getting their consent, as I believe, for nearly eight years built up a substantial business, the injustice is apparent, of allowing the plaintiff now to assert its rights. McLean v. Fleming, 95 U. S. 245, 24 L. Ed. 828, and Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, do not support a contrary doctrine, even though they were not modified, by Saxlehner v. Eisner & Mendelsohn Co., 179 U. S. 19, 39, 40, 21 Sup. Ct. 7, 45 L. Ed. 60. Assuming that the theory of those cases is that time will never run against a fraud, surely it is wrong to say that when the plaintiff on original inquiry as to its position acquiesces in the infringement, the defendant commits a fraud in going on. Creswell v. Knights of Pythias, 225 U. S. 246, 261, 32 Sup.

Ct. 822, 56 L. Ed. 1074, seems to me a weaker case on the facts, yet the defendant succeeded.

I vote to affirm on the ground of acquiescence without expressing any opinion upon the plaintiff's original right.

CUNEO IMPORTING CO. v. AMERICAN IMPORTING & TRANSPORTATION CO. et al.

(Circuit Court of Appeals, Second Circuit. December 20, 1917.)

No. 77.

1. ADMIRALTY ⟸50—PROCEEDINGS—BRINGING IN NEW PARTIES.
Where the subcharterer of a vessel libeled the charterer to recover damages to a cargo on account of vessel's alleged unseaworthiness, and the charterer filed a petition under admiralty rule 59 (29 Sup. Ct. xlvi) to bring in as a party one who executed the charter party as managing owner, and the managing owner answered the libel and petition, the case should be treated as if the libel had originally been filed against both the charterer and the managing owner.

2. ADMIRALTY ⟸103—APPEAL—FINAL DECISION.
A subcharterer libeled the charterer to recover damages to a cargo alleged to have been caused by the unseaworthy condition of the vessel, and the charterer by petition brought in one who executed the charter party as managing owner. Such impleaded respondent filed an answer, alleging that the vessel was owned by a corporation of which he was president, and set up that, in a suit to recover the charter hire, the charterer counterclaimed for damages on the ground of the vessel's unseaworthiness, and that in such case judgment was rendered in favor of the corporation owning the vessel, establishing its seaworthiness during the whole term of the charter party. Libelant, the subcharterer, moved for a decree against the charterer, and the impleaded respondent moved for dismissal of the petition, both of which motions were granted. Thereupon the charterer appealed. *Held*, that the appeal could not be dismissed, on the ground that the decree was not final, for it established the charterer's liability to the libelant and the nonliability of the impleaded respondent.

3. JUDGMENT ⟸701—CONCLUSIVENESS—PRINCIPAL AND AGENT.
In such case, as the previous judgment between the charterer and the owner of the vessel established the owner's nonliability, and the impleaded respondent, who signed the charter party, showed that he was president of the corporation owning the vessel, he sufficiently established his privity with the owner, and the judgment was a conclusive adjudication against his liability to the charterer, even though he could not technically be managing owner of the vessel.

Hough, Circuit Judge, dissenting in part.

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

Libel by the Cuneo Importing Company against the American Importing & Transportation Company, which by petition made Daniel Bacon a respondent. There was a decree in favor of libelant against the American Importing & Transportation Company, and in favor of the impleaded respondent (241 Fed. 421), and the Transportation Company appeals. Affirmed.

Twyman O. Abbott, of New York City, for appellant.

MacFarland, Taylor & Costello, of New York City, for appellee Cuneo Importing Co.

R. J. M. Bullowa, of New York City, for appellee Bacon.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. July 2, 1915, the Cuneo Importing Company filed its libel as subcharterer from the American Importing & Transportation Company, charterer from Daniel Bacon, managing owner of the steamer Banes, to recover damages to a cargo of fruit alleged to have been due to the unseaworthiness of the steamer.

The answer of the American Company denied any knowledge or information sufficient to form a belief as to the steamer's seaworthiness. It also filed a petition under rule 59 of the Supreme Court in admiralty (29 Sup. Ct. xlvi) to bring in Daniel Bacon, who executed the charter to it as managing owner of the steamer, and praying that the libelant might recover its damages against him.

Bacon filed an answer to the petition, which set up as a separate defense that on or about November 1, 1909, the Banes Steamship Company, as owner of the steamer Banes, brought suit in the superior court of Suffolk county, Mass., against the American Company to recover charter hire, in which that company set up a claim for damage on the ground of the steamer's unseaworthiness, in which cause it was so proceeded that a judgment was rendered for the plaintiff, establishing the steamer's seaworthiness during the whole term of the charter party, which is res adjudicata between it and the petitioner and a complete defense in bar to the petitioner's claim. Bacon also filed an answer to the libel of the Cuneo Company, alleging that the Banes Company, with which he, as managing owner, was in privity, had maintained the steamer in a seaworthy condition during the whole term of the charter party, except in so far as seaworthiness was prevented by exceptions in it contained.

[1] On this state of the pleadings the cause is to be treated under the fifty-ninth rule as if the libel had originally been filed against both the American Company and Bacon, managing owner.

The American Company excepted, under admiralty rule 35 of the District Court, to this defense, on the ground that it did not touch any matter of defense to the allegations of the petition. January 8, 1917, Judge Mayer entered an order overruling the exceptions and holding the Massachusetts judgment to be a complete defense against the American Company's claim.

March 26th the cause coming on for trial, the American Company admitted the libelant's claim, which was consistent with its attitude in the Massachusetts action, whereupon the libelant moved for a decree against the American Company, and Bacon moved for a dismissal of the petition under the fifty-ninth rule, both of which motions were granted.

Subsequently the American Company took this appeal, assigning, among other things, for error, the overruling of its exceptions to the defense of res adjudicata pleaded by Bacon, the impleaded respondent.

The theory is that the decree in favor of the libelant should have been primarily against Bacon, managing owner, and secondarily against it.

[2] The Cuneo Company now moves to dismiss the appeal, on the ground that the decree was not final. Manifestly it was final, both as to the libelant and as to the American Company. By virtue of it the American Company can never hereafter dispute the right of the Cuneo Company to recover from it, and can never recover from Bacon any sum paid by it under the decree. But, if Bacon was primarily liable for any amount recovered against the American Company by the Cuneo Company, then manifestly it had a right to appeal. Therefore the motion to dismiss the appeal is denied.

[3] This brings us to the merits. Is the American Company entitled to recover of Bacon, managing owner, any sum it may have to pay the Cuneo Company, notwithstanding the Massachusetts judgment? That judgment was res adjudicata between the American Company and the Banes Steamship Company to the effect that the steamer was seaworthy during the whole term of the charter party. It lay upon Bacon, in relying upon the judgment as a defense, to show that he was in privity with the Banes Steamship Company, and therefore entitled to its protection. It being admitted on all hands that the Banes Steamship Company is the owner of the steamer, Bacon could not technically be managing owner. He was, however, president, and did execute the charter on behalf of the owner, and the owner, as well as the American Company, recognized and carried it out. We have therefore no difficulty in holding that he was acting as the authorized agent of the Banes Steamship Company in executing the charter party, although he was technically wrong in describing himself as managing owner. Therefore the Massachusetts judgment was as conclusive between the American Company and Bacon, the managing owner, as it was between that company and the Banes Steamship Company, and was a complete bar to the American Company's claim.

The decree is affirmed.

HOUGH, Circuit Judge (dissenting in part). If I could think this appeal well taken, concurrence on the merits would be necessary, for the judgment of the Massachusetts court is in my opinion a complete adjudication of the whole matter.

The majority ruling on practice, however, makes a precedent which is thought both erroneous and dangerous, inasmuch as one party (American Company) has been substantially permitted to choose how much of the case or what issues therein should be litigated both here and below. That respondent, having been sued for breach of a subcharter, impleaded Bacon, alleging that such breach was his doing or fault. He pleaded to the merits, put both libelant and the impleading respondent to proof of any and all breaches or negligence, and as a separate defense set up the Massachusetts proceedings as res adjudicata. On peremptory exception to that separate defense alone by American Company, the same was upheld; whereupon American Company, tendered or confessed judgment to the libelant, whose proctors then entered a so-called final decree, in which it is recited that the

libel is dismissed as to Bacon "on motion of" Bacon's proctor. There never was any trial or hearing of any issue other than the argument on peremptory exception.

Libelant and original respondent having thus by agreement between themselves produced this condition of affairs, this appeal was taken from the decree and by the party who produced it by confession; and that party seeks in this court to shift the burden of his confession to Bacon, without having afforded to Bacon an opportunity of trying out any of his pleaded defenses on the merits. It might have been said, with a technicality quite foreign to the admiralty, that Bacon, by moving for decree, had abandoned all his other defenses; but that ground of decision does not seem to be relied upon in the prevailing opinion. If this point be laid aside, I believe that the appeal before us should either be dismissed on the ground that what is appealed from is not final, or the decree affirmed because it was confessed by the appellant.

Inasmuch as Bacon's proctor stoutly maintains that he never made the motion attributed to him in a form of decree drawn by libelant's proctor, the situation is warning to a bar careless and rather contemptuous of points of practice; for if this court had differed from the court below as to the effect of the Massachusetts judgment, Bacon would have been in a parlous position, under Bull v. New York & Porto Rico S. S. Co., 167 Fed. 792, 93 C. C. A. 182, certiorari denied 214 U. S. 526, 29 Sup. Ct. 704, 53 L. Ed. 1068.

GENERAL ACC., FIRE & LIFE ASSUR. CORP., Limited, v. PACIFIC COAST CASUALTY CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 60.

1. INSURANCE ⟸686—CONTRACTS—CONSTRUCTION.

Defendant agreed by a contract of reinsurance to assume all risks outstanding which plaintiff had underwritten, the contract providing that plaintiff immediately upon receipt should deliver to defendant at its office in New York all notices, summons, or other processes and any and all communications that it might receive from or on behalf of any of its policy holders in any way arising from or relating to accidents covered by its contracts of insurance. Plaintiff had underwritten a liability insurance to one S. under which a loss occurred. S. was sued, and his son inclosed the summons in a postpaid envelope addressed to plaintiff at its office in New York, which office at that time had been abandoned. The action went against S., and he recovered against plaintiff. *Held* that, in an action by plaintiff against defendant on its contract of reinsurance, defendant's liability was in the first instance absolute, and plaintiff was not in the first instance bound to show that it transmitted the summons to defendant, but defendant was bound to show that plaintiff received the same and failed to transmit it.

2. INSURANCE ⟸686—ACTIONS—PRESUMPTIONS.

In such case the fact that judgment was recovered against plaintiff does not, in the absence of evidence, warrant an assumption that S., the insured, served summons on plaintiff.

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3. EVIDENCE ⊂⊃71—PRESUMPTIONS—RECEIPT.
In such case, as plaintiff's office in New York had been abandoned before the summons was mailed, the presumption of receipt arising from the posting of the letter is destroyed.

4. INSURANCE ⊂⊃626—ATTORNEY'S AUTHORITY—RECEIPT OF SUMMONS.
In such case attorneys for plaintiff particularly retained for each case had no authority to receive such summons on plaintiff's behalf.

5. INSURANCE ⊂⊃686—ACTIONS—EVIDENCE—SUFFICIENCY.
In such case evidence *held* insufficient to establish that an attorney who actually received the summons was authorized to receive the same on behalf of plaintiff.

6. INSURANCE ⊂⊃686—ADMISSIONS—EXTENT.
In an action on a contract of reinsurance, admission that plaintiff, the original insurer, paid a judgment recovered against it by the insured, does not warrant recovery by plaintiff of expenses of defending action by the insured; the admission not extending to that item.

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

Action by the Pacific Coast Casualty Company against the General Accident, Fire & Life Assurance Corporation, Limited. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Writ of error to the District Court, Southern District of New York (Mayer, J., presiding), upon a judgment entered for the plaintiff upon a verdict directed by the court at the close of the evidence.

The action was to recover upon a contract of reinsurance made between the parties under which the defendant agreed to assume all the risks outstanding on January 15, 1912, which the plaintiff had underwritten. The ninth article of the contract upon which the case turned was, so far as relevant, as follows: "The Pacific Coast [the plaintiff] agrees immediately upon their receipt to deliver to the General Accident [the defendant], at its office in the city of New York, all notices, summons, or other processes and any and all communication whatsoever that it may receive from or on behalf of any of its said policy holders in any way arising from or relating to accidents occurring after 12 o'clock noon on the 15th day of January, 1912."

Before January 15, 1912, the plaintiff had underwritten a liability insurance to one Adolph Schlessinger, under which after January 15, 1912, a loss occurred. Schlessinger was the landlord of a building in which a tenant was injured, and the tenant served him with two summonses in the City Court of New York about November 23, 1912. Schlessinger's son inclosed these summonses in a postpaid envelope and posted them to the plaintiff addressed to its office at 95 William street in the city of New York, which was the last office maintained by it in that city. The plaintiff had meanwhile discontinued its business in New York and abandoned the office before November 23, 1912.

The tenant recovered a judgment against Schlessinger, which he paid. Thereafter he sued both the parties hereto upon the liability insurance policy and recovered judgment against the plaintiff, having discontinued against the defendant. The plaintiff, having paid the judgment, brought this action to recover under the contract of reinsurance mentioned above.

The plaintiff proved the recovery of Schlessinger's judgment against itself and its payment of the same, the contract of reinsurance, and the policy issued by it to Schlessinger. It then rested, and the defendant moved to dismiss. Upon denial of this motion the defendant proved the mailing of the summonses to the plaintiff as above set forth and called two attorneys at law, members of the firm of Tuttle & Coughlan, who had customarily represented the plaintiff in the defense of litigation brought against it, and who were designated under the insurance law of the state of New York as persons to

whom all process should be sent which should be served upon the superintendent of insurance in that state. Upon the examination of Tuttle it appeared that he had not received the summonses, though he had received other mail of the plaintiff to some extent during the months of October and November, 1912. The firm of Tuttle & Coughlan had been dissolved before November 23, 1912, but Coughlan received the summonses at some time not disclosed.

No evidence was produced to show that the plaintiff had directed the post office to send mail to Tuttle & Coughlan except the following:

"Q. Mr. Tuttle, do you know whether or not or did you ever direct the post office authorities in this building that any mail addressed to the Pacific Coast Casualty Company should be forwarded, and, if so, where and to whom?

"Mr. Combs: Was this order in writing?

"The Court: Was it in writing Mr. Tuttle?

"The Witness: I never gave any order to the post office authorities to send any mail forward.

"Q. Do you know of any such order?

"Mr. Combs: I object to that.

"The Court: Mr. Tuttle is a lawyer. Do you now of any such order of your own knowledge?

"The Witness: Yes; in the former case in the Supreme Court there were two orders in evidence sent by the Pacific Coast Company to the post office authorities."

This testimony was not objected to or stricken out.

The defendant asked several questions of Tuttle and of Coughlan, all incompetent in form, designed to show that the plaintiff had authorized the firm of Tuttle & Coughlan to receive its mail, but these were excluded. It also tried to prove that it had not received the summonses, but this, too, was excluded because of the failure of proof that the plaintiff had ever received them.

Alfred W. Meldon, of New York City (Wendell P. Barker and Albert J. Hiers, both of New York City, of counsel), for plaintiff in error.

Daniel Combs, of New York City, for defendant in error.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] The correctness of the ruling below turns upon whether it was a part of the plaintiff's case to show that it had not received the summonses or whether that burden lay on the defendant. If it was upon the plaintiff, the evidence does not prove that it did not receive the summonses; but if it lay with the defendant, it, too, has failed, as we shall show later. The general rule reenforced by later decisions is, of course, to construe all performance due from the plaintiff and prior in time to the defendant's performance as a condition precedent to the latter's obligation. However, the plaintiff's performance here was to send on to the defendant all notices or process which it might receive. That obligation was contingent upon its own receipt of such documents, and in the absence of their receipt it was under no obligation, and there was no condition precedent. The plaintiff does not therefore approach the cause suing upon a conditional obligation; on the contrary, the defendant's obligation is prima facie absolute. It is only when the plaintiff's cross obligation, itself conditional, has been shown to be absolute that its performance can become a condition upon the defendant's obligation. Hence the proper course of proof is for the plaintiff to prove the

contract and the breach and rest. Then the defendant must prove that the condition upon the plaintiff's obligation arose so that it became absolute. We need not go further and hold that the plaintiff must then prove its performance in order to avoid the effect of the condition upon the defendant's obligation. It is enough here that there was no unconditional condition upon the defendant's obligation.

[2] Nor is the point good that the recovery of the plaintiff in the action of Schlessinger v. Pacific Coast Insurance Company presupposed that the defendant there had received the summonses in the actions of the tenant against Schlessinger. How that point was dealt with on that trial we do not know, even supposing, and we do not mean so to hold, that every fact necessary to a recovery there is established by estoppel against the plaintiff here. We need not assume, however, that in that case Schlessinger proved the receipt by the plaintiff here of the summonses.

[3-5] We therefore come to the question whether the defendant showed that the plaintiff had received the summonses. The only evidence is that, when Schlessinger sent the letter, the office of the plaintiff had been abandoned. Tuttle says that he does not know the exact date, but he thinks it was before November 23, 1912. This disposes of the presumption arising from the posting of the letter.

The only thing that remains is whether Coughlan, who in some way received the summonses, was then authorized to receive them by the plaintiff. Of course, as a member of the firm of Tuttle & Coughlan, even if it had not then been dissolved, he would not have been so authorized. These gentlemen were merely attorneys at law who were particularly retained for each case.

It seems to us that the sole ground for assuming that Coughlan was so authorized appears in the passage recited above in the statement of facts. In fact, the two orders which Tuttle speaks of may have been actually signed by the plaintiff, and Coughlan may have got the summonses as agent for the plaintiff, but we have no proof of it. Assuming that the proof, which was admitted without objection, stands for what it says, it can hardly serve in place of proof that the orders emanated from the plaintiff. It is perfectly clear that the defendant did not so regard it. Thus in the colloquy between the court and Mr. McDonnell the court said:

"You have not here any proof that instructions were given to the post office authorities to forward mail."

He answered:

"No; but I have proof here that I mailed a letter to your last-known address."

We think that the defendant failed to show that the plaintiff ever received the summonses, and that the direction of a verdict for the plaintiff was right. None of the exceptions to the exclusion of evidence seem to us to affect the result. Without the necessary keystone to the defense, nothing could support it.

[6] The proof as to the amount of the verdict was vague. All that the defendant admitted was that the plaintiff had paid the judgment.

We cannot find any proof of the amount of the plaintiff's expenses in defending the Schlessinger action, and we do not think the admission covered it. For this reason the plaintiff must abate from the judgment $106.68, with interest, or the judgment must be reversed. If it does, judgment affirmed, with costs.

ELLAMAR MINING CO. OF ALASKA v. POSSUS.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 2949.

1. MASTER AND SERVANT ⟸373—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—"ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

Sess. Laws Alaska 1915, c. 71, known as the Workmen's Compensation Act, provides in section 1 that the employer shall be liable to pay compensation in accordance with the schedule therein adopted to each of his employés who receives personal injury by accident arising out of and in course of his or her employment, while section 7 declares that the right to compensation for an injury and the remedy therefor provided by the chapter shall be in lieu of all rights and remedies existing at common law, or otherwise, and no rights or remedies except those provided for by the act shall accrue to employés entitled to compensation under the act. The act was limited to cases of death or injury to employés in the mining industry in the territory, and provided for a trial to be maintained and determined in and by the courts of the territory, and for a judgment creating a personal liability against the employer. *Held* that, where an employé's injuries arising out of and in the course of his employment were aggravated by insufficient medical attention furnished by the employer pursuant to an agreement with the employé to furnish competent medical and surgical attention in case of the employé's illness or injury, the employé's right to recover for such aggravation injuries did not fall within the act, not being an injury "arising out of and in the course of employment."

2. MASTER AND SERVANT ⟸394—WORKMEN'S COMPENSATION ACT—JOINDER OF ACTIONS.

Comp. Laws Alaska 1913, § 916, declares that plaintiff may unite several causes of action in the same complaint when they all arise, first, out of contract express or implied, and, second, injuries with or without force to the person. An Alaska mine employé, alleging that he suffered injuries in the course of his employment, and also from defendant's failure to furnish competent surgical and medical attendance in pursuance of an agreement whereby deductions were made from his wages, joined the two causes of action. *Held*, that the joinder was proper, the Alaska Workmen's Compensation Act governing the action for injuries arising in the course of employment being elective and having been adopted by the parties, for both causes of action were based on contract.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Action by Tony Possus against the Ellamar Mining Company of Alaska, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error was the plaintiff in an action in the court below, in which he pleaded two counts. The first was to recover compensation for injuries received by him in the course of his employment in the defendant's

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

mine, and was brought under the provisions of chapter 71 of the Session Laws of Alaska 1915, known as the Workmen's Compensation Act. The second was to recover damages for the aggravation of his injuries and for his suffering by reason of the defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; the plaintiff alleging that under the defendant's rules the sum of $1.50 per month had been deducted from his wages for hospital dues, which entitled him to care in a hospital and to competent surgical and medical attendance at the expense of the defendant, in case of his injury or illness arising in the course of his employment. The defendant demurred to the complaint on the ground that the causes of action had been improperly united, and on the further ground that under the first cause of action the plaintiff was entitled to recover all damages which he sustained for aggravation to his injuries through the lack of proper hospital treatment, and that to permit the maintenance of the second count would be to compel the defendant to answer twice in damages for the same cause of action. The demurrer was overruled. The jury by their verdict found for the plaintiff on the first cause of action in the sum of $1,368, and on the second cause of action in the sum of $1.

Section 1 of the Workmen's Compensation Act provides that the employer shall be liable to pay compensation in accordance with the schedule therein adopted to each of his employés "who receives a personal injury by accident arising out of and in the course of his or her employment." The act sets forth a schedule of compensation covering all ordinary and usual injuries arising from accidents in mines resulting in either temporary or permanent disability, and further makes provision for compensation for injuries and disabilities which do not come wholly within any of the specific cases for which provision is made. Section 7 provides: "The right to compensation for an injury, and the remedy therefor provided by this act shall be in lieu of all rights and remedies as to such injury now existing * * * at common law, or otherwise, and no rights or remedies, except those provided for by this act, shall accrue to employés entitled to compensation under this act while it is in effect; nor shall any right or remedy, except those provided for by this act, accrue to the personal or legal representative, dependents, beneficiaries under this act, or next of kin of such employé."

Donohoe & Dimond and W. S. Bonnifield, all of Valdez, Alaska, and George E. De Steiguer, of Seattle, Wash., for plaintiff in error.

John Lyons and E. E. Ritchie, both of Valdez, Alaska, for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The defendant contends that, if the plaintiff is entitled to any compensation or damages for his injuries, he must seek the same under the Workmen's Compensation Act alone, and cites Ross v. Erickson Const. Co., 89 Wash. 634, 155 Pac. 153, L. R. A. 1916F, 319, a case in which it was held that the purpose of the Industrial Insurance Law of Washington (3 Rem. & Bal. Code, §§ 6604—1 et seq.) was to remove from the courts personal injury actions by employès, and was intended to cover, not only injuries, but all aggravations through negligence of a physician engaged by the master and paid out of sums deducted from the wages of employés. But the Industrial Insurance Law of Washington differs materially from the Workmen's Compensation Act of Alaska. The intention of the Washington law, as expressed in the terms thereof, was to withdraw from private controversy all

phases of civil causes for personal injuries to employés, and to abolish the jurisdiction of courts over such causes, and the Supreme Court in the case cited held that the purpose of the act was to end all litigation growing out of, incident to, or resulting from the primary injury, and in lieu thereof to give the workman one recovery in the way of certain compensation, and to make the charge upon the contributing industries alone. Support of that view of the law was found in the fact that provision was made that compensation allowed under the act might be readjusted if aggravation of the disability should take place or be discovered. Again, in Stertz v. Industrial Insurance Com., 91 Wash. 588, 158 Pac. 256, it was said:

"Ours is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the 'Industrial Insurance Commission.' All the features of an insurance act are present. Not only are all remedies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employé is no longer to look to the master even for the scheduled and mandatory compensation."

The essential features of the Workmen's Compensation Act of Alaska are the limitation of its provisions to cases of death or injury to employés in the "mining industry of the territory," the limitations and specifications of the amount recoverable in case of death or injury, and the specified disabilities, and the joinder in one action of all claimants injured from the same cause. It provides for a trial to be maintained and determined in and by the courts of the territory, and to be governed by the law of procedure applicable to other actions for the recovery of money. The judgment when rendered creates a personal liability against the employer, and not against a fund created by contributions from or assessments against other employers. We are of the opinion that under the act the plaintiff could not recover for aggravation to his injuries as pleaded in his second count. The act limits recovery thereunder to cases of death or injury arising "out of and in the course of employment." That phrase is one that is commonly used in workmen's compensation acts, and its meaning has been determined in numerous decisions. "This phrase embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business." 5 Labatt's Master and Servant, § 1806. An injury arises out of the employment if there is a causal connection between the working conditions and the injury, and it must be possible to trace the injury to the nature of the employer's work, or to the risks to which the employer's business exposes the employé. Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; Kimbol v. Industrial Accident Commission, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595. In Ruth v. Witherspoon-Englar Co., 98 Kan. 179, 157 Pac. 403, L. R. A. 1916E, 1201, construing the Compensation Act of Kansas (Laws 1911, c. 218), the court held that recovery can be had only upon the basis of disability resulting from injury received in the course of employment, and that it cannot be augmented by the fact that the disabling effects of the injury are increased or prolonged by

incompetent or negligent surgical treatment, even where the employer is responsible therefor. The court said:

"So much of an employé's incapacity as is the direct result of unskillful medical treatment does not arise 'out of and in the course of his employment' within the meaning of that phrase as used in the statute. * * * For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence."

Of similar import is the decision of the Supreme Court of California in Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24.

[2] Error is assigned to the trial court's ruling that the causes of action were properly joined. The Compiled Laws of Alaska, § 916, provide:

"The plaintiff may unite several causes of action in the same complaint when they all arise out of: First, contract, express or implied; * * * second, injuries with or without force to the person. * * * But the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of trial, and must be separately stated."

Passing by the question whether or not the two causes of action here pleaded are for injuries "with or without force to the person," we entertain no doubt that they come within the first clause, in that they arise out of "contract express or implied." The Workmen's Compensation Act of Alaska is elective and not compulsory. It applies to those only who choose to avail themselves of its provisions, and agree to abide by its terms. All rights thereunder have their origin in the agreement of the parties. The plaintiff in his first cause of action does not recover on a liability arising out of the defendant's negligence, but on a liability arising out of contractual obligation, and which exists irrespective of the defendant's negligence. Winfield v. Erie R. Co., 88 N. J. Law, 619, 96 Atl. 394. In Madden's Case, 222 Mass. 487, 496, 111 N. E. 379, 383, L. R. A. 1916D, 1000, it is said:

"It is plain and has been said repeatedly that the act eliminates all consideration of tort, penalty, or negligence, save where there has been 'serious and willful misconduct.'"

Several assignments of error relate to exceptions to instructions given, and denial of instructions requested. They are all so plainly without merit as to require no discussion.

The judgment is affirmed.

GRAYSONIA-NASHVILLE LUMBER CO. v. GOLDMAN.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1917. Rehearing Denied January 28, 1918.)

No. 4959.

1. GUARANTY ⇐36(2)—CONSTRUCTION OF CONTRACT.
A contract by a corporation "to guarantee the principal and interest on the bonds" of another corporation, under the evidence in this case, *held* a guaranty of payment of the bonds, and not merely of their collection.

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2. CORPORATIONS ⇐388(2)—CONTRACTS—DEFENSE OF ULTRA VIRES—ESTOPPEL.
A lumber company made a contract of guaranty of the bonds of a railroad company which was owned by the same stockholders. It also received and used in its own business the greater part of the proceeds of the bonds. Both were Arkansas corporations. *Held*, that under the law of the state as established by decisions of its Supreme Court, which were binding on the federal courts, the lumber company could not plead the defense of ultra vires to its contract of guaranty.

Appeal from the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

Suit by Alvin D. Goldman, trustee, against the Nashville Lumber Company and the Graysonia-Nashville Lumber Company. Decree for complainant, and the last-named defendant appeals. Affirmed.

G. T. Priest, of St. Louis, Mo. (T. E. Francis and Boyle & Priest, all of St. Louis, Mo., on the brief), for appellant.

G. B. Rose, of Little Rock, Ark. (W. E. Hemingway, D. H. Cantrell, J. F. Loughborough, and V. M. Miles, all of Little Rock, Ark., on the brief), for appellee.

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

CARLAND, Circuit Judge. Appellant has appealed from a decree of foreclosure rendered against it and the Nashville Lumber Company, hereafter called "Lumber Company." The Lumber Company declined to join in the appeal and a severance was granted. The facts as they appear in the record are as follows: The Lumber Company and the Memphis, Paris & Gulf Railroad Company, hereafter called "Railroad Company," are corporations organized under the laws of the state of Arkansas. The line of the Railroad Company ran from Nashville to Ashdown in said state. The two corporations formed the usual combination of sawmill and Railroad Company in the timber country. The stock of each corporation was owned by the same individuals in practically the same proportions. W. W. Brown was president of the Railroad Company and vice president of the Lumber Company, in 1907–08. J. W. Bishop was secretary of both companies.

In December, 1907, both companies were in need of money and were willing to put up their respective properties as security for a loan. Mr. Brown went to the city of St. Louis and talked with appellee, who was then president of the Lesser-Goldman Cotton Company, hereafter called "Cotton Company," and as a result thereof on December 5, 1907, the Cotton Company entered into a contract with the Lumber Company, Mr. Brown signing the contract in behalf of the Lumber Company as vice president, whereby the Cotton Company agreed to purchase the bonds of the Railroad Company to the amount of $420,000 at 80 cents on the dollar. At the time this contract was entered into no bonds had been issued, and nothing was said in the contract as to who should be regarded as the vendor of the bonds. The contract, however, contained the following language: "The party of the second part (Lumber Company) agree to guarantee the principal and interest on the bonds." Jan-

uary 3, 1908, the stockholders of the Railroad Company authorized the issuance of $420,000 of the bonds of the Railroad Company to be payable on January 1, 1918, at the election of the Railroad Company, or if not paid on that day, to be paid on the 1st day of January, 1928, with the privilege on the part of the Railroad Company to redeem the bonds at any time after January 1, 1918. The bonds were to bear interest at 6 per cent. per annum, payable semiannually at the office of the Mercantile Trust Company in the city of Little Rock, Ark. At the same time it was resolved that the president or vice president and the secretary or assistant secretary of the Railroad Company be authorized and directed in the name and on behalf of the company to execute, acknowledge, and deliver to Alvin D. Goldman, as trustee (appellee), a mortgage and deed of trust to be dated January 1, 1908, mortgaging all of the railroad's franchises, equipment, and other property and income then owned by said company for the purpose of securing the payment of said issue of bonds. The bonds were issued and the deed of trust executed as provided in the resolution.

These bonds were purchased by the Cotton Company in pursuance of the contract of December 5, 1907. The deed of trust executed and delivered provided that if default should be made in the payment of any installment of interest on any of the bonds when and as the same should become payable, and such default should continue for the space of six months, the majority in amount of the owners of the bonds should have the authority to declare the whole amount of the bonds due and payable and the trustee should have the right and authority to proceed to protect his rights and the rights of the bondholders by a suit in equity for the foreclosure of said trust deed for interest or for principal and interest and for the enforcement of any other appropriate legal or equitable remedy as the trustee should deem mose effectual in support of his rights or duties under the trust deed. On January 3, 1908, the directors of the Lumber Company adopted a resolution authorizing the issuance of bonds of the Lumber Company in the amount of $750,000, and also authorizing the president or vice president and the secretary or assistant secretary of said Lumber Company to execute, acknowledge, and deliver to Alvin D. Goldman, trustee (appellee), a deed of trust, to be dated the 1st day of January, 1908, mortgaging, pledging, and hypothecating all of the property of the Lumber Company then owned by it or thereafter to be acquired, except its stock of lumber and merchandise kept for sale for the purpose of securing the payment of said issue of bonds. The property covered by this trust deed is the property in controversy, and the trust deed covering the same is the instrument which the decree of the court below ordered to be foreclosed. The resolution which authorized the issuance of bonds by the Lumber Company and the trust deed to secure the same were preceded by the following preamble which is set forth in the deed of trust:

"Whereas, the Memphis, Paris & Gulf Railroad Company has issued its certain series of mortgage bonds numbered 1 to 420 inclusive, each for the sum of one thousand dollars and aggregating a total amount of four hundred and twenty thousand dollars; and

"Whereas, this company has purchased the said bonds and has contracted

to sell the same to the Lesser-Goldman Cotton Company; and

"Whereas, it is contemplated that this company will require funds with which to purchase other timbered lands, and possibly to make improvements upon its plant; and

"Whereas, by the terms of the contract between this company and the said Lesser-Goldman Company this company is to guaranty the payment of the said bonds of the said Memphis, Paris & Gulf Railroad Company, and also the payment of all interest thereon as it matures, and also the compliance by said Memphis, Paris & Gulf Railroad Company with all the terms of the deed of trust or mortgage securing the payment of said bonds."

And the resolutions themselves which were incorporated in the deed of trust contained the following language:

"Four hundred and twenty of said bonds shall immediately be certified by the trustee and deposited with the said Mercantile Trust Company, which shall hold the same as collateral security for the payment of the four hundred and twenty bonds of the Memphis, Paris & Gulf Railroad Company hereinbefore referred to, and for the performance of all the conditions and covenants of the mortgage or deed of trust securing the said bonds; and any default in the payment of said bonds of the Memphis, Paris & Gulf Railroad Company, or any default in complying with any of the terms and conditions of the mortgage securing the said bonds, shall be deemed a default under the terms of the instrument, and shall entitle the trustee herein to the same rights and remedies which he would have in case a default should be made in the payment of the bonds hereby secured, or the coupons thereon, or in the performance of the covenants and conditions of this indenture. * * *

"The said lumber company shall maintain upon its property insurance in a company satisfactory to the trustee to the amount of at least forty-two thousand dollars on its mill plant and 85 per cent. of the stock of lumber on hand; the policies of insurance to be made payable to the trustee, with the standard mortgage clause thereto attached, protecting the trustee and the bondholders against forfeiture by reason of breaches on the part of the lumber company.

"In case of any loss under said policies of insurance the same shall be paid to the said trustee, who shall deposit the same in the said Mercantile Trust Company."

The same remedies in behalf of the bondholder were given in the trust deed of the Lumber Company as in the trust deed of the Railroad Company. The Railroad Company defaulted in the payment of interest on its bonds, and the Lumber Company did not comply with the provision in regard to insurance, whereupon the trustee at the request of the bondholders declared the principal of the bonds due and payable. It does not appear that any bonds were ever issued by the Lumber Company, but this is immaterial, as no one is before the court who holds or owns any of said bonds or is asking for their payment. The Cotton Company paid $336,000, for the bonds of the Railroad Company. The Lumber Company received $236,000 of this amount, and the Railroad Company $100,000. The Lumber Company gave its notes to the Railroad Company for the $236,000, but these notes were subsequently canceled by the Railroad Company as they well might be; the claim that the corporations were different legal entities being in a court of equity a mere fiction. On December 9, 1911, the Lumber Company by special warranty deed conveyed all of the mortgaged property to appellant. In this deed appears the following language:

"This conveyance is also made subject to the instrument executed by the Nashville Lumber Company to A. D. Goldman, trustee, whereby certain bonds of the Memphis, Paris & Gulf Railroad Company were guaranteed."

[1] On the above state of facts counsel for appellant contends that the guaranty of the Lumber Company was a guaranty of the collection of the amount due on the railroad bonds and not a guaranty of payment, and therefore the appellee was not entitled to a foreclosure of the Lumber Company mortgage until he had exhausted his remedy against the Railroad Company. The contract between the Lumber Company and the Cotton Company contained the agreement on the part of the Lumber Company "to guarantee the principal and interest on the bonds." When the corporation itself came to perform such agreement by passing the resolutions of January 3, 1908, it recited:

"By the terms of the contract between this company and the said Lesser-Goldman Company this company is to guarantee the payment of the said bonds of the said Memphis, Paris & Gulf Railroad Company, and also the payment of all interest thereon as it matures, and also the compliance by said Memphis, Paris & Gulf Railroad Company with all the terms of the deed of trust or mortgage securing the payment of said bonds."

We are of the opinion if there was any doubt about what the contract meant the Lumber Company made it plain by its interpretation of the same in the resolutions which it passed. We think the language used constituted a guarantee of payment. 20 Cyc. 1450; 1 Brandt on Suretyship and Guaranty, § 97; Barnes v. Bradley, 56 Ark. 105, 19 S. W. 319; Walker v. Files, 94 Ark. 456, 127 S. W. 739; 32 Cyc. p. 143.

[2] It is next contended that the contract of guaranty by the Lumber Company was ultra vires. As the articles of incorporation of the Lumber Company originally stood, there would probably be merit in this contention; but on January 3, 1908, for the very purpose of meeting this difficulty the stockholders of the corporation by unanimous resolution amended the articles of incorporation so as to provide:

"That its corporate power shall include the erecting and operating a sawmill, planing mill, spoke, lath, handle and a furniture factory, using all kinds of wood-working machinery; to manufacture and deal in all kinds of timber, lumber and the products thereof, finished and unfinished; to own and dispose of real property, improved and unimproved, including city property; to make improvements on real estate, erect houses, rent, lease and sell the same; to carry on a general mercantile business; to build and operate trams in connection with said sawmill business; and to do and perform everything necessary, incident and requisite to carrying out in full the several objects aforesaid; to buy, own and sell the stocks of railroads and other corporations; to guarantee payment of the same, and of the compliance by the company or companies issuing the same with the terms of the mortgages under which they are issued; and to mortgage its own property for the purpose of securing the payment of any bonds or other corporations which it may guarantee; and to insure compliance with the terms and conditions of the contracts and mortgages under which said guaranteed bonds may be issued."

This resolution was published in the Nashville News for a period of one week, the first insertion being January 21, 1908. It was also recorded in Howard county, Ark., January 31, 1908. Just when the amendment became effective under the laws of Arkansas is not clear; but, if it was not in force when the trust deed was given, we are of the opinion that under the facts in this case it is not open to the

Lumber Company to set up the defense of ultra vires. Equity looking through the forms by which the Lumber Company and the Railroad Company framed their transactions will observe the substance of things, and in so doing it appears in this case that the guaranty of the Lumber Company was simply an agreement on the part of the same parties who issued the railroad bonds to pay their own indebtedness. Further than this, it appears that the Lumber Company received $236,000 of the money paid by the Cotton Company for the railroad bonds for no other consideration than its promise to pay the railroad bonds. Under this state of facts, the Lumber Company was more of a debtor than the Railroad Company. The rule that one who has received the benefit of a contract which is simply ultra vires and not contrary to good morals may not plead the defense of ultra vires is fully sustained by the decisions of the Supreme Court of Arkansas, of which state the Lumber Company was a corporation. Dunbar v. Cazort & McGhee Co., 96 Ark. 310, 131 S. W. 698; Richeson v. National Bank of Mena, 96 Ark. 602, 132 S. W. 913; Minneapolis Fire Ins. v. Norman, 74 Ark. 190, 85 S. W. 229, 109 Am. St. Rep. 74, 4 Ann. Cas. 1045; Arkadelphia Lumber Co. v. Posey, 74 Ark. 377, 84 S. W. 1127; Bloom v. Home Ins. Co., 91 Ark. 368, 121 S. W. 293. The law in this respect as announced by the Supreme Court of Arkansas is to be followed by us. Eastern Building & Loan Assn. v. Ebaugh, 185 U. S. 114, 22 Sup. Ct. 566, 46 L. Ed. 830; Mudge v. Black, 224 Fed. 923, 140 C. C. A. 397. The argument of counsel for appellant that the bonds which were to be issued by the Lumber Company would have been invalid under article 12, § 8, of the Constitution of Arkansas, is irrelevant in this case. As we have said before, no person is before the court seeking the enforcement of any bond issued by the Lumber Company, and it is stated in the brief of counsel for appellee that no such bonds were issued. No liability is sought to be enforced against the Lumber Company except the mortgage which it gave to secure the payment of the principal and interest of the railroad bonds. We therefore decide that the contract of guaranty was one of payment and not of collection, and that if the contract was ultra vires the corporation is not entitled to set up such defense on the facts as they appear in the record.

The decree below is affirmed.

LINDAUER et al. v. COMPANIA PALOMAS DE TERRENOS Y GANADOS, SOCIEDAD ANONIMO, et al.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1917. Rehearing Denied January 28, 1918.)

No. 4910.

1. COURTS ⊕317—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES.

A suit to enjoin persons from illegally and fraudulently assuming to act as officers and directors of a corporation is one in the right of the corporation and to which it is an indispensable party, and if it is made a defend-

ant, but joins in the prayer of the bill, it will be aligned as a complainant for the purposes of determining the jurisdiction of a federal court.

2. COURTS ⊂=316—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.

By making persons who are necessary parties plaintiff defendants, jurisdiction is not conferred upon a federal court, where, if they had been made plaintiffs, there would not have been the necessary diversity of citizenship.

Appeal from the District Court of the United States for the District of New Mexico; John H. Cotteral, Judge.

Suit by the Compania Palomas de Terrenos y Ganados, Sociedad Anonimo, and another, against Sigmund Lindauer, Arthur A. Temke, and others. Decree for complainants, and the defendants named appeal. Reversed.

Walter D. Hawk, of Chicago, Ill., and A. B. Renehan, of Santa Fé, N. M. (George A. Miller and Samuel S. Holmes, both of Chicago, Ill., and E. R. Wright, of Santa Fé, N. M., on the brief), for appellants.

James R. Garfield, of Cleveland, Ohio, and D. J. Cable, of Lima, Ohio (Francis C. Wilson, of Santa Fé, N. M., on the brief), for appellees.

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

CARLAND, Circuit Judge. Appellees, corporations of the republic of Mexico, commenced this action in the United States District Court, District of New Mexico, against Walter D. Hawk, Samuel S. Holmes, citizens of Illinois, Sigmund Lindauer, Arthur A. Temke, citizens of New Mexico, Luis Huller, a citizen of the republic of Mexico, and the Northwestern Colonization & Improvement Company of Chihuahua, hereafter called the Northwestern Company, a corporation organized under the laws of New Mexico.

The complaint among other things alleged that appellees were the owners of 822,510 acres of land in the republic of Mexico, described by metes and bounds in the complaint, lying along the boundary line between the United States and said republic; that this land was formerly owned by Luis Huller, deceased, father of Luis Huller, one of the defendants; that Huller, Sr., caused the Northwestern Company to be incorporated under the laws of the territory of New Mexico on or about the 9th day of March, 1889; that said corporation continued to exist and still exists as a lawful corporation under the laws of the state of New Mexico; that Huller, Sr., conveyed the above-mentioned lands to said Northwestern Company in consideration of the issuance to him by said corporation of $600,000 in the bonds of said corporation, secured by a mortgage upon the land conveyed, in favor of the Mercantile Trust Company of New York, as trustee, and 499,991 shares of the stock of said corporation of the par value of $10 per share; that subsequently one John C. Sanders, a citizen of the state of Ohio, was substituted as trustee in the mortgage in place of the Trust Company; that during the month of April, 1902, said Sanders,

trustee, entered suit in the Second civil court of the city of Mexico for the bondholders under said mortgage to recover the principal and interest evidenced by said bonds, and for a sale of the land described in the mortgage; that such proceedings were thereafter had in said suit that a final judgment and decree was entered therein, whereby the lands covered by said mortgage were sold, one parcel thereof to Compania Palomas de Terrenos y Ganados, Sociedad Anonimo, and the other to Compania de Dublan de Aguas y Colonization, Sociedad Anonimo, appellees herein; that, notwithstanding appellee's title to said lands, said defendants Hawk, Holmes, Temke, Lindauer, and Huller had conspired and confederated together for the purpose of making for and in behalf of said Huller, Carmen Huller de Niles, and Theresa Marie Huller, heirs of Luis Huller, deceased, and said Huller, as administrator of the estate of Luis Huller, deceased, a false and fraudulent claim to the effect that said heirs or the said administrator of the estate of the said Luis Huller, deceased, or some of them were at all times the owners of the stock and bonds of the said Northwestern Company, that the sale of the lands by virtue of the proceedings in the Second civil court of the city of Mexico, was a nullity and void, and that the Northwestern Company, and not appellees, was the owner of the lands and entitled to the possession thereof.

The complaint then alleged the commission of acts by the defendants, above named, whereby they represented and pretended that they were officers and directors of the Northwestern Company, and had pretended to hold a meeting of the directors and stockholders of said corporation at Deming, N. M., for the express purpose of clouding the title to plaintiff's land. The prayer of the complaint asked for a writ of injunction to be directed to the defendants Hawk, Holmes, Temke, Huller, and Lindauer, restraining them and each of them, their agents, servants, and employés, from in any manner acting or pretending to act for or in behalf of the Northwestern Company, and from committing as pretended officers, agents, stockholders, or directors of the said corporation any of the acts complained of in the complaint. This relief was granted as to Temke and Lindauer.

The appellees dismissed the action as to the defendant Luis Huller on objection being made that he was a citizen of the republic of Mexico, and therefore not suable by corporations of the same republic. The action was dismissed by the court as to the defendants Hawk and Holmes for the reason that they were citizens of Illinois, and could not be sued against their consent in the district of New Mexico. This left the case pending against Temke, Lindauer, and the Northwestern Company. There were two sets of answers filed in the case by the Northwestern Company; one set, consisting of two answers, may be termed fighting answers. These answers, however, were stricken from the action by the final decree, rendered in favor of appellees, on the ground that the appearances and answers in the cause of Mr. Walter D. Hawk, Mr. George A. Miller, Messrs. Renehan & Wright, and Mr. Raymond W. Beach, in behalf of said corporation, were without authority from said corporation. This action of the court left two answers signed by the Northwestern Company, by O. M. Stafford, presi-

dent, and by H. B. Jamison and Manuel U. Vigil, attorneys. These two answers were practically the same, one being to the original complaint and the other to the so-called amended complaint. These answers were for all practical purposes complaints in line with that of appellees, and each contained the following prayer:

"And further this defendant prays that upon final hearing this honorable court find and decree that said meeting of Luis Huller, Walter D. Hawk, Arthur A. Temke, S. Lindauer, and their associates held in Deming, N. M., December 14, 1910, was not a meeting of the Northwestern Colonization & Improvement Company of Chihuahua, its stockholders, or its directors; that any and all acts taken by any of said persons or their associates for or in the name of the Northwestern Colonization & Improvement Company of Chihuahua were and are illegal and void; that any and all powers of attorney executed and issued by any of said persons or their associates to Burton W. Wilson, Jorge Vera Estanol, Romulo Becerra, or any other person or persons for or in the name of the Northwestern Colonization & Improvement Company of Chihuahua were and are illegal and void; and that any and all certificates executed and issued by any of said persons or their associates for or in the name of the Northwestern Colonization & Improvement Company of Chihuahua and filed in the office of the secretary of state of New Mexico or the office of the commissioner of corporations of New Mexico were and are illegal and void."

[1] No relief was prayed against the Northwestern Company, and none was granted; therefore it did not join with the other defendants in their appeal. Several motions were made, during the pendency of the case in the court below, to dismiss the action for want of jurisdiction; but an examination of the record does not show that the specific point now urged by counsel for appellants was brought to the attention of the court. It is now insisted, however, by oral argument and in brief, that the court below had no jurisdiction of the action, because, when the parties to the action are properly aligned, it develops that the Northwestern Company must be aligned with the plaintiffs, and when that is done it comes to pass that there is a plaintiff who is a citizen of New Mexico, of which state Lindauer and Temke, the only remaining defendants, are also citizens. We think this contention must prevail.

The Northwestern Company was a necessary and indispensable party to the action, either as defendant or plaintiff. Appellees own no interest or stock in the corporation, and the right to complain of the acts of defendants in pretending to be stockholders and directors of the corporation was a right of the corporation, and the action could not be maintained without the corporation was before the court. The Northwestern Company by its answers joined the plaintiffs in their demand. No relief was prayed or granted against the Northwestern Company. There is no allegation in the complaint that it refused to join the plaintiffs, as plaintiffs, and at this point we may quote with propriety the language used by the Supreme Court of the United States in a recent opinion filed May 21, 1917, in the case of Hamer et al. v. N. Y. Rys. Co., 244 U. S. 266, 37 Sup. Ct. 511, 61 L. Ed. 1125, as follows:

"No reason is assigned in the bill or in the answer of the Trust Company for its refusal to sue; and none suggests itself save the willingness of an accommodating trustee to enable its beneficiaries to present that appearance or diversity of citizenship essential to conducting this litigation in the federal court."

[2] If the District Court had no jurisdiction of the action, then we have none, except to decide that question, and anything we might say upon the merits would be without authority. By making persons who are necessary parties plaintiff defendants, jurisdiction is not conferred upon a federal court where, if they had been made plaintiffs, there would not have been the necessary diversity of citizenship. Bland v. Fleeman (D. C.) 29 Fed. 669. We are satisfied that under the authority of Hamer et al. v. New York Railways Co. et al., supra, Blacklock v. Small, 127 U. S. 96, 104, 8 Sup. Ct. 1096, 32 L. Ed. 70, Harter v. Kernochan, 103 U. S. 562, 26 L. Ed. 411, Pacific Railroad v. Ketchum, 101 U. S. 289, 25 L. Ed. 932, Allen-West Commission Co. v. Brashear, (C. C.) 176 Fed. 119, and Shipp v. Williams, 62 Fed. 4, 10 C. C. A. 247, it is our clear duty to arrange the parties to the action by placing the Northwestern Company where it has placed itself on the side of the plaintiffs, and, when that is done, it becomes necessary to reverse the judgment below and remand the case, with instructions to dismiss the action for want of jurisdiction; and it is so ordered.

The motion to dismiss the appeal is denied.

LEHIGH & WILKES-BARRE COAL CO. v. SAWICKAS.

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

No. 43.

1. MASTER AND SERVANT ⟸118(9)—MASTER'S LIABILITY FOR INJURY TO SERVANT—USE OF DANGEROUS TOOLS.

Plaintiff, while employed as a miner in defendant's coal mine, was injured by the premature explosion of a powder charge, which he and his helper were shoving into a hole with a steel tamping bar. He had worked in the mine for six years, the last three as a certified miner under the state law (Act June 2, 1891 [P. L. 196]), furnishing his own tools. There was a statutory provision that no tight cartridge should be rammed into a hole with an iron or steel tamping bar, unless the end of the bar was tipped with at least six inches of copper or other soft metal. The bar used by plaintiff was not so tipped, but the cartridge was loose and the hole damp. The method used was customary, and had never previously been known to explode the charge. Plaintiff's theory was that the explosion was caused by a spark struck from rock or "sulphur" by the bar, and the negligence charged against defendant was in permitting plaintiff to use such bar. *Held* that, as such use had not been shown by experience to be dangerous, there was nothing to charge defendant with the duty of preventing it, and that, if it was dangerous, the danger was as patent to plaintiff, as a certified miner, as to defendant; that there was no evidence of negligence to sustain a verdict against defendant.

2. MASTER AND SERVANT ⟸107(1)—MASTER'S LIABILITY FOR INJURY TO SERVANT—USE OF DANGEROUS TOOLS.

The rule charging the master under certain circumstances with the consequences of his servant's use of an unsafe tool does not apply, when the cause of hurt is not furnished by the master, who is not charged with the duty of providing the same.

3. MASTER AND SERVANT ⟸152—MASTER'S LIABILITY FOR INJURY TO SERVANT—FAILURE TO INSTRUCT.

One who holds himself out as skilled in a trade, and thereby procures employment, cannot hold his employer liable for failure to instruct him

in a matter he must be assumed to know in order successfully to pursue that trade.

Learned Hand, District Judge, dissenting.

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

Action at law by Vincent Sawickas against the Lehigh & Wilkes-Barre Coal Company. Judgment for plaintiff, and defendant brings error. Reversed.

Sawickas was a miner in the employ of the Coal Company, and while so employed, and in Pennsylvania, received serious personal injuries by the premature explosion of a blast, which he was preparing with the assistance of his workman or helper. This suit is to recover damages for such injuries. The explosion killed the helper, and no other person was very near when the accident happened, wherefore Sawickas' evidence as to occurrences preceding explosion is the only direct testimony thereupon. By that evidence he was, when injured, 26 years old, had worked in the same mine 6 years, nearly 3 as a laborer or helper, and over 3 as a certified miner, i. e., a person examined by state authority, and given a certificate as qualified to be a miner in "any anthracite coal mine" in Pennsylvania. It was unlawful to employ as a miner any uncertified person. Act Pa. June 2, 1891.

He owned his own tools, and could get them where he chose, though as matter of fact he had procured them all at the company's store. He had fired thousands of blasts before this accident. For the charge that injured him he and his helper bored a hole some six feet deep, prepared a powder cartridge, put it in the hole with fuse attached, as far as possible by hand, and then shoved it back (so as to plant the cartridge at the bottom of the hole) with a steel tamping bar, thus bringing the metal bar end in contact with the powder cartridge, and not with a wad of dirt or other nonexplosive. While so shoving back the cartridge, it exploded, throwing down considerable coal, but also blowing out of the untamped blast hole flame and burning powder.

The coal vein on which the injured men were working contains some hard rock, locally known as "sulphur." This Sawickas had long known, and he bored through or past some of it in preparing the blast hole which prematurely fired. He had heard that a blow with steel on "sulphur" would produce sparks, but had never seen it himself. The blast that injured him he was preparing in his usual way, a method he had learned from the miners with whom he had worked before getting his certificate; nor had he ever at any time been instructed or warned that it was dangerous. His entire mining experience had been obtained in defendant's mine.

The Pennsylvania Mining Act (Act June 2, 1891 [P. L. 196]), above referred to, authorizes the following statutory rule: "(30) In charging holes for blasting in slate or rock in any mine, no iron or steel pointed needle shall be used, and a tight cartridge shall not be rammed into a hole in coal, slate or rock with an iron or steel tamping bar, unless the end of the tamping bar is tipped with at least six inches of copper, or other soft metal."

Sawickas had no tamping bar with a copper or other soft metal end, nor had any one ever ordered or recommended that he get one. The cartridge that exploded was, however, not tight, and the blast hole was damp.

Another statutory rule (54) requires that an abstract of said rules and statute "shall be posted up in legible characters in some conspicuous place or places at or near" every mine. Plaintiff testified that he had never seen anything of the kind; there was abundant evidence that such posting had been effected at two places near the mine, necessarily frequented by every miner.

The assignments of error substantially challenge the refusal of the trial judge to direct a verdict for defendant.

De Forest Bros. and Gomer H. Rees, both of New York City (Nathan A. Smyth, Gomer H. Rees, and Leslie Reid, all of New York City, of counsel), for plaintiff in error.

Baltrus S. Yankaus, of New York City (Albert Massey, of New York City, of counsel), for defendant in error.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

HOUGH, Circuit Judge (after stating the facts as above). [1] We assume the facts to be as related by the plaintiff below. The action as brought depended, not only upon general rules of law, but on the Employers' Liability Act and mining statutes of Pennsylvania. Of these statutes it is enough to say that none of them makes of the employer or mine owner an insurer. Plaintiff was obliged to prove affirmatively as a prerequisite for recovery that defendant below had been guilty of some actionable negligence.

The complaint herein was supplemented by a bill of particulars, and on turning to that document, to ascertain the sort or kind of negligence of which defendant complains, we find but one allegation which, in the light of Sawickas' own story, needs consideration. The bill asserts in a variety of ways that it was negligent to permit, and not to prevent, plaintiff below from using an iron or steel tamping bar without a copper or other soft metal head.

Assuming for argument's sake that any such duty lay upon the defendant below, it is still necessary to find some causal connection between the use of an uncapped tamper and the explosion producing injury. The plaintiff's theory (and the word is used advisedly) is that the steel tamper must have struck "sulphur," thereby produced a spark, which spark ignited the cartridge and caused the explosion, and that this train of circumstances happened in a damp hole, and had never anywhere happened before to the knowledge of plaintiff, or (it may be added) of any one else who testified herein.

But let it be assumed that the plaintiff below was injured because he was putting in a blast in an improper manner, and especially with an improper tool, that in so doing he did strike a spark, and as a consequence thereof received the injury complained of. He was a certified miner, not only a proper person, but the only kind of person lawfully authorized to do the work he was doing. He had been used to this labor for years, and if it be true that sparks may be produced from damp rock by blows from a steel tamper, he for years had had opportunity of learning the truth about the matter, larger than that of all except other miners. Knowledge of such dangers was part of a miner's equipment for his work, and to ascertain and remember the fact required nothing but ordinary judgment and common observation.

A master is not bound to warn a servant of dangers so patent as to be readily observed by the reasonable use of the senses, considering the age, intelligence, and experience of the observer. Chicago, etc., Co. v. Shalstrom, 195 Fed. 725, 115 C. C. A. 515, 45 L. R. A. (N. S.) 387; King v. Morgan, 109 Fed. 446, 48 C. C. A. 507; Lindsay v. New York, etc., Co., 112 Fed. 384, 50 C. C. A. 298; Crawford v. American, etc., Co., 123 Fed. 275, 59 C. C. A. 293. A knowledge of danger may be presumed from the servant's "abundant opportunities of observation" (Fletcher v. Traction Co., 190 Pa. 117, 42 Atl. 527), and the court may draw such inference (Borck v. Michigan, etc., Works, 111 Mich. 129,

69 N. W. 254). Knowledge of a trade, gained by working thereat, compels a servant to assume the patent dangers thereof, just as fully as does knowledge gained by teaching or instruction in its ordinary sense. Brotzki v. Wisconsin, etc., Co., 142 Wis. 380, 125 N. W. 916, 27 L. R. A. (N. S.) 982.

[2, 3] The rule charging a master, under many circumstances, with the consequences of his servant's using an unsafe contrivance, does not apply when the cause of hurt is not furnished by the master, who is not charged with the duty of providing the same. McKean v. Colorado, etc., Co., 18 Colo. App. 292, 71 Pac. 425, and cases cited. One who holds himself out as skilled in a trade, and thereby procures employment, cannot hold his employer liable for failure to instruct him in a matter he must be assumed to know, in order successfully to pursue that trade. Hammond v. Union, etc., Co., 136 App. Div. 102, 120 N. Y. Supp. 652. Since there is no proof that the master knew of the alleged danger in Sawickas' tools or methods, or that such danger was so notorious that knowledge thereof must be imputed, such decisions as Griffiths v. London, etc., Co., L. R. 12 Q. B. Div. 495, McGowan v. La Plata, etc., Co. (C. C.) 9 Fed. 861, and Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464, do not apply.

While holding, as above indicated, that defendant below had a right to rely upon this certified miner's knowledge of the matter suggested as the cause of injury, it is also true that, if the accident happened in the way and for the cause necessarily found by the jury, such cause of injury was an unusual and therefore unheard of incident; and the proofs, so far from showing that spark danger with a loose cartridge and a damp hole was usual, make it plain that it could not have been warned against because no one had ever heard of such a thing happening. To predicate negligence on lack of a warning not based on either experience or observation is, we think, unheard of.

It is urged that rule 30, supra, was violated by the use of the tamping bar without a soft metal head. But this rule applies only to instances where a "tight cartridge" is being rammed into a hole. The cartridge in this instance was not tight, and the rule inapplicable.

Finally, it is suggested that defendant is liable because it did not have the statute and rules posted in compliance with the rule, supra. Of this contention it may be observed (1) that in response to appropriate interrogatories no such charge of negligence is contained in the bill of particulars; (2) since the cartridge was not tight, there was no violation of the rule, and the injury could not have flowed from a failure to post rules which were not violated; (3) plaintiff does not testify that the rules were not posted, but only that he had not seen them. This is unavailing against uncontradicted evidence that they were posted in several places in compliance with the statute.

A verdict should have been directed for defendant below. Judgment reversed, with costs.

LEARNED HAND, District Judge (dissenting). There was some evidence that a spark from the bar fired the charge. Suppose the bar had ruptured the cartridge and exposed the powder. One witness,

Joseph Dapkawitz, swore that powder would fire from such a spark. Assuming that the accident did happen as the plaintiff said, I can see no other explanation. I might have thought the explanation too improbable to allow me to accept the story at all; but if I did accept the story, and here I must, I should have taken the explanation with it as the only possible way to account for the explosion which indubitably happened. The existence of rule 30, moreover, appears to me to show that it was known that similar explosions might occur, and the whole evidence of the supposed danger from the method adopted corroborates the possibility.

Nor can I see, especially if the plaintiff's explanation of the explosion is thrown out as beyond any legitimate inferences from the evidence, how it can be supposed that ordinary judgment and common observation would have disclosed the danger. I agree that experience showed it was a very remote danger; apparently this was the first instance of it. How far it should have been anticipated was another matter. If the miner were on an equal footing of experience with the owner, there would be, of course, no reason to require the owner to instruct him. Surely he is not. Seeing the work going on about him in the way which eventually undid him, and having no instruction against it, the jury might have concluded that a prudent man would think it safe.

Yet I think that there was room to say that the danger was enough within customary foresight to charge an owner with some precautions. Rule 30 does not, of course, cover this case, but it shows that, when a steel bar ruptures a tight cartridge, its sparks may fire the powder. The question is whether, if a steel bar is used to tamp a free cartridge, it may not rupture it, and then fire it in the same way. It is true that this contingency was apparently too remote to justify a rule against it, but not conclusive. Some of the witnesses said that they put a dirt wad between the bar and the cartridge when driving it in, and Rowan, a supposed expert, said that to drive it in with a steel bar was dangerous. One of the defendant's own witnesses, Kelly, said that there was a tradition among miners against it, though he himself thought it safe. The fact that no instance of explosion from the method was recorded does not, however, necessarily absolve the master from precautions. I cannot see how we may take from the jury the question whether the traditional fear among miners was wholly unfounded.

Finally, the plaintiff's certification as a miner under the law seems to me irrelevant. It had no effect upon the mutual duties of the parties; the law was only a police regulation of Pennsylvania. I agree that, if a stranger presented such a certificate, the master might assume that he already possessed the rudiments of his calling. The critical question, however, is always this: How far would a prudent master suppose the servant qualified? If the master had other evidence bearing on his qualifications, the certificate would only be evidence with the rest, going to establish how far he might think instructions necessary. Here the master knew just what the miner's experience had been. At most he could only have asked that the jury consider whether the board's certification of the plaintiff might not have assured him

that the plaintiff must have learned in some other way of those dangers which the master himself had failed to teach him. I cannot see why we should say that it must have satisfied him. To say the master may excuse his default, because an official fails to detect its result, must perplex the victim of each.

While I should not have reached this verdict myself, I cannot see how we can reverse the judgment without taking over the decision of what have aways been called questions of fact. I dissent.

ROYAL TRUST CO. et al. v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.

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

No. 144.

1. INSURANCE ⊂⊃38—INSURANCE COMPANIES—CONSTRUCTION OF CHARTER—OWNERSHIP OF SURPLUS.

The charter of a stock life insurance company provided that holders of the stock might receive dividends thereon not to exceed 7 per cent. per annum, and that the earnings and receipts of the company over and above the dividends, losses, and expenses should be accumulated; also that the business of the company should be conducted on the mutual plan; that the officers should cause a balance of the affairs of the company to be struck annually, exhibiting its assets and liabilities, and also the net surplus, after deducting a sufficient amount to cover all outstanding risks and other obligations; and that each policy holder should be credited with an equitable share of the said surplus, to be applied as therein specified. *Held*, that such net surplus belonged to the policy holders, and that the stockholders had no interest therein which entitled them to an injunction restraining the company from using it for the purchase of its stock for retirement in carrying out a plan for its conversion into a mutual company as authorized by a state statute.

2. INSURANCE ⊂⊃34—INSURANCE COMPANIES—CONVERSION FROM STOCK TO MUTUAL COMPANY—RIGHTS OF STOCKHOLDERS.

In the case of a life insurance corporation, whose net earnings do not belong to its stockholders, but to its policy holders, an owner of a majority of the stock does not stand in the same trust relation to minority stockholders as in ordinary corporations, and where the company is authorized by statute to use such earnings for the purchase and retirement of its stock and its conversion into a mutual company, such majority stockholder has the same right as the minority stockholders to negotiate for the sale of his stock and to obtain the best price possible therefor, in view of his controlling interest.

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

Suit in equity by the Royal Trust Company, Lucy Adaline Hurd Van Horne, Adaline Van Horne, and Richard Benedict Van Horne, as executors and trustees under the will of Sir William C. Van Horne, against the Equitable Life Assurance Society of the United States. From an order denying a preliminary injunction, complainants appeal. Affirmed.

Lord, Day & Lord, of New York City (Henry De Forest Baldwin and F. C. Nicodemus, Jr., both of New York City, of counsel), for appellants.

Alexander & Green, of New York City (Charles E. Hughes and Allan McCulloh, both of New York City, of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is an appeal from an order of Judge Hough denying a motion for an injunction pendente lite. The bill alleges that the complainants are stockholders of the Equitable Life Assurance Society of the United States, which was incorporated in 1859 as a stock company under a general law of the state of New York enacted June 24, 1853, entitled "An act to provide for the incorporation of life and health insurance companies and in relation to the agencies of such companies." Laws 1853, c. 463. The capital consisted of 1,000 shares, of $100 each, fully paid and invested in securities deposited as required by law with the comptroller of the state of New York. The business authorized to be done was to make insurances on lives and to grant, purchase or dispose of annuities.

Article 3 of the charter reads:

"The capital of said company shall be one hundred thousand dollars in cash, divided into one thousand shares of one hundred dollars each, which shall be personal property, transferable only on the books of the company, in conformity with its by-laws. The holders of the said capital stock may receive a semiannual dividend on the stock so held by them, not to exceed three and one-half per cent. of the same; such dividends to be paid at the times and in the manner designated by the directors of said company. The earnings and receipts of said company, over and above the dividends, losses, and expenses, shall be accumulated."

Article 6, so far as material, provided:

"The insurance business of the company shall be conducted upon the mutual plan. * * * The officers of the company, within sixty days from the expiration of the first five years from December 31, 1859, and within the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, which shall exhibit its assets and liabilities, both present and contingent, and also the net surplus, after deducting a sufficient amount to cover all outstanding risks, and other obligations. Each policy holder shall be credited with an equitable share of the said surplus. Such equitable share, after being ascertained, shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself), expressing the reversionary value of such equitable share at such interest as the directors may designate, or if any policy holder so direct, such equitable share of surplus shall be applied to the purchase of an annuity at such rate of interest as the directors shall designate, to be applied in the reduction of his or her future premiums."

This requirement was subsequently made annual. Under the law of New York at the time the Equitable Society was organized no purely mutual life insurance company could be incorporated. The law required a paid-up capital of not less than $100,000 to be invested in certain specified securities and deposited with the state comptroller at Albany. Such companies, however, were not prohibited from doing mutual business, that is, the insurance of persons who should be en-

titled to a ratable proportion of the surplus profits of the business, and the society does and always has done both participating and nonparticipating business, the former being by far the larger.

Section 95 of chapter 326, Laws of 1906, authorized the conversion of stock life insurance corporations into mutual corporations, and from that time the mutualization of this Society has been desired. July 19, 1917, a committee theretofore appointed by the board of directors reported a plan, and about the same time sections 16 and 95 of the Insurance Law (Consol. Laws N. Y. c. 28) were amended (Laws 1917, c. 301), no doubt in aid of the plan proposed by the committee, which was as follows: The Society is to purchase T. Coleman Du Pont's block of stock, consisting of 564 shares, paying him $5,400 per share for 501 shares and $1,500 per share for the remaining 63 shares and $1,500 per share for the 436 shares held by others if offered for sale within 90 days after the consummation of the plan, and a price not exceeding that sum if offered thereafter.

The purchase money for Du Pont's stock, amounting to some $3,000,000, is not to be paid down, but in installments between November 1, 1917, and May 1, 1937, out of the interest payable semiannually by the Equitable Office Building Corporation on a purchase-money mortgage of $20,500,000 executed by the Building Corporation on land formerly belonging to the Equitable Society, on which it has erected an office building known as the Equitable Building. In addition, the Equitable Society is to release to the Building Corporation its right under a previous agreement to 9 per cent. of all dividends paid by the Building Corporation out of its surplus earnings on its common stock. All stock purchased is to be held by trustees, who are to vote the same until the whole capital has been acquired, whereupon it shall be retired and canceled.

Section 95 of the Insurance Law as amended permits any stock life insurance company to become a mutual company by acquiring its capital stock, provided the terms of purchase be approved (1) by the board of directors; (2) by a vote of the stockholders at a special meeting; (3) by a vote of the policy holders in person or by proxy at a special meeting called for the purpose; (4) by the superintendent of insurance. Section 16 of the Insurance Law as amended provides:

"* * * If a stock life insurance corporation shall determine to become a mutual life insurance corporation, it may, in carrying out any plan to that end under the provisions of section 95 of this chapter, acquire any shares of its own stock by gift, bequest or purchase. And until all of such shares are acquired, any shares so acquired shall be acquired in trust for the policy holders of the corporation as hereinafter provided and shall be assigned and transferred on the books of the corporation to three trustees and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote, until all of the capital stock of such corporation is acquired when the entire capital stock shall be retired and canceled and thereupon, unless sooner incorporated as such, the corporation shall be and become a mutual life insurance corporation without capital stock. * * * All dividends and other sums received by said trustees on said shares of stock so acquired, after paying the necessary expenses of executing said trust, shall be immediately repaid to said corporation for the benefit of all who are or may become policy holders of said corporation and entitled to participate in the profits thereof, and shall be added to and become a part of

the surplus earned by said corporation and be apportionable accordingly as a part of said surplus among said policy holders." Laws N. Y. 1917, c. 301, § 1.

The plan proposed by the committee was approved by the board of directors of the Equitable Society and afterwards by the stockholders at a special meeting, and the Society was about to call a meeting of the policy holders when the bill was filed. The bill charges that the proposed plan is illegal, because it has been so far carried through by the vote of a board of directors, elected by Du Pont and by a stock vote controlled by him; that the price to be paid by the Equitable Society of $5,400 per share for 501 shares of his holdings is exorbitant and a waste of the company's surplus; that Du Pont by means of his stock control is bringing about an illegal discrimination in his own favor and in fraud of the minority stockholders; that he had no right to vote his stock; that, if section 95 of the Insurance Law permits these things to be done, it is unconstitutional and void. The prayer for relief is for an injunction pendente lite prohibiting the defendant, its officers, etc., from calling or holding a meeting of the policy holders to vote upon the proposed plan and from submitting the plan, if approved by the policy holders, to the superintendent of insurance for his approval, and that the plan may be adjudged illegal and void.

The defendant objects that the suit is premature, because the plan may never be carried out; the policy holders may not vote for it, and, if they do, the superintendent of insurance may not approve it. But the injury complained of is not only threatened, but the proceeding to accomplish it is actually under way. The complainants are not obliged to wait until it is consummated before asking for relief. If their contentions are right, equity should protect them by injunction.

The complainants' case is this:

First. That the stockholders are the owners of the Society's free surplus—that is, the surplus over and above what shall be necessary to cover all outstanding obligations, losses, and expenses—and are therefore injured by any waste of it, as, for example, by the purchase of Du Pont's stock control at an exorbitant price.

Second. That the proposed mutualization plan has been brought about by Du Pont's control of the board of directors and the meeting of stockholders held to consider it.

Third. That Du Pont has used his stock control to oppress the minority stockholders, by getting a higher price for 501 of his shares than they can get for theirs.

Fourth. That if sections 16 and 95 of the Insurance Law, as amended, authorize the purchase of Du Pont's stock on these terms and under these circumstances, they are unconstitutional.

[1] We are, however, satisfied that the proper construction of article 3 of the Society's charter is that the sole right of the stockholders is to receive semiannual dividends not exceeding 3½ per cent. on their stock, and of course the ownership of the securities deposited now with the superintendent of insurance at Albany, in case the Society were wound up and its debts paid. All the earnings over and above those dividends and losses and expenses are to be accumulated for the

benefit of the policy holders, necessarily the participating policy holders. This construction is confirmed by the provision in article 6 that the insurance business is to be conducted on the mutual plan and that every policy holder is to be credited with his equitable share of the net surplus. Complainants say that the business meant is that of participating policy holders and annuitants only, and does not apply to nonparticipating policy holders and annuitants. But it is the earnings of the Society's whole business, from whatever source, that are to be accumulated and to be credited, not to the stockholders, but to each policy holder, in proportion to his equitable share of the net surplus. This equitable share is evidently so much of the surplus of the annual dividend policies, as distinguished from the tontine or deferred payment policies (which receive their full share of the surplus of each class at the expiration of its fixed period), as may be prudently divided, with a view to the protection of all policies and annuities, and to protection against unforeseen losses, expenses, or contingencies.

Furthermore, the continuous practice of the Society from its incorporation down to the present time confirms this construction of the charter. The plan submitted at the original meeting of the projectors, the annual reports of the Society, its prospectuses issued to the public, its answers to official inquiries, all declare that it does a wholly mutual business; no part of the earnings, except dividends not exceeding 7 per cent. on their holdings, going to the stockholders. Therefore we think there is nothing in the complainants' claim that they as stockholders are injured in connection with the appropriation out of the Society's surplus to purchase Du Pont's stock, because they have no interest in the surplus whatever. If any one has a right to complain on this point, it is the participating policy holders and annuitants.

[2] We come now to the alleged violation by Du Pont of his trust relationship to the minority stockholders, in considering which it must be constantly borne in mind that we are dealing with a corporation whose stockholders do not own its surplus. A different conclusion would be reached in the case of an ordinary stock company. When the Legislature authorized stock life insurance companies to acquire their own stock, it must be taken to have authorized the usual negotiations between buyer and seller for the purchase, not all at one price, nor all at one time, but at various times and prices as the stock could be acquired. A stockholder who controls this Society has the same right to negotiate as a minority stockholder has. If the proposed plan had fixed a lump sum for the purchase of Du Pont's stock, without saying anything about the price to be paid for other stock, we do not see that there could have been any complaint. It is because the plan fixes a much lower price for minority stock that the complainants complain.

But it is common knowledge that stock sufficient to control a corporation is worth more than minority stock, and, though Du Pont's stock can never receive more than the very moderate dividend of 7 per cent., still its power to control the management of a company whose assets amount to nearly $600,000,000 confers a standing and influence which greatly increases its value. It has been the fear that this influence may

be improperly used that has caused the general and long-standing desire to put the control of the Society in the hands of the participating policy holders, who really own it. The history of the continued stock control shows its value. It was first sold by James Hazen Hyde to Thomas F. Ryan for $2,500,000; Ryan sold it to the late J. P. Morgan for about $3,000,000; Morgan sold it to Du Pont for over $4,000,000; and now Du Pont offers it to the corporation for about $2,000,000 less than he paid. Complete mutualization can never be carried through without Du Pont's stock, and it would be unreasonable to suppose that it can be acquired on the same terms as the minority stock. The inviolable equality of stock for which the complainants contend does not require that all stock shall be sold at all times at the same price.

These conclusions leave sections 16 and 95 of the Insurance Law as amended free from all attack in this case on the ground of unconstitutionality.

The general principles of law are not the subject of dispute. The cases cited by the complainants went off, so far as the purchase by a corporation of its own stock is concerned, on the construction of particular statutes and particular charters. Nor, in deciding that the stockholders do not own the surplus, need we consider just what the relations of the participating policy holders are to the company and to the surplus. What the complainants have to show in order to get relief is that they own the free surplus.

In Currier v. Lebanon Slate Co., 56 N. H. 262, the board of directors of an insolvent company purchased shares of a subscriber, who had not paid in full for the purpose of relieving him of liability. This was held illegal, and an unfair distribution of the company's assets.

In Berger v. U. S. Steel Co., 63 N. J. Eq. 809, 53 Atl. 68, an offer of the company to purchase its preferred stock with its 5 per cent. bonds was held to be a fair distribution of assets, because it was made to all the preferred stockholders without discrimination. This was the case of a stock corporation whose assets belonged to the stockholders.

In Robotham v. Insurance Co., 64 N. J. Eq. 673, 53 Atl. 842, under a statutory authority to invest, persons who controlled a stock corporation appropriated $8,000,000 out of its surplus to get control of a second stock corporation for the purpose of perpetuating their control of the first corporation. In a suit by a stockholder this was held to be illegal.

In Greeff v. Equitable Life Assurance Society, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659, the holder of a tontine policy for $20,000 in this company brought an action at law to recover an amount in addition to the share of the surplus paid him on the ground that the whole surplus should have been awarded. The court held that, as his policy provided the company should determine the amount to be distributed, the action could not be maintained, in the absence of bad faith, willful neglect, or abuse of discretion.

In Equitable Life Assurance Society v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682, the holder of a participating life policy of this company brought a suit in equity, alleging that the defendant had wasted, misapplied, and misappropriated the surplus, and praying for

the appointment of a receiver and an administration and distribution of the fund by the court. It was held that such misappropriation and waste by the previous administration of the company were no ground for equitable jurisdiction; that the bad faith mentioned in the Greeff Case meant, not waste nor misappropriation of the company's assets by the company's officers and others, but bad faith in the distribution between policy holders of the same class.

In neither of these cases, nor in any similar case to which we have been referred, did the question arise whether the accumulated profits under this or any similar charter belong to the stockholders or to the participating policy holders.

The complainants urge that we should maintain the status quo until final hearing at least by enjoining delivery of schedule B, providing for the payment of installments of the purchase price of Du Pont's stock out of the interest due by the Building Corporation on its mortgage and the delivery of the release, schedule C, of the Equitable Society's right to 9 per cent. of the dividends paid by the Building Corporation on its common stock. It is said that this course will be of little disadvantage to the defendant, which by the eighth article of the agreement of sale is subject, in case of delay in delivering schedules B and C, only to the payment of interest at 5 per cent. on any installments payable to Du Pont before actual delivery; whereas, on the other hand, if the plan is presently consummated, they will be under great difficulties if they prevail at final hearing.

The complainants' contentions are too doubtful to justify us in doing this, and the order is therefore affirmed.

PEINTNER v. BARNES et al.

(Circuit Court of Appeals, Eighth Circuit. November 28, 1917.)

No. 4846.

1. FRAUDULENT CONVEYANCES ⟸95(2)—CONVEYANCE BY HUSBAND TO WIFE—CONSIDERATION.
   The relationship between husband and wife was a good consideration for a deed of gift made voluntarily by the husband for the benefit of the wife.
2. FRAUDULENT CONVEYANCES ⟸225—PERSONS ENTITLED TO ATTACK.
   Attorneys who assisted a wife in obtaining from her husband a conveyance that was fraudulent as to the husband's creditors were not thereby precluded from attacking as fraudulent the wife's conveyance of the property and other property taken in exchange.
3. FRAUDULENT CONVEYANCES ⟸172(2)—VALIDITY AS BETWEEN PARTIES.
   A conveyance made for the purpose of defrauding creditors is valid as between the parties to the conveyance and those in privity with them, and therefore a husband, conveying property to his wife in fraud of his creditors, could not be heard to ask a reconveyance to himself because of the fraud.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by R. M. Barnes and another against Conrad Peintner, in which May Peintner, as executrix, was substituted. From a decree in favor of complainants, defendant appeals. Affirmed.

Frank L. Martin, Van M. Martin, and John M. Martin, all of Hutchinson, Kan., for appellant.

R. R. Vermilion, Earle W. Evans, Joseph G. Carey, and W. F. Lilleston, all of Wichita, Kan., for appellees.

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

MUNGER, District Judge. The decree of the lower court subjected property that Conrad Peintner claimed to own to the payment of a judgment against May Peintner, his wife, and from this decree he appealed. He died since the appeal was taken, and his executrix has been substituted as appellant. The judgment was obtained by R. M. Barnes and J. H. Magoon, who are partners engaged in the practice of law. After obtaining a judgment and the return of an execution unsatisfied, they filed the bill in this case, alleging that May Peintner was the owner of lands, but had conveyed the title to another defendant without consideration and for the purpose of defrauding her creditors. It was also charged that with a portion of the proceeds of the sale of other lands belonging to her she had purchased other lands and had caused the deed for them to be made in the name of another to defraud her creditors, and had deposited another portion of the proceeds in a bank under the name of "Mrs. C. Peintner." The prayer was for the subjection of this property to the satisfaction of their judgment. By a supplemental bill the plaintiffs made Conrad Peintner a party, alleging that he claimed to be the owner of the property, and praying that he be required to assert any claim that he had and that a decree be entered barring him from making any further claim thereto. The answer of Conrad Peintner alleged that when he was old he was married to May Peintner, a young woman, and that she thereafter induced him, by undue influence, duress, and fraud, to convey a large amount of property to her, and that Barnes and Magoon had aided and advised her in obtaining the conveyances, and asked for a dismissal of the bill, and that he be decreed to be the owner of the property.

The questions presented by appellants' brief and assignment of errors relate to the sufficiency of the evidence to support the decree. The evidence shows that Conrad Peintner before he was married to May Peintner made her a written promise to convey to her a farm worth ten thousand dollars. After the marriage she endeavored to obtain a conveyance, and employed Mr. Barnes as her attorney. Mr. Barnes had several conversations with Conrad Peintner in regard to it, and finally Conrad Peintner conveyed 320 acres of land to her by deed, reserving the use of it for his life, and conditioned upon her continuing to live with him as his wife. In the following year Mrs. Peintner filed a bill against her husband for separate maintenance, but shortly afterwards this suit was dismissed on the stipulation of the parties. In the following year, Conrad Peintner agreed to make an unconditional conveyance to his wife of the land previously conveyed, and also to con-

vey three other quarter sections of land to her, and such conveyances were made, but his wife entered into a lease to him for the term of his life of the land first conveyed, and a contract was entered into between them relating to the other three quarter sections of land, by the terms of which Conrad Peintner was to have the use of that land for the term of his life, but May Peintner agreed to reconvey this land to him at any time within one year, on request. if he was clear of indebtedness. This contract contained a recital that Conrad Peintner made the conveyance of his own volition, for the purpose of placing the lands for the present during his temporary financial embarrassment beyond the reach of certain creditors who were threatening to bring proceedings, but that it was understood that when such financial embarrassment should have passed away, and the claims of such creditors should have been satisfied, and Conrad Peintner should be free from debt, May Peintner, on request of Conrad Peintner, would reconvey these lands on the terms before stated. Barnes and Magoon were employed by Mrs. Peintner to advise with her and to draw these latter conveyances and contracts. There is no evidence that Conrad Peintner ever requested a reconveyance of any of these lands, or that he was thereafter free from debt. He and his wife continued to live together and from time to time joined in executing mortgages upon part of the lands, conveyed other portions in exchange for other lands, the title to which was also taken in the name of May Peintner, and sold some portions for money which was deposited in the bank to her credit, and out of this money other lands were purchased by her, but the title was taken in the name of a relative of hers, who paid no part of the consideration. About four years after the date of the second conveyances from Conrad Peintner to his wife, when Barnes and Magoon had brought suit against her to recover a judgment for the value of their services, she and her husband united in making a deed of the remainder of the lands in question to another relative of hers, without consideration.

[1] That the purpose of May Peintner and of her husband in causing the title to this property to be placed in the names of others was to hinder and delay Barnes and Magoon in the collection of their claim against her is abundantly sustained by the evidence. The appellants insist that Barnes and Magoon are not entitled to have this property subjected to their judgment, because the second deed from Conrad Peintner to May Peintner was obtained at a time when he was sick and unable to attend to business, and as a result of her desires and plans to obtain a conveyance of his property to her. The evidence does not show that Conrad Peintner was unable to comprehend the nature of the act in which he was engaged when he made these conveyances, nor that he was acting under duress, and, although he executed them as the result of importunities of his wife, they were made voluntarily for her benefit, and the relationship between husband and wife was a good consideration for the executed gift. Jackson v. Jackson, 91 U. S. 122, 23 L. Ed. 258; Kitchen v. Bedford, 13 Wall. 413, 20 L. Ed. 637.

Appellant further insists that Barnes and Magoon are not entitled to the relief they seek, because they drew the contract signed by Conrad Peintner which contained a recital that the purpose of the deeds then

executed was to place the property beyond the reach of his creditors. The relief asked by Barnes and Magoon is the cancellation of the later conveyances by May Peintner and her husband, in which they had no participation. Conrad Peintner prayed the court to set aside the conveyance which he had voluntarily made to his wife, although he had joined her in her subsequent conveyances of this property to others.

[2,3] We see no reason why Barnes and Magoon may not complain of the fraudulent transfer of her property by May Peintner, even if they had previously assisted her in obtaining a conveyance that might have been fraudulent as to his creditors. A conveyance made for the purpose of defrauding creditors is valid as between the parties to the conveyance and those in privity with them, and Conrad Peintner cannot be heard to ask a reconveyance to himself because of his fraudulent conveyance. Byrd v. Hall, 196 Fed. 762, 117 C. C. A. 568; Pigg v. Casper Co., 196 Fed. 177, 116 C. C. A. 9; Sturges v. Portis Mining Co. (D. C.) 206 Fed. 534.

We find no error in the record and the decree of the lower court will be affirmed.

UNITED STATES v. GRAND CANYON CATTLE CO.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 2894.

1. MINES AND MINERALS ⟸45—FRAUDULENT PATENTS—DEFENSES.
In a suit by the United States to set aside patents to mining claims on the ground that they were fraudulently obtained, the defense of bona fide purchaser is an affirmative one which must be alleged and proved.

2. APPEAL AND ERROR ⟸194(1)—PLEADING—DEFECTS—WAIVER.
In a suit by the United States to set aside patents to mining claims which with other lands had been conveyed to defendant, on the ground that they were obtained by fraud, the failure of defendant's answer which relied on the defense of bona fide purchase to comply with the rule that the consideration must be stated with a distinct averment that it was bona fide and truly paid cannot for the first time be raised on appeal, no demurrer or other objection having been made to the answer below, and the evidence showing payment of the consideration having been received without objection.

3. MINES AND MINERALS ⟸45—BONA FIDE PURCHASERS—PRESUMPTIONS.
Where plaintiff purchased a cattle ranch which included mining claims that had been abandoned for mining purposes, for a gross sum, and there was no evidence tending to show that the parties agreed on any set price for any particular tract, it must, in a suit by the government to set aside the mineral patents, where plaintiff claimed as a bona fide purchaser, be presumed that such portion of the gross consideration was paid for the property covered by the mining claims as their actual value bore to the whole of the lands.

4. MINES AND MINERALS ⟸45—PATENTS—BONA FIDE PURCHASERS.
A purchaser of a ranch which included land patented as mineral land is entitled to rely to some extent upon the action of the Land Department which by its issuance of patents determined that the land was mineral in character, and that the patentee complied with the law, and hence, in a suit by the government to set aside the patents on account of the patentee's fraud, the purchaser cannot be denied protection as a bona fide

purchaser for value because he knew that a portion of the property had been patented as mineral land, and was not being worked; for it is a matter of common knowledge that mining claims located in good faith and patented as such often prove unprofitable and are not worked because of the low grade of the ore, etc.

Appeal from the District Court of the United States for the District of Arizona; Wm. H. Sawtelle, Judge.

Suit by the United States against the Grand Canyon Cattle Company, a corporation. From a decree for defendants, complainant appeals. Affirmed.

Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz., and S. W. Williams, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

O'Melveny, Millikin & Tuller, and Henry J. Stevens, all of Los Angeles, Cal., for appellee.

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

GILBERT, Circuit Judge. The United States brought a suit against the appellee to set aside patents to certain mining claims. In the bill it was alleged that under the mining laws of the United States one Saunders located certain lode claims and mill sites, representing to the officers of the Land Office that said claims contained gold and silver, and that the mill site was used and occupied by him for mining purposes, for the storing of ore, and for milling purposes, that those representations were false, and the lands so located are not mineral lands and contain no valuable mineral, and that in fact they were not located for mining purposes, but for the purpose of obtaining exclusive possession and use of certain springs of water existing thereon, and it was alleged that Saunders had conveyed said lands to the appellee. The court below found from the evidence that Saunders acquired patents to the mining claims by fraud, but that the evidence was insufficient to prove that the appellee, at the time of purchasing said property and paying the consideration therefor, had actual notice, or any notice, of the alleged fraud or illegal methods of Saunders, or facts sufficient to put it upon inquiry, and that the defense of bona fide purchaser for value without notice was fully met and proved.

[1, 2] The appellant assigns error to these findings, and contends, first, that the defense of bona fide purchaser was not sufficiently alleged in the appellee's answer. The answer alleged that the appellee purchased the land for a valuable consideration in good faith, without notice or knowledge of any improper means by which the title had been obtained by Saunders, and that it took title thereto relying upon the record of the patents from the United States to Saunders, and not otherwise. It is true, as it is contended by the appellant, that the defense of bona fide purchaser is an affirmative defense which must be alleged and proved. (Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637; Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388; Cooper v. United States, 220 Fed. 871, 136 C. C. A. 501; United States v. Brannan, 217 Fed. 849, 133 C. C. A. 559; Northern

Colorado Coal Co. v. United States, 234 Fed. 34, 148 C. C. A. 50), and that the answer fails to comply with the rule stated in Boone v. Chiles that the consideration must be stated, with the distinct averment that it was bona fide and truly paid. But, in view of the fact that there was no demurrer or other objection taken to the defense as it was pleaded, and that testimony was admitted without objection which showed that the mining claims were part and parcel of a group of tracts of land which were used as a cattle ranch, and that the consideration for the whole thereof was a sum in gross and was actually paid, we are of the opinion that the objection to the form in which the defense was pleaded, now being made for the first time, cannot avail in an appellate court.

[3] But it is urged that the appellee failed to show what consideration it paid for the particular lands which are in controversy here. The evidence is sufficient to indicate, and it must be assumed, that for those mining claims such proportion of the gross consideration was paid as their actual value bore to the value of the whole group of lands, there having been no negotiations between the parties to indicate that at any time a price had been set or agreed upon for any particular parcel or tract.

[4] The question remains whether the defense of bona fide purchase was established by the evidence. The evidence consists of the testimony of Marshall, who made the purchase from Saunders, and who subsequently became president of the appellee. His testimony is that in making the purchase his purpose was to acquire a cattle ranch with the stock and personal property thereon situate. He knew that a portion of the land had been patented to Saunders as mineral land. He made no inquiry as to the mineral character of the patented land, or its value for mining purposes. Saunders told him that there was water on the patented mining claims. Before purchasing he inquired of his attorney whether a patent under a mining claim was to be regarded in the same light as a patent under other land laws, and he was told that it was. He was not a mining man, and had never been engaged in mining. He testified that on the occasions when he went over the cattle ranch to look at the lands he did not visit any of the mining claims, except that on two occasions he was on the Jacobs lode claim, and that as a result of his two visits to the property he got no impression at all of the patented mining claims as to their mineral features. "My examination of those lands was not with any reference to mineral. There was no statement made to me by anybody with respect to their mineral character, or with respect to their development." Witnesses for the appellant testified that at the Jacobs claim there was copper-stained rock on the dump and scattered about on the claim, and one witness testified that it was possible that the copper-stained rock came out of the cut in the Jacobs lode. The appellant introduced assay certificates of samples from the Jacobs lode which showed traces of copper. A short distance from the Jacobs claim there was a copper mine which had been worked to some extent, and the rock on that claim resembled the rock which was seen on the Jacobs claim. It is common knowledge that claims have been located in good faith as mining claims

and have gone to patent, and the ore has subsequently been found of such low grade, or so refractory, or so inaccessible, as not to justify development. The fact that the purchaser of such claims, who buys them with other lands as a part of a large cattle ranch, knows that the claims have been patented as mining claims and sees no mining operations carried on thereupon is not sufficient, we think, to put him upon notice to make further investigation to discover whether or not the patents had been fraudulently obtained. He is entitled to rely to some extent upon the action of the Land Department, which, by its issuance of patents, has determined that the land is mineral land, and that the patentee has complied with the law. United States v. California, etc., Land Co., 148 U. S. 31, 45, 13 Sup. Ct. 458, 37 L. Ed. 354. We find no error in the conclusion of the court below that the defense of bona fide purchase was proven.

The decree is affirmed.

CLINTON MINING & MINERAL CO. v. COCHRAN et al.

(Circuit Court of Appeals, Third Circuit. January 17, 1918.)

No. 2300.

1. APPEAL AND ERROR ⟸854(5)—REVIEW—REASONS FOR DECISION.
   The correctness of a decree dismissing the bill must be determined on appeal, without regard to the reasons that may have led the court below to enter it.

2. CORPORATIONS ⟸265(6)—STOCKHOLDERS' LIABILITY—ENFORCEMENT—PARTIES.
   A creditors' bill, to enforce the general liability of stockholders in a corporation to contribute ratably towards paying plaintiff and all others who join in the bill, cannot be maintained without the corporation as a party, where, though it has ceased doing business, it has not been dissolved, but still exists, has a corporate organization, and is capable of being sued.

3. COURTS ⟸262(3)—FEDERAL COURTS—EQUITY JURISDICTION.
   Civ. Code S. D. § 441, provides that each stockholder of a corporation is individually and personally liable for its debts to the extent of the amount unpaid on his stock, and that any creditor may institute joint or several actions against any of the stockholders that have not fully paid the capital stock held by them, and that in such action the court must ascertain the amount unpaid by each stockholder and several judgments must be rendered against each in conformity therewith. *Held*, that this liability cannot be enforced in a federal court by a bill in equity against a number of stockholders, as the statute cannot enlarge the federal jurisdiction in equity, and such jurisdiction does not extend to such a bill.

4. TRIAL ⟸11(3)—TRANSFER OF CAUSES FROM EQUITY TO LAW.
   Where plaintiff brought an action to enforce the statutory liability of a number of stockholders, in which six of the defendants were served or appeared, the court did not err in dismissing the action, instead of transferring it to the law side of the court, since, if maintainable at law, it would have been necessary to transform the action into six separate actions, especially where plaintiff made no motion for such transfer.

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

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

Suit by the Clinton Mining & Mineral Company against A. J. Cochran and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Arthur O. Fording, of Pittsburgh, Pa., and Norman T. Mason, of Deadwood, S. D., for appellant.

E. C. Higbee, of Uniontown, Pa., and J. M. Hodgson, of Deadwood, S. D., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. [1] This bill in equity was filed in the Western District of Pennsylvania by the Clinton Mining & Mineral Company, an Iowa corporation, which is a judgment creditor of the Imperial Gold Mining & Mineral Company, a corporation of South Dakota. The bill named as defendants, the Imperial Company, A. J. Cochran, and ten other persons, citizens and residents of the Western district, and Charles S. Graham, a citizen of the Eastern district of Pennsylvania. Neither Graham nor the Imperial Company was served, and only six of the other defendants either were served or appeared to the action. These were made parties in their character as holders of stock in the Imperial Company, and their answers disclosed the names and addresses of 23 other holders, all residing within the Western district, who had not been named as defendants. The plaintiff's evidence having been heard, and the District Court having dismissed the bill, we have to do on this appeal with the correctness of the decree, without regard to the reasons that may have led the court below to enter it. Boise Water Co. v. Boise City, 213 U. S. 287, 29 Sup. Ct. 426, 53 L. Ed. 796; Security Ass'n v. Buchanan (C. C. A. 6) 66 Fed. 801, 14 C. C. A. 97. We turn to the bill in order to ascertain the grounds that underlie this suit in equity before a federal court.

[2] Two distinct grounds of relief are set up: (1) A South Dakota statute, which is said to make each of the six defendants liable to the plaintiff for its claim; and (2) the general liability of stockholders (if they still owe the corporation anything on their stock) to contribute ratably toward paying a plaintiff and all others who join in a creditors' bill. The Clinton Company asks for an accounting of debts due by and to the Imperial Company, for an assessment on the stock as far as may be necessary, and for the appointment of a receiver. We need not spend time on the second ground. Assuming, but without deciding, that these two causes of action may be joined in the same bill, we think that lack of essential parties prevents the District Court from determining the defendants' general liability in this proceeding. The bill does not aver, and the evidence does not prove, that the Imperial Company has been dissolved; apparently the corporation has not been doing business since March, 1914, but it still exists, has a corporate organization, and is capable of being sued. To such a proceeding as a creditors' bill, the corporation itself would appear to be an indispensable party. Swan Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; Elkhart Bank v. Guaranty Co. (C. C. A. 3) 87 Fed. 252, 30 C. C. A. 632. It is not necessary to pass now upon the questions whether the twenty-three other stockholders in the Western district should be

made parties defendant; or, if so, by whom that step should be taken.

It remains to consider the South Dakota statute (the Civil Code), which (as far as we know) has not yet been passed upon by the Supreme Court of that state:

"Section 441. Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him. Any creditor of the corporation may institute joint or several actions against any of its stockholders that have not fully paid the capital stock held by him, and in such action the court must ascertain the amount that is unpaid upon the stock held by each stockholder and for which he is liable, and several judgments must be rendered against each in conformity therewith. The liability of each stockholder is determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced, and such liability is not released by any subsequent transfer of stock. And in no other case shall the stockholders be individually and personally liable for the debts of the corporation."

The facts to which the plaintiff seeks to apply the statute are as follows: On September 1, 1899, the directors of the Imperial Co., who at that time were also its only stockholders, bought certain mining property in South Dakota from W. S. Elder, one of the stockholders, and paid for it (as the laws of the state permitted) by transferring its whole capital stock of 1,000,000 shares, the par value being $1 each. This was the first, and the only, property of this kind the company acquired. Immediately thereafter Elder returned 750,000 shares to the company's treasury, and the certificates were indorsed, "Fully paid and nonassessable." The value of the property bought may have been less than the par value of the stock issued in payment; on the record before us we cannot determine this question satisfactorily, but in any event the issue of the capital stock was authorized by all the incorporators, the directors, and the stockholders of the company, and moreover they all agreed to Elder's retransfer of the 750,000 shares in order that the company might dispose of them as seemed best. What the company did was to issue bonds to the amount of $200,000, and to sell them at par, transferring to each purchaser of bonds an equal amount of the treasury stock. All the defendants acquired shares in this manner, and some of them bought other shares from the treasury by paying cash therefor.

[3] We shall assume that under the statute the Imperial Company's stockholders are liable to the plaintiff, either ratably or to the full extent of the stock they hold; but the question still remains: Can such liability be enforced in a federal court by a bill in equity of the joint character now presented? We say nothing about the plaintiff's right to file such a bill in the courts of Pennsylvania, or of any other state, or to sue the defendants separately in a federal court of law. The sole question now is whether the joint remedy by bill can be maintained, and on this subject we think the answer should be in the negative. The Dakota statute cannot enlarge the federal jurisdiction in equity, and in our opinion this jurisdiction does not extend to such a bill as is now before us. The cases may not be completely in harmony on this subject, but there seems to be good reason to hold that to enforce such a liability as this the remedy at law is adequate. Flash

v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; Kelley v. Gill (Nov. 5, 1917) 245 U. S. 116, 38 Sup. Ct. 38, 62 L. Ed. ——; Fidelity Co. v. Archer (C. C. A. 3) 179 Fed. 32, 103 C. C. A. 16.

[4] As neither ground for relief was well taken, the district court was right in refusing to dismiss the bill as to one ground, and retain it as to the other. Neither was it erroneous to dismiss the bill altogether, instead of transferring the dispute to the law side of the court. The plaintiff made no such motion, and in any event the action in its present joint form could not have been properly transferred. If maintainable at law, the court would have been obliged to transform it into six separate actions, and this would have been equivalent to the bringing of six new suits.

Other questions have been argued, but they belong to a trial on the merits and should not be considered now.

The decree is affirmed, but without prejudice to the plaintiff's right to bring such other suit or suits as it may desire, either at law or in equity, in any forum that may have jurisdiction thereof.

ORR et al. v. COCA-COLA CO.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 2977.

1. INJUNCTION ⊜129(1)—RIGHT TO DISMISS—PREJUDICE.
Ordinarily a plaintiff may, as a matter of right, at any time before interlocutory or final decree dismiss his suit without prejudice to beginning another, provided he pay the costs, and the dismissal will not deprive the defendant of any substantial right accrued after the suit has been instituted, or prejudice the defendant by depriving him of some affirmative advantage to which he would be properly entitled, and the mere prospect of future litigation, rendered possible by the discontinuance of a suit in which plaintiff's motion for preliminary injunction, made upon the bill and affidavits, does not amount to prejudice, depriving plaintiff of the right to dismiss.

2. INJUNCTION ⊜129(1)—RIGHT TO DISMISS—DISCRETION OF COURT.
Though the court had denied plaintiff's motion for preliminary injunction, made on the bill and affidavits, it was not an abuse of discretion to allow plaintiff to dismiss the suit without prejudice to beginning another, even though defendants objected on the ground that the denial of the preliminary injunction was a decretal order sustaining their right to continue their business until further order of the court or final determination.

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

Suit by the Coca-Cola Company against Rose Orr and Frank L. Orr, doing business as the Orr Drug Company, or the Orr Pharmacy. From an order and decree dismissing the cause on plaintiff's motion without prejudice, defendants appeal. Affirmed.

Appeal from an order and decree granted on plaintiff's motion, and against defendant's objections, dismissing the cause without prejudice. The suit was brought for injunction and accounting, plaintiff charging unfair competition with the plaintiff in selling a drink in simulation of "Coca-Cola" syrup. Preliminary motion for injunction was made upon the bill and a number of affidavits. Defendants answered, denying specifically and particularly any infringement of the rights of plaintiff, and supported their answer by affidavits. The District Court denied injunction pendente lite. The cause was set for trial for February 16, 1917, but on January 31st plaintiff made motion to dismiss "without prejudice to the bringing of another cause of action on the same alleged facts by complainant." Defendants resisted this motion and filed affidavits in opposition. The District Court dismissed the cause without prejudice and made decree accordingly. When the motion to dismiss was heard by the court, no testimony had been taken in the cause. The essential matter at issue between the parties was whether or not defendants had sold as Coca-Cola any substance that was not in fact Coca-Cola.

S. J. Parsons, of Los Angeles, Cal., for appellants.

O'Melveny, Stevens & Millikin, Walter K. Tuller, and Roy V. Reppy, all of Los Angeles, Cal., and Candler, Thomson & Hirsch, of Atlanta, Ga., for appellee.

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

HUNT, Circuit Judge (after stating the facts as above). The substance of the errors assigned by the defendants is: That by considering the affidavits upon the motion for preliminary injunction, and by setting the case down for trial, the District Court determined the cause, and made a "decretal order" sustaining the right of the defendants to continue their business until the further order of the court, or the final determination of the cause, and that the defendants thereby acquired the right to have the matter so continued, and to have it determined in the same District Court without being subjected to litigation in some other or different court as threatened by the defendant.

[1, 2] The general rule is that a plaintiff may, as a matter of right, at any time before interlocutory or final decree dismiss his suit without prejudice to beginning another, provided he pays the costs, and the dismissal will not deprive the defendant of any substantial right accrued after suit has been instituted, and the dismissal will not prejudice the defendant by depriving him of some affirmative advantage to which he would be properly entitled. In Street's Federal Equity Practice, page 804, we find this statement of the rule:

"Prejudice to the defendant, then, is a factor sufficient to defeat the right of the plaintiff to dismiss. If it appears that the dismissal of the bill would deprive the defendant of some litigable right that he is entitled to enforce in that suit, or perhaps, even, if it appears that by the dismissal he would be subjected to some disadvantage or deprived of some equity, the leave to dismiss will be refused. It will be noted, in this connection, that the mere possibility that the defendant may be harassed by another litigation directed to the same object is not enough to disentitle the plaintiff to dismiss. The prejudice that the law contemplates as sufficient to authorize a denial of the plaintiff's motion to dismiss must be 'some plain, legal prejudice other than a mere prospect of future litigation rendered possible by the dismissal of the bill.' But if, beyond the incidental annoyances of a second litigation upon the same subject-matter, such action would be manifestly prejudicial to the

defendant, leave to dismiss will not be granted. On the question as to what will constitute a sufficient prejudice to the defendant to justify a refusal of leave to dismiss, the courts very properly exercise a considerable latitude of judicial discretion; and except in a case where there is an obvious violation of a fundamental rule or an abuse of the discretion of the court, the action of the Circuit Court in granting or refusing leave to dismiss will not be reversed."

It does not seem to be consistent with principles of equity to say that merely because an order denying injunction pendente lite has been made, all discretion in respect to the allowance of motion for dismissal by plaintiff is removed, and therefore that the court may not inquire into the question whether or not the dismissal would constitute a substantial prejudice to defendant. In Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108, the Supreme Court expressly held that the prejudice to the defendant which would authorize a denial of a motion to discontinue must be other than the mere prospect of future litigation, rendered possible by the discontinuance. Upon the question of discretion, it was said:

"Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, a decision of a motion for leave to discontinue will not be reviewed here."

In Penn Phonograph Co. v. Columbia Phonograph Co., 132 Fed. 808, 66 C. C. A. 127, on an appeal from a decree dismissing a bill on motion of the plaintiff, the Court of Appeals for the Third Circuit found no abuse of legal discretion in making the decree complained of and said:

"No testimony had been taken in the case, and there had been no hearing or decree upon the merits. The hearing of the motion for a preliminary injunction upon opposing ex parte affidavits and the denial of the motion did not bar the dismissal of the bill by permission of the court in the exercise of its sound discretion. Nor was leave to dismiss precluded because the defendant was called on to answer the bill under oath, and did so. The appellant, we think, was deprived of no substantial right by the dismissal. We cannot agree that future litigation thus made possible amounted to legal prejudice."

That there is discretionary power up to the time that evidence may be heard upon the merits is held in the following cases: Young v. Samuels & Brothers, 232 Fed. 784, where Judge Brown, in the District Court for the District of Rhode Island, has collated and considered many of the decisions bearing upon the point; Houghton v. Whitin Machine Works (C. C.) 160 Fed. 227; Staude Manufacturing Co. v. Labombarde et al. (D. C.) 229 Fed. 1004. See, also, Bates, Federal Equity Procedure, pp. 709, 710; Curtis v. Lloyd, 4 My. & Cr. 194; Thomson-Houston E. Co. v. Holland (C. C.) 160 Fed. 768; Ebner v. Zimmerly, 118 Fed. 118, 55 C. C. A. 430.

In C. & A. R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081, the Supreme Court, speaking through Justice Woods, after conceding that as a general rule, a complainant could at any time upon the payment of costs, dismiss his bill, said that the rule was subject to exception, namely:

"That after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such pro-

ceedings have been taken as entitled the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant."

The court cites Daniel's Chancery Practice, pp. 793, 794, where it was laid down that:

"After a decree or decretal order the court will not allow a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it."

We do not understand that the Supreme Court meant to decide that where injunction pendente lite has been denied, and there has been no testimony heard upon the merits of the case, the order denying such injunction necessarily brings the case within the settled exception to the general rule. The case which was before the court did not call for decision to such effect; and in the later case of Pullman's Car Co. v. Central Transportation Co., supra, Justice Peckham, although he referred to C. & A. R. R. Co. v. Union Rolling Mill Co., supra, in stating the general proposition, was careful, it would seem, to avoid language which would deny to a plaintiff the right to dismiss his bill at any time before the hearing, except where, "beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant." Carrington v. Holly (1755) 1 Dickens, 281.

Holding that the order made was within the discretion of the court, and that no abuse is shown, the decree is affirmed.

UNITED STATES v. HOWARD et al.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1917.)

No. 4787.

1. PUBLIC LANDS ⊂⊃120—HOMESTEADS—ACQUISITION.

On testimony that he had continually resided on the land for five years after application, defendant was granted a patent. It appeared that he had not cultivated the land during that time, and had improved it only by erecting some wire fences and preparing a rude dugout, in which he occasionally spent a night or two; it being his custom to go onto the premises from other land on which he lived, and to there stay a short time, eating food prepared away from the homestead property. *Held* that, as the purpose of the Homestead Act (Rev. St. §§ 2289–2291 [Comp. St. 1916, §§ 4530–4532]) is to allow bona fide settlers to obtain a home, and as to secure the gift the applicant must show that he has made the land a homestead, the patent granted to defendant should be vacated on the ground of fraud in its procurement.

2. PUBLIC LANDS ⊂⊃120—HOMESTEADS—VACATION OF PATENT.

As Rev. St. § 2291, provides that, in order to obtain a patent, the entryman must present final proofs, after the expiration of five years and before the expiration of seven years from the date of entry, showing that he has resided on and cultivated the land for a term of five years immediately succeeding the initiation of the homestead entry, an entryman, who obtained a patent by fraudulent representations that he had resided upon and cultivated the land for five years after entry, cannot

avoid a cancellation of the patent by showing that two years after obtaining his patent he raised a crop, and later resided on the land for several years, making improvements and continuing to cultivate it.

3. PUBLIC LANDS ⊂⊃120—PATENTS—CANCELLATION.

Where an entryman, by fraudulent representations that he had resided upon and cultivated the land for five years after entry, obtained a homestead patent, he cannot defeat suit to cancel the patent on the theory that the government should place him in statu quo and reimburse him for improvements, for the government, in disposing of its public lands, does not assume the position of an ordinary vendor, but has attempted to advance the interests of the whole country by opening the lands to entry in comparatively small tracts, under restrictions designed to promote settlement and development, and a suit to cancel a patent obtained through fraudulent representations is not only one to regain title, but is intended to enforce the statutes and policy relating to settlement of public lands.

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

Suit by the United States against John B. Howard and others. From a decree for defendants, the United States appeals. Reversed and remanded, with directions.

T. S. Allen, U. S. Atty., of Lincoln, Neb.

John J. Halligan, of North Platte, Neb. (Wilcox & Halligan, of North Platte, Neb., on the brief), for appellees.

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

MUNGER, District Judge. This suit was brought to cancel a patent issued to John B. Howard for 160 acres of land in Scotts Bluff county, Neb. The decree was in favor of the defendant. The bill alleged that the patent was obtained by false and fraudulent statements made by the entryman in making his application for the land as a homestead, and in his final proofs. The defendant filed his homestead application for this land on August 10, 1900, and on August 12, 1905, he filed a final affidavit with the register and receiver of the local land office, in which he swore that he had made actual settlement upon the land on August 15, 1900, and had cultivated it and resided thereon until August 12, 1905. At the same time he made a final proof statement, in which he swore that he had established actual residence on the land in the fall of 1900 and had cultivated about 10 acres for each season. He also produced two witnesses who testified that he had established actual residence on the land five years before, and had resided on the land continuously.

[1] The defendant was a single man when he applied for this homestead, but was married about two years before he made final proofs. The undisputed proof shows that during the five-year period his true residence was five miles distant from this land, on other land which he rented and cultivated, where he kept his horses and farm implements, his household furniture and supplies. He prepared a rude dugout on the land claimed as a homestead, in which he placed a bed, a stove, and a table; but his attempts at occupation of this as a dwelling were limited

to occasional visits, for one night at a time, and these visits were made not oftener than three or four times in any six months period during this five years. On these occasional visits he would take from his home on the rented land enough provisions for one or two meals on the homestead. No crops were raised on the land, nor did the claimant ever attempt to cultivate the land. The only other improvement than the dugout, was some wire fencing.

The purpose of the Homestead Act (sections 2289, 2290, 2291, Rev. Stats. [Comp. St. 1916, §§ 4530–4532]) as was said in McCaskill Co. v. United States, 216 U. S. 504, 30 Sup. Ct. 389, 54 L. Ed. 590, "is to give a home, and to secure the gift the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two credible witnesses." United States v. Mills, 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752; Cooper v. United States, 220 Fed. 867, 136 C. C. A. 497. Manifestly, the facts in this case show that the defendant did not make this land his home at any time prior to making final proofs, and further show that he obtained the patent to the land by fraud, as charged in the bill.

[2] Counsel for defendant practically concede that the defendant did not comply with the law as to residence and improvements before obtaining patent, but contend that the patent should not be canceled, because the defendant, two years after he obtained his patent, raised a crop of wheat on some of the land, and afterwards put on the land a house, barn, and other improvements, resided upon the land for three years, and has continued to cultivate portions of the land. In order to obtain a patent, the entryman was required by section 2291 of the Revised Statutes, to present final proofs after the expiration of five years, and before the expiration of seven years, from the date of entry, showing that the entryman had resided upon and cultivated the land for a term of five years immediately succeeding the initiation of the homestead entry. To earn the grant of a patent under this section of the statute, the entryman must maintain his residence upon and must cultivate the land for the next five years after he makes his initial entry. As the defendant did not comply with this statute, but obtained a patent by fraudulent representations that he had followed its provisions, he may not avoid a cancellation of the patent by showing that he resided upon the land for three years after his patent was obtained, and has made some improvements and cultivated a portion of the land.

[3] A further suggestion is made that the government is not entitled to a cancellation of this patent, unless it places the defendant in statu quo. A similar claim has frequently been made in suits for cancellation of patents, where the entryman was in the more favorable position of one who had paid to the government, at the time of receiving his patent, a substantial sum per acre for the land. As to such cases it is said in Causey v. United States, 240 U. S. 399, 36 Sup. Ct. 365, 60 L. Ed. 711:

"The further objection is made that the bill cannot be maintained, because it does not contain an offer to return the scrip received when the commuted entry was made. The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the government in disposing of its public

lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor, suing to annul a sale fraudulently induced, must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded. United States v. Trinidad Coal Co., 137 U. S. 160, 170, 171 [11 Sup. Ct. 57, 34 L. Ed. 640]; Heckman v. United States, 224 U. S. 413, 447 [32 Sup. Ct. 424, 56 L. Ed. 820]. And see Rev. Stat. § 2362 [Comp. St. 1916, § 4771]; Act June 16, 1880, c. 244, § 2, 21 Stat. 287 [Comp. St. 1916, § 4596]; Hoffeld v. United States, 186 U. S. 273 [22 Sup. Ct. 927, 46 L. Ed. 1160]; United States v. Commonwealth Trust Co., 193 U. S. 651 [24 Sup. Ct. 546, 48 L. Ed. 830]; United States v. Colorado Anthracite Co., 225 U. S. 219 [32 Sup. Ct. 617, 56 L. Ed. 1063]."

For the same reasons we think that the government is not required to pay the value of improvements made upon land, to which the patent was obtained by fraudulent representations, as a condition of the cancellation of the patent.

The decree of the District Court is reversed, and the case remanded, with directions to enter a decree as prayed for in the bill.

HUNTER, WALTON & CO. v. J. G. CHERRY CO. et al.*

In re GURLER & CO.

(Circuit Court of Appeals, Eighth Circuit. December 27, 1917.)

No. 176.

1. BANKRUPTCY ⇐86—SUBPŒNA—PUBLICATION.
Where the printed copy of the order directing the service by publication of the subpœna of an involuntary petition in bankruptcy, directed against a partnership and the individual members thereof, who resided without the district, although they had their principal place of business within the district, omitted the recital that "the subpœna should be served by publication of the order, together with the subpœna," the omission did not make the order misleading or unintelligible, and is no ground for setting aside the adjudication.

2. BANKRUPTCY ⇐100(2)—ADJUDICATION—ERRORS.
Where an involuntary petition in bankruptcy was not referred to the referee until five days after the return day, and his order of adjudication of bankruptcy showed that it was made on the day the proceedings were referred, the fact that the record contained an obviously erroneous recital that the matter came on for hearing on the previous day, which was within four days of the return day, does not warrant vacation of the adjudication under Bankruptcy Act July 1, 1898, c. 541, § 18b, 30 Stat. 551, as amended by Act Feb. 5, 1903, c. 487, § 6, 32 Stat. 798 (Comp. St. 1916, § 9602), declaring that the bankrupts and their creditors may appear and plead to the petition within five days after the return day.

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

*Rehearing denied May 6, 1918.

3. BANKRUPTCY ⟸446—REVIEW—PETITION TO REVISE.
Where there was evidence in support of the court's denial of a petition to set aside an adjudication in bankruptcy on the ground that the bankrupts, who were partners and resided in another district, did not have their principal place of business within the district of adjudication, the denial of the petition cannot, as it involved controverted questions of fact, be reviewed on petition to revise, authorized by Bankruptcy Act July 1, 1898, § 24b (Comp. St. 1916, § 9608); the petition being confined to matters of law.

Petition to Revise Order of the District Court of the United States for the Northern District of Iowa; Henry Thomas Reed, Judge.

In the matter of the bankruptcy of G. H. Gurler and C. H. Gurler, individually and as copartners under the style of Gurler & Co. The J. G. Cherry Company, a corporation, and others, filed an involuntary petition. After adjudication, Hunter, Walton & Co., a copartnership, filed a petition to set aside the adjudication in bankruptcy. The petition was denied (232 Fed. 1016), and Hunter, Walton & Co. petition to revise the order. Petition to revise dismissed.

Merrick A. Whipple, of Chicago, Ill. (Allen, Whipple & Ward, of Chicago, Ill., on the brief), for petitioners.

A. H. Sargent, of Cedar Rapids, Iowa (Deacon, Good, Sargent & Spangler, of Cedar Rapids, Iowa, on the brief), for respondents.

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

AMIDON, District Judge. On October 2, 1915, J. G. Cherry Company and two other creditors filed an involuntary petition in bankruptcy in the Northern district of Iowa, against the partnership of Gurler & Co., and the individual members thereof, G. H. and C. H. Gurler. The petition alleged that, for the greater portion of the six months next preceding the date of its filing, Gurler & Co. had had their principal place of business in the city of Cedar Rapids, Iowa. The proceeding took its usual course, and resulted in the entry of a judgment on November 5, 1915, in accordance with the petition. The bankrupts were not found personally in the Northern district of Iowa, and the subpœna was served upon them by publication and mailing. January 23, 1916, the petitioners, Hunter, Walton & Co., creditors of the bankrupts residing in Chicago, filed a petition to set aside the adjudication in bankruptcy. It is based mainly upon the claim that the bankrupts in fact did not have their principal place of business at Cedar Rapids, but at De Kalb, Ill. The firm was engaged in the creamery business. The partners resided and kept their firm books and correspondence and office at De Kalb. A very large, if not the principal, amount of their business, so far as volume of trade is concerned, was done at Cedar Rapids. It is claimed by the petitioners, Hunter, Walton & Co., that the business at this point was merely ancillary, consisting of the purchase of cream by an employé who made regular reports to the firm at De Kalb. The trial judge heard a large amount of evidence pro and con as to where the principal place of business of the firm was, and

denied the petition to set the adjudication aside. This is a petition to revise that order.

[1] Two minor errors are assigned. By mistake of the printer the following line was omitted from the printed copy of the order directing that the subpœna be served by publication: "* * * Be made by publishing this order together with said subpœna." This omission did not make the order misleading or unintelligible. It is therefore immaterial, and certainly could not be made the basis for such fundamental action as setting aside the adjudication.

[2] The return day fixed by the order of publication and the subpœna was October 30th. By section 18b of the Bankruptcy Act the bankrupts and their creditors "may appear and plead to the petition within five days after the return day." The adjudication, therefore, could not have properly been entered until November 5th. The referee who entered the judgment recites that the matter came on to be heard on the 4th day of November. This was a clerical error, as the proceeding was not referred to him until the 5th. His order of adjudication actually bears date on November 5th. It is plain, therefore, that the recitation of November 4th was a clerical error, and affords no ground for such relief as the petitioners are seeking.

The only support for the petition that has any merit is the claim that Gurler & Co. did not have their principal place of business at Cedar Rapids.

We pass, without expressing any opinion, a question which has not been argued, namely, whether the limitation of 10 days fixed by section 25a of the Bankruptcy Act (Comp. St. 1916, § 9609) for appealing from an adjudication can be avoided by a petition to revise an order refusing to set aside the adjudication after the 10-day period has expired. B–R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co., 206 Fed. 885, 124 C. C. A. 545; Hart-Parr Co. v. Barkley, 231 Fed. 913, 146 C. C. A. 109; In re Goldberg, 167 Fed. 808, 93 C. C. A. 203; In re Hudson Clothing Co. (D. C.) 140 Fed. 49; Brady v. Bernard, 170 Fed. 576, 95 C. C. A. 656. There are grave objections to keeping an administration in bankruptcy in suspense for a long period, as has been done in this case. It entails upon the bankrupts all the injuries of an actual administration in bankruptcy, without any of the benefits that would accrue to them and their creditors by a speedy administration, such as the bankruptcy law clearly contemplates.

[3] The petition to revise authorized by section 24b of the Bankruptcy Law is confined to matters of law. It cannot involve controverted questions of fact arising upon the evidence, or upon inferences to be drawn from the evidence. In re Lee, 182 Fed. 579, 105 C. C. A. 117; In re Frank, 182 Fed. 794, 105 C. C. A. 226; Hall v. Reynolds, 224 Fed. 103, 139 C. C. A. 659. The question whether the bankrupts had their principal place of business at Cedar Rapids is such a question. There was abundant evidence to support the decision of the trial court. This is true, not only of the direct testimony, but of the inferences properly to be drawn from all the evidence. It follows that the case presents no question which may properly be reached by a petition to revise.

The petition is therefore dismissed.

SMITH v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. December 24, 1917.)

No. 4906.

1. JUDGMENT ⊜218—FORM AND REQUISITES OF JUDGMENT ENTRY.
Any entry, whatever its form, is a sufficient entry of a judgment, if the substance of the entry clearly shows that it was intended as the determination of the court, and shows the nature and scope of the relief granted.

2. DIVORCE ⊜243—ALIMONY—JUDGMENT.
An entry in a divorce suit appeared to be the act of the court, and not of the clerk, and contained findings of plaintiff's residence, of the service of summons, of the fact of marriage, and of the cause for divorce, and then ordered, adjudged, and decreed that the marriage be dissolved, and further ordered, adjudged, and decreed that plaintiff was entitled to alimony from defendant, and "that he be ordered to pay" plaintiff the monthly sums therein specified. *Held*, that this was not a mere recital that a judgment be thereafter entered, but had the effect of a judgment for the amount of alimony stated.

3. COURTS ⊜322(1)—FEDERAL COURTS—EVIDENCE—CITIZENSHIP OF PARTIES.
Where no issue of diversity of citizenship was made by the pleadings, evidence as to time spent by plaintiff in a state other than that of which she testified she was a resident was properly excluded.

4. APPEAL AND ERROR ⊜226(1)—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS.
An objection that the introduction in evidence of certified copies of certain statutes made unnecessary costs could not be urged on appeal, when not made when the exhibits were offered in evidence.

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

Action by Elizabeth B. Smith against Ralph W. Smith. Decree for plaintiff, and defendant brings error. Affirmed.

T. J. O'Donnell, of Denver, Colo. (John W. Graham and Canton O'Donnell, both of Denver, Colo., on the brief, and G. W. Musser, of Denver, Colo., of counsel), for plaintiff in error.

Edward C. Stimson, of Denver, Colo., for defendant in error.

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

MUNGER, District Judge. The defendant in error brought suit against the plaintiff in error in the court of insolvency for Hamilton county, Ohio, asking for a divorce and for alimony. A decree was rendered in that suit which reads as follows:

"This cause came on this day to be heard on the petition of the plaintiff herein and the evidence, on consideration whereof the court finds: That the plaintiff, at the time of the filing of her petition herein, had been a resident of the state of Ohio for more than one year next preceding the date of the filing thereof, and was at the time a bona fide resident of the county of Hamilton, state of Ohio. That the plaintiff was married to the defendant on the 28th day of October, 1896, at Lancaster, Ohio, and that no children were born as the issue of said marriage. That in accordance with the statute in such case made and provided there was served personally on the defendant a

summons in this case, directed to the sheriff of said county, on the 23d day of December, 1909, and, having failed to plead, the court finds the defendant in default for answer or demurrer to said petition, and further finds that the allegations thereof are confessed by him to be true. The court further finds, upon the evidence adduced, that the defendant has been guilty of gross neglect of duty, in that he has since July 26, 1908, refused to permit the plaintiff to live with him, wholly disregarding his marital duties, and that the defendant has also been guilty of extreme cruelty towards this plaintiff, by reason whereof the plaintiff is entitled to a divorce as prayed for in her petition.

"It is therefore ordered, adjudged, and decreed by the court that the marriage contract heretofore existing between the said Elizabeth B. Smith and Ralph W. Smith be and the same hereby is dissolved, and both parties are released from the obligations thereof. It is further ordered, adjudged, and decreed that the plaintiff is entitled to alimony from the defendant as per agreement between the parties, and that he be ordered to pay to the plaintiff the sum of $150 per month from the date of the entry hereof up to January 1, 1912, and at the rate of $200 per month from January 1, 1912, payable on the 1st day of each and every month, and the costs of this proceeding taxed at $———."

The defendant in error afterwards commenced this action against the plaintiff in error upon that decree, alleging that a large portion of the sum awarded as alimony was due and unpaid, and recovered a judgment. The chief contention of the plaintiff in error is that the decree above recited is not an adjudication that any sum shall be paid by him as alimony, because it is not a final decree, but a mere recital that a judgment is thereafter to be entered.

[1] A number of cases have been cited in which it was held that entries, such as "let judgment be entered accordingly," "judgment is rendered," "the court ordered this cause dismissed," "ordered that the plaintiff's prayer for a decree of divorce be denied and that the defendant have judgment for costs," and "ordered that plaintiff have and secure judgment, * * * and the clerk of the district court is hereby ordered to enter judgment accordingly," did not set forth judgments, but were mere memoranda for or by the clerk of the court, and contemplated a further and formal entry of the judgments. The proposition is then advanced that this decree merely "ordered * * * that" defendant "be ordered to pay" the amount of alimony specified, and that this contemplated further action by the court before the plaintiff in error could be required to make payment of alimony. The practice of making pronouncement, either orally or by written memoranda in the minute books of the court or of the clerk, of the terms of judgments that are to be entered, to be followed later by the formal entry of the judgments, has sometimes led to some uncertainty as to the time from which the judgments were to run. See Gage v. Judson (D. C.) 92 Fed. 545; Fairbanks v. Amoskeag (C. C.) 32 Fed. 572; Judson v. Gage, 98 Fed. 540, 39 C. C. A. 156. Whatever its form, if the substance of the entry clearly shows that it was intended as the determination of the court in the action, and shows the nature and scope of the relief granted, it is a sufficient entry of a judgment. Freeman on Judgments, § 47; Black on Judgments, § 115; Rhodes v. Spears, 63 Kan. 218, 65 Pac. 228.

[2] In this case the entry appears as the act of the court, and not of the clerk, and does not appear to be a direction to the clerk. There are

findings of the residence of the plaintiff, of service of summons on the defendant, of the fact of marriage, and of cause for divorce. The decree then proceeds in apt terms to dissolve the marriage relation. The portion of the decree relating to alimony, taken in connection with the rest of the decree, does not indicate that a further order shall be made upon the defendant, either for the payment of the sums allowed as alimony or for the payment of the costs of the suit. The language of the decree is similar to an entry that it is considered or ordered by the court that the plaintiff have judgment. The effect of such an entry by the court is to give a judgment then for the amount stated. Potter v. Eaton, 26 Wis. 382; Mattice v. Street, 15 S. D. 63, 87 N. W. 522; Crowell v. Johnson, 2 Neb. 146; Flack v. Andrews, 86 Ala. 395, 5 South. 452; Tift v. Keaton, 78 Ga. 235, 2 S. E. 690.

[3] The defendant in error was called as a witness, and gave testimony to show that she was a resident of Ohio at and before the time this action was begun. Plaintiff in error complains of the refusal of the court to allow an answer, on cross-examination of the witness, concerning the time she had spent in New York after obtaining her decree of divorce. There was no issue of diversity of citizenship made by the pleadings, and hence there was no error in the court's ruling.

[4] Complaint is also made because the court allowed in evidence certified copies of acts of the Legislature of Ohio creating the court of insolvency and conferring jurisdiction of certain classes of cases upon it. The ground of complaint now urged is that unnecessary costs were made by this action. No such objection was made when the exhibits were offered in evidence.

The judgment will be affirmed.

DENNING v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 14, 1918.)

No. 3176.

1. COURTS ⟸376—FEDERAL COURTS—EVIDENCE—STATE STATUTES.
State statutes regulating the admission of testimony in criminal cases have no application to the trial of such cases in federal courts.

2. WITNESSES ⟸61(1)—COMPETENCY—WIFE.
While at common law a wife was not a competent witness directly to criminate her husband or to disclose marital communications, except in cases of violence upon her person, yet in a prosecution for violation of the Mann Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1916, §§ 8812–8819]), where it was charged that accused feloniously induced his wife to go from one place to another in interstate commerce for purposes of prostitution, the wife is a competent witness, for accused's offense would result in most grievous injury to the wife's person.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Elmer Denning was convicted of having feloniously persuaded and induced a woman to go from one place to another in interstate commerce for the purpose of prostitution, and he brings error. Affirmed.

John F. Weeks, of El Paso, Tex. (Hudspeth & Harper and Chas. Owen, all of El Paso, Tex., on the brief), 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.

BATTS, Circuit Judge. Plaintiff in error was convicted upon the charge of having feloniously persuaded and induced a woman to go from one place to another in interstate commerce for the purpose of prostitution. The woman was his wife. The wife was called as a witness, and her testimony, with other evidence in the case, was sufficient to sustain the verdict. If her testimony be rejected, the evidence is insufficient.

[1] The conviction was had in the Western district of Texas, and plaintiff in error suggests that the rules of evidence to be applied are articles 774 and 775 of the Code of Criminal Procedure of Texas of 1895, regulating the circumstances under which the wife might testify against her husband. Texas authorities interpreting these articles are cited to the effect that the wife cannot give testimony against her husband, except in cases involving physical violence to her person. It is perfectly clear, from the decisions of the Supreme Court of the United States, that state statutes regulating the admission of testimony in criminal cases have no application to the trial of such cases in federal courts. United States v. Reid, 12 How. 361, 13 L. Ed. 1023; United States v. Logan, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

[2] The specific question here presented has not been passed upon by the Supreme Court, and there is divergence of opinion among the Circuit Courts of Appeal. As strong a statement of the common law, which we assume to be applicable, as can be made, is the language of Justice McLean in the case of Stein v. Bowman, 13 Pet. 209, 10 L. Ed. 129, to the effect:

"It is, however, admitted, in all the cases, that the wife is not a competent" witness, "except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she had learned from him in their confidential intercourse." "This rule," says the court, "is founded upon the deepest and soundest principles of our nature—principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life."

Justice Brewer, in the case of Bassett v. United States, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762, used this language:

"And the common-law exception to the silence upon the lips of the husband and wife was only broken, as we have noticed, in cases of assault of one upon the other."

Continues the court:

"Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife."

The common law had no occasion to deal specifically with the matter under consideration, and any rule which is now to be applied must be

the result of an application of its principles. The question to be determined is whether the offense here under consideration is also a crime "against the wife," or merely a crime "against the marital relation."

The first case brought to our attention specifically ruling upon the matter here involved is U. S. v. Rispoli (D. C.) 189 Fed. 271, wherein District Judge McPherson permitted the wife to testify, holding that, in cases where the wife's personal rights were concerned, the exceptions should be benevolently regarded, and that the—

"offense in question was essentially within the spirit of the long-established rule that allows her to testify in protection or in vindication of her right to be secure in her person against threat or assault, even by her husband."

In Cohen v. United States, 214 Fed. 29, 130 C. C. A. 423, the Circuit Court of Appeals for the Ninth Circuit held:

"That the personal injury to a wife which permits the admission of her testimony against her husband, within the exception recognized at the common law, * * * is not confined to cases of personal violence, but may include cases involving a tort against the wife, or a serious moral wrong inflicted upon her,"

and that she could testify against him in a case of the kind here under investigation.

A different conclusion was reached by the Circuit Court of Appeals for the Eighth Circuit in Johnson v. United States, 221 Fed. 250, 137 C. C. A. 106, and in United States v. Gwynne (D. C.) 209 Fed. 993, it was held that, where the offense was committed before marriage, the wife could not testify.

In the case of Lord Audrey, found guilty of rape against his own wife by having instigated another to the act of violence, the question having arisen upon his trial before the House of Lords, the judges ruled:

"In a criminal cause of this nature, where the wife is the party grieved, and on whom the crime is committed, she is to be admitted as a witness against her husband."

It must be held that it is within the reason of the common-law exception to the rule of incompetency to permit the wife to testify against the husband when the commission of the offense charged against the latter is an act directed against the person of the former. It cannot be that the common law would protect the wife against a single act of violence, and not against a system of assaults; against an act that brought merely mortification and shame, and not against a series of acts which brought degradation and destruction of body and soul; against a single essay at crime, and not against a continuing effort at pre-eminence in infamy.

The offense cannot be classed with those which merely offend the marital relation. It operates immediately and directly upon the wife. It is an offense against the wife. A primary purpose of the Mann Act was to protect women who were weak from men who were bad. Its protection was not confined to unmarried women. Its punishment was not intended to be limited to unmarried men. Men led by cupidity to the base crime have utilized marriage in the accomplishment of their ends. They should not be permitted to use marriage to prevent their

punishment. They should not be permitted to invoke a sacred institution, and the rules established for its protection, to secure immunity from punishment for the most infamous crime that could be devised for its degradation.

In the absence of an authoritative expression from the Supreme Court, we hold that a woman is as much entitled to protection against complete degradation as against a simple assault. The evidence was properly admitted.

The judgment is affirmed.

PHILADELPHIA & R. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. January 16, 1918.)

No. 2253.

1. APPEAL AND ERROR ⊜1010(1)—REVIEW—FINDING.
   A finding of fact by the court sitting without a jury is, like a verdict, conclusive on an appellate court, if supported by competent evidence.
2. CARRIERS ⊜37—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—VIOLATIONS.
   Under the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1916, §§ 8651–8654]), a railroad company which, knowing that its lines were congested and delays were imminent, took a chance when the margin of safety was small, in attempting to transport shipments of cattle through to their destination without unloading and feeding, must, the animals having been confined without rest, food, or water beyond the prescribed time before they reached the destination, be deemed to have knowingly and willfully violated the act, and so was liable for the penalty.

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

Action by the United States against the Philadelphia & Reading Railway Company for penalty for confinement of cattle in violation of the Twenty-Eight Hour Law. There was a judgment for the United States (238 Fed. 428), and defendant brings error. Affirmed.

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

Robert J. Sterrett, Asst. U. S. Atty., of Philadelphia, Pa.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Four suits, originally distinct, for violation of the Twenty-Eight Hour Law, were consolidated by agreement, and were submitted to the District Court without a jury. Three of the government's charges were sustained (238 Fed. 428), and are now before us on this writ; the fourth charge was dismissed, and will be disposed of in a separate opinion to be filed herewith. See 247 Fed. 469. All the facts were undisputed, and the only point involved in the case now being considered is whether the District Court had competent evidence before it to support its finding that the railway's violation of the statute was knowing and willful.

[1] Such a finding is one of fact, and, like the verdict of a jury, binds a court of appeal, if it be supported by competent evidence. Nashville Ry. v. Barnum (C. C. A. 2) 212 Fed. 638, 129 C. C. A. 170; United States v. Fidelity Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696. What, then, are the facts found by the court below? First, the following general findings, which are applicable to each of the three charges, viz.: That the statutory period expired while the animals were in the railway's possession and control; that the animals had neither rest, water, nor food during this period; that the railway's default was not excused by storm or other accidental or unavoidable cause, that could not have been anticipated or avoided by due diligence and foresight; and that the railway's default was knowing and willful. In the case of each shipment the period was 36 hours, but in other details the charges differ:

[2] No. 1. The animals were confined 30 minutes beyond the period. They left Pittsburgh at 11:50 a. m. on April 5, 1916, consigned to Philadelphia, and were received by the railway at Harrisburg (or Rutherford Yard, 3 miles further on) at 4:32 a. m. on April 6. This left 19 hours 18 minutes to complete the journey, but a delay of 4 hours 23 minutes occurred at Rutherford, leaving 14 hours 45 minutes for the run, which was the normal or average time. Rutherford was a feeding point, but the animals were not unloaded. They left Rutherford at 8:55 a. m. and reached Reading at 1:47 p. m. (4 hours 52 minutes), leaving 9 hours 53 minutes to reach Philadelphia. A further delay of 52 minutes occurred in Reading, reducing the margin to 9 hours 1 minute. Reading was also a feeding point, but no unloading took place. The normal running time to Philadelphia was 5 hours 40 minutes, so that, when the animals left Reading at 2:39 p. m. on April 6, there was an apparent leeway of about 3 hours 20 minutes before the 36 hours would expire. But there were delays on the road, and the animals were not unloaded until 12:20 a. m. on April 7, a half hour beyond the limit.

No. 2. The animals were confined 1 hour 20 minutes beyond the period. They left Buffalo at 6 p. m. on April 10, 1916, consigned to Philadelphia, and were received by the Railway at South Bethlehem at 10 p. m. on April 11. This left 8 hours to complete the journey, but at this point there was a delay of 2 hours 13 minutes, reducing the margin to 5 hours 47 minutes. South Bethlehem was a feeding point, but the animals were not unloaded. The normal time to Philadelphia was 6 hours 38 minutes, so that, when the shipment left South Bethlehem at 12:13 a. m. on April 12, it had 51 minutes less than the average time to reach its destination. It was still further delayed on the road, and the animals were not unloaded until 7:20 a. m., 1 hour 20 minutes beyond the limit.

No. 3. The animals were confined 50 minutes beyond the period. They left Buffalo at 5 p. m. on April 11, 1916, and were received by the railway at South Bethlehem at 7 p. m. on April 12. This left 10 hours to complete the journey, but at this point there was a delay of 2 hours 48 minutes, thus reducing the margin to 7 hours 12 minutes. South Bethlehem was a feeding point, but the animals were not unloaded. The average running time to Philadelphia is 6 hours 38 min-

utes, so that, when the shipment left South Bethlehem at 9:48 on April 12, the railway had an apparent margin of only 44 minutes. But a delay occurred at Tabor Junction, 2½ miles from the point of destination. Here the engine was detached and sent to move other cars (not a part of its own train) to a yard at Erie avenue. If conditions had been normal, the engine could have done this work, and could also have moved the animals to their destination, just within the statutory period. The yard was congested, however, the engine was delayed beyond the normal time for doing this extra work, and as a result the animals did not reach their destination until 5:50 a. m. on April 13, 50 minutes beyond the period. The Erie avenue yard had been congested for about two years, and of this fact the railway had full knowledge.

The only defense is that the violation of the act was not "willful," and the railway's only argument in this court is that the government offered no evidence to support a proper inference of such violation. In addition to the facts already set forth, the parties agreed that since before December, 1915, congestion had been general on all the railroads in the country, including the road of the Reading, and that such condition had been well known to the defendant. The delay in No. 1 was caused by this condition, and in No. 2 it was caused in part by this condition, and in part by the fact that the train carrying the animals was a local freight, and was obliged to switch out cars at several points along its route. The delay in No. 3 has already been explained.

The railway contends that its conceded knowledge of general conditions was not sufficient, but should have been supplemented by further evidence to the effect that before each shipment was sent out the railway knew specifically of conditions that would either certainly or probably delay that particular shipment, and contends, further, that the government offered no such evidence, and therefore that the court was not justified in drawing the inference of willful violation. We are unable to sustain this position. The general congestion affected the defendant's road, and, although no one could forecast precisely what kind of a situation might confront a particular train as it pursued its course, the railway's officials must have known that some difficulties, many of them unexpected, were continually arising, and that transportation was beset with hindrances and delays. We assume that the railway did its best to overcome every definite obstacle it could hear of in the path of each train now in question. but it could not foresee every contingency that was likely to arise. It did know, however, that serious congestion existed and was likely to cause unexpected delays, and this was a fact of which we think it was bound to take notice, and for which it was bound to make allowance. In every instance the risk of violating the law could have been avoided by feeding the animals before they started on the final stage of their journey, and if the railway, knowing that delays were likely to happen, chose to take the risk of getting the shipment through on time, we see no reason for relieving it from the consequences of failure. In our opinion there was evidence to support the finding of the District Court; the railway, with knowledge of the risk, encountered it deliberately, and this satisfies the requirements of the statute.

The judgment is affirmed.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(Circuit Court of Appeals, Third Circuit. January 16, 1918.)

No. 2259.

CARRIERS ⟸37—TRANSPORTATION OF LIVE STOCK—TWENTY-EIGHT HOUR LAW —VIOLATIONS.

The Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1916, §§ 8651–8654]), prohibiting carriers from confining live stock for more than 28 consecutive hours without rest, food, and water, but allowing the time to be extended by the shipper to 36 hours, declares that, in estimating the confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without rest, food, or water on connecting roads shall be included; it being the intent of the act to prohibit their continuous confinement beyond 28 hours, save in the contingencies provided. A railroad company, knowing that the normal time for the transportation to the point of destination was slightly more than the time during which a shipment of live stock could lawfully be confined in cars without food, water, or rest, elected to attempt to transport the stock to the point of destination, instead of unloading them for food, etc. The shipment arrived at the consignee's siding within time, and three of the cars were placed thereon and unloaded; but, the siding facilities being insufficient to accommodate the other two cars, they were not unloaded until 2½ hours later, the engine of the train meanwhile having departed on other business. *Held* that, notwithstanding the failure of the railroad company to deliver two of the cars was in part due to the restricted terminal facilities of the consignee, nevertheless, as the railroad company took a chance in continuing the confinement of the stock, knowing that the margin of safety was very slight, and as the cars could not be unloaded until placed upon the siding, the company must, as to the two cars, the unloading of which was delayed, be deemed to have knowingly and willfully confined the stock beyond the time allowed.

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

Action by the United States against the Philadelphia & Reading Railway Company for violation of the Twenty-Eight Hour Law. There was a judgment for defendant, and the United States brings error. Reversed, with instructions.

See, also, 238 Fed. 428.

Robert J. Sterrett, of Philadelphia, Pa., for the United States.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This case involves two cars of live stock, and was heard and decided by the District Court at the same time as the three cases we have just disposed of on the railway's writ of error. 247 Fed. 466.

The undisputed facts show that the shipment included five cars, three of which were placed on the consignee's siding at 6:20 a. m., February 16, 1916, so nearly within the 36 hours permitted by the statute that the government claimed no penalty in respect of these.

The platform could only accommodate three cars, and the other two, while remaining coupled, were not placed where the stock could be unloaded. The engine left the five cars and went away to do work in a yard at some distance, but returned and moved the unloaded cars to the platform at 8:50 a. m., 2½ hours beyond the period. The engine's delay in returning was caused by the congested condition of the yard, and the railroad had previous knowledge of this condition.

In his supplemental opinion (not reported) the District Judge held that the railway had discharged its full duty when the five cars were put upon the consignee's siding, and of course he had no occasion to consider whether a "knowing and willful" violation of the act had been committed. He directed judgment in favor of the company, giving the following reasons:

"The cars * * * arrived at their destination in time, or so near it, that the United States disclaimed the thought of asking an imposition of the penalty for the mere excess. The failure to unload was due to the fact that the unloading facilities at the terminal siding of the consignee were insufficient. The train which had arrived was made up of five cars, for all of which there was not room at the unloading chute. So many as the siding would accommodate were put upon it and the cars unloaded. For these cars the United States asks no imposition of the penalty. It asks, however, that a distinction be made between the cars for which there was room and those for which there was not. The act of Congress is confined to cattle in transitu, and does not apply after the journey is at an end. To hold otherwise would be to make the carrier responsible for the terminal facilities of the consignee, or the ability of the consignee to handle the cattle after they had arrived. The contract and duty of the carrier were alike fulfilled when it brought the cars to the place of destination ready to be placed on the siding as soon as the consignee made room for them. If they were to go upon a siding, and could be there placed, the carriage would not be complete until they were so placed; but it was the duty of the consignee to receive, and therefore to be prepared to receive, and the obligation of the carrier had been met when it had the cattle there ready to be turned over to the care of the owner. This will necessitate a finding that the defendant is entitled to judgment for costs."

We are unable to agree with this conclusion. It is clear that the evil aimed at by the statute is the confinement of animals in excess of 28 or 36 hours (except in specified contingencies) without unloading for rest, water, and food. In positive language Congress declares that no railroad shall confine such animals for a longer period than 28 or 36 hours, and goes on to say that in estimating such confinement the time consumed in loading and unloading shall not be considered, adding still further:

"It being the intent of this act to prohibit their continuous confinement beyond the period of 28 [or 36] hours, except upon the contingencies hereinbefore cited."

Words could hardly be plainer; Congress had especially in mind the effect of confinement on the animals, and fixed a period that must not be exceeded, save for specified reasons. Unless, therefore, a railroad delivers the animals at a place where they can be unloaded—that is, where their confinement can be brought to an end—it has failed to discharge the duty imposed by the act, and if such failure has been knowing and willful it becomes liable to the statutory penalty.

In the case before us we think all the elements of the offense are present. The animals left Buffalo at 6 p. m. on February 14, consigned to Philadelphia, and were received by the Reading Railway at South Bethlehem at 9:30 p. m. on February 15, having been 27½ hours on the road. The time had been extended, however, and the railway still had 8½ hours to complete the carriage. At Bethlehem there was a delay of 3 hours and 10 minutes, so that the movement was not resumed until 12:40 a. m. on February 16. This left 5 hours and 20 minutes for the run to Philadelphia and as the normal time between these two points is 6 hours and 38 minutes it is clear that the railway took the chance of reaching Philadelphia in about 1 hour and 18 minutes less than the average time. In part, the chance fell out in the railroad's favor; for three of the cars were delivered and unloaded within, or practically within, 36 hours, and the animals in these cars were released from confinement. But the animals in the other cars were still confined; they could not be released until the cars could reach the platform, and to do this the engine must move them to the proper point. The cars had no facilities for food and water, and the platform might as well have been a mile away. Meanwhile the engine departed on other business, and when it returned and moved the cars to the proper place more than 38 hours had elapsed.

It seems to us that these facts admit of but one conclusion. South Bethlehem was a feeding point, where the command of the act could have been complied with, and we think the railway may properly be said to have violated the act knowingly and willfully when it sent the animals forward on the chance that they would complete the journey in less than the average running time. Certainly this conclusion would follow if the railway had been sure that the run could not be made within the statutory period, and we think the conclusion is also justified where the probabilities are against the company, as they were under the facts now presented, as stated herein and in the preceding case. No sufficient reason appears for taking such a chance. The animals could have been rested and fed at South Bethlehem, and all danger of violating the statute would thus have been avoided. As to three of the cars the railway was fortunate, but as to the other two the chance fell out against it, and it must accept the consequence. We do not decide that the railway should have unloaded the cars within the period; our decision is that the cars should have been placed where they could have been unloaded.

The judgment is reversed, with instructions to enter a judgment in favor of the government.

FEDERAL MINING & SMELTING CO. v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 3002.

1. MASTER AND SERVANT ⟸222(1)—INJURIES TO SERVANT—FELLOW SERVANTS —NEGLIGENCE.

The rules of a mining company declared that each man should ascertain by careful examination that the particular place in which he was employed was safe, and that, if unsafe, measures should be taken to remove such danger at once before proceeding with the work, and, if necessary, the foreman or the shift boss should be notified. A miner, who operated a drill, on beginning his work attempted to test the rock above his place of work with his drilling machine; there being no bar to pry down the loose rock. The shift boss, who had charge of the operations on that level, assured the miner that the place was all right, and directed him to commence work. After about ten minutes work loose rock fell, injuring him. *Held* that, as the very rule of the mining company gave the shift boss or foreman the ultimate authority to determine the safety of the working place, he was to that extent vice principal of the mining company, and his negligence was that of the mining company, even though he was a fellow servant of the miners, and hence the miner did not assume the risk of injury from fall of rock, being entitled to rely on the statement of the shift boss.

2. MASTER AND SERVANT ⟸222(1)—INJURIES TO SERVANT—ASSURANCE OF VICE PRINCIPAL.

In such case the order and assurance of the shift boss, who was given control of operations on that level, were within the authority implied in the rule of the mining company.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by Louis Anderson against the Federal Mining & Smelting Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Featherstone & Fox, of Wallace, Idaho, for plaintiff in error.

John P. Gray and McFarland & McFarland, all of Cœur d'Alene, Idaho, for defendant in error.

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

GILBERT, Circuit Judge. The plaintiff in the court below was an experienced miner, who for a year had been operating a compressed air drill in the defendant's mine. He was drilling into the face of the rock in a stope in which he had been working two or three months, when loose rock fell from above his head and injured him. He testified that, before beginning to work on the day of the accident, he looked for a bar to bar down the loose rock, but that he could not find a bar; that he attempted to test the rock with his machine drill, and that while doing so the shift boss came and asked him if he was not doing anything there, to which he replied that he was barring down the loose rock and could not find a bar; that the shift boss then said, "Never mind that; that is all right," and told him to start to work and get

the holes drilled, adding that he had found that the place was all right. The plaintiff testified that he obeyed the shift boss, and after drilling not more than ten minutes the rock fell. The plaintiff recovered a judgment in the court below.

[1] The defendant assigns error to the denial of its requested instruction for a directed verdict in its favor, and it contends that the evidence showed no negligence on its part, but showed that the plaintiff's injuries were the result of his own negligence and carelessness, and the obvious risk of his employment, which risk was assumed by him. The plaintiff's testimony, the purport of which is above set forth, is sufficient to establish the defendant's negligence, if, as was held by the court below, the assurance of the shift boss that the place in which the plaintiff was working had been found safe is to be deemed the assurance of the defendant itself. The defendant contends that the shift boss was but the fellow servant of the plaintiff. The shift boss had charge of the mining operations upon the sixteenth and eighteenth levels of the mine, comprising 22 floors, and had supervision of the work of from 35 to 40 men. He did no manual labor, but his entire time was given to directing and superintending the work of others, and ordinarily he was able to visit each place where the work was going on at least twice during each shift. He had the authority to direct the plaintiff to go to work upon the wall, and he informed the plaintiff, in substance, that he had inspected the rock, and that the place was safe. There is no evidence that he had not the authority to make the inspection and give the assurance of safety.

The defendant relies upon a rule of the mine which it says imposed upon the plaintiff and all workmen in the mine the duty of careful examination of the particular place in which they were employed, to see that it was safe, and that by that rule authority to make such inspection was taken from the shift boss. The rule provides:

"Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once, and before proceeding to work, and, if necessary, the foreman or shift boss must be notified."

That rule by express terms vested the shift boss with general supervisory authority in the matter of making the working place safe, and the evidence shows that the plaintiff complied with the rule. He at first, as the rule required him, attempted to make his working place safe. At that point the shift boss intervened, and told him that examination had been made, and that the place was safe, and he peremptorily ordered the plaintiff to proceed to work. In so doing, the shift boss exercised authority which is found in the language of the rule, and, although the evidence leaves it doubtful whether the shift boss was a fellow servant with the plaintiff, the question whether or not he was such fellow servant is not necessarily involved here, for by the language of the rule the defendant gave the shift boss the ultimate authority to determine the question of the safety of the working place, and made him its vice principal for that purpose, and that authority the shift boss exercised by telling the plaintiff that the place had been

inspected and was safe. Thereby he relieved the plaintiff of the duty of making further inspection.

A foreman may be a fellow servant when engaged in accomplishing the common object of the laborers; but he is a vice principal when performing, or aiding to perform the duties which by law devolve upon the master. If the act which he performs is one which pertains to the duty which the master owes to the servant, the master is responsible for its performance, irrespective of the rank of the servant to whom it is intrusted. Alaska Pacific S. S. Co. v. Egan, 202 Fed. 867, 121 C. C. A. 225; Bunker Hill & Sullivan Min. & C. Co. v. Jones, 130 Fed. 813, 65 C. C. A. 363; Mast v. Kern, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Perras v. Booth & Co., 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Knutter v. N. Y. & N. J. Telephone Co., 67 N. J. Law, 646, 52 Atl. 565, 58 L. R. A. 808; Ashcraft v. Locomotive Works, 148 Iowa, 420, 126 N. W. 1111. In Northern Pacific Railroad Co. v. Peterson, 162 U. S. 346, 353, 16 Sup. Ct. 843, 845 (40 L. Ed. 994) the court, after referring to the duty of the master to provide the servant with a reasonably safe place to work, and safe tools and appliances, said:

"If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

[2] We find no merit in the contention that the order and assurance of the shift boss were made in contravention of the defendant's rule. On the contrary, we think it is clear that the action of the shift boss was within the authority contemplated by the defendant when it promulgated the rule.

The judgment is affirmed.

DELAWARE, L. & W. R. CO. v. BALTRUSHITIS et al.

(Circuit Court of Appeals, Third Circuit. December 14, 1917.)

No. 2284.

RAILROADS ⟸400(2)—INJURY TO CHILD ON TRACK—TRESPASSER—WHEN QUESTION OF FACT.

Defendant owned a short line of railroad in a city, consisting of five tracks; the two outer tracks being used for moving trains and the others for the storage of cars, some awaiting repairs, and some, further movement. The crippled cars sometimes remained there for several months. On one side of the tracks, on about the same level and not separated from them, was an open field, which for many years, without objection from defendant, had been used as a playground at all times of the year by children, who also played on and between the tracks, and were often on and around the standing cars. A moving freight train of 50 or 60 cars stopped on the nearest track, where it stood for some half an hour; the engine not being in sight. Plaintiff, a boy 11 years old, with companions, was playing a game beside the tracks, using in the play a piece of wood which they lost. Plaintiff finally saw it under the standing train

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

and crept in after it, when the train started without warning, running over him and cutting off his arm. There was no evidence that defendant had actual knowledge of his presence. *Held*, that the occupancy of the track by the train was so like the previous occupancy of the other tracks by standing cars that plaintiff could not be said as matter of law to have been a trespasser, to whom defendant owed no duty of notice, but that such question was properly left to the jury.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action at law by John Baltrushitis and another against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Warren, Knapp, O'Malley & Hill, D. R. Reese, J. H. Oliver, and H. A. Knapp, all of Scranton, Pa., for plaintiff in error.

R. L. & Leon Levy and Clarence Balentine, all of Scranton, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This action is by a minor son and his mother (the father being dead) to recover damages for the loss of the boy's right arm. He was 11 years old at the time, and was injured by the unannounced starting of a freight train.

The company owns and operates a short line in the city of Scranton, called the Keyser Valley Branch, running from Cayuga Junction to Hampton Yard. Adjoining this line on the left, and close to the plaintiffs' house on Clearfield street, was an open field or common, several acres in extent, which had for years been much used by boys and girls as a playground, both in summer and in winter, especially on Sundays and holidays. Immediately alongside the common ran the five tracks of the branch; the first and the fifth tracks being used for live, or regular, traffic, and the second, third, and fourth tracks being used for the storage of cars, some of them empty and awaiting repairs, and some of them loaded and awaiting further movement. The crippled cars sometimes stood for several months. There was no barrier between the tracks and the field, and the rails were nearly level with the ground. While playing upon or near the common, the children were often on or about all the tracks, and also on or about the standing cars. In the summer, baseball and other games were played, and these sports often led the players upon the tracks and on and over the cars. On the right of the tracks there were swimming holes, and to reach these the boys continually crossed and recrossed the rails. Close to the first track were several trees, and swings were suspended from these, upon which the children swung forward and backward over the company's ground. In winter there was much coasting, the grade sloping toward the tracks, and the sleds often ran up to and upon the right of way. A small pond immediately adjoining the tracks on the left was much used for skating, and indeed skating and sliding were practiced even between the rails themselves. There was no dispute about the use of the field and of the right of way as a playground, or about the fact that the company had known of such use for years and had made no

objection thereto. On the afternoon of Sunday, January 12, 1913, a freight train, 50 or 60 cars long, was running on the first or left-hand track toward Hampton Yard, and was brought to a stop opposite the common. The locomotive was not in sight, and the train may have remained at rest for half an hour. The boy and two companions had been playing at a game known as "nips," and they had lost a piece of wood, an essential implement of the game. His companions went away, but he continued the search, and finally saw the piece under the standing train. He crept under to recover it, and while he was on the track the train started, without bell, whistle, or other signal, and ran over him, doing the injury complained of. There was no evidence that the company had actual knowledge of his presence, and the jury (following instructions that are not complained of) has determined that he was not guilty of contributory negligence.

The foregoing statement sets forth, not only the undisputed facts, but also the facts that were disputed, but have been found by the jury in favor of the plaintiffs. The only question presented upon this writ is whether the defendant was entitled to binding instructions; the argument being made that, as the company had resumed the occupancy of the track by running a live train thereon, its right of occupancy was exclusive, so that the boy must be regarded as a trespasser, to whom the company owed no duty, because it had no actual knowledge of his presence. It is conceded that, under the decision in O'Leary v. Railroad, 248 Pa. 4, 93 Atl. 771, the company would have been liable if the boy had been struck by the engine as it approached the playground without giving proper signals of the company's intention to resume the actual and exclusive occupancy of the track. That case, however, is said to be inapplicable, because the injury here took place after the company had actually resumed its exclusive occupancy and had placed a live train upon the rails, thus revoking its permission to use the track as a playground, and the decision in Zenzil v. Railroad, 257 Pa. 473, 101 Atl. 809, is relied on to support the distinction. We cannot agree with this contention. In our opinion the occupancy of the track now in question was so like the previous occupancy of the other tracks that the situation had not been materially changed; the only difference was that, instead of three tracks being used for standing cars, four tracks were now occupied, and this can hardly be regarded as unmistakable notice that one set of cars belonged to a live train, while the other cars were merely in storage. The company had permitted the use of all its tracks as a playground, whether the tracks were empty or were occupied by standing cars, and we think it would be going too far to hold that the trial judge was bound to decide as a matter of law that (without more) the presence of the standing train on track No. 1 was conclusive notice that the train was alive and might be moved at any moment. At the best, the jury was the proper tribunal to determine whether under all the circumstances the company failed to exercise reasonable care in operating the train for the purpose of avoiding injury to those who might be continuing the permissive use of the tracks. This question was submitted and was decided against the company.

We find no error in the record, and the judgment is therefore affirmed.

H. F. DANGBERG LAND & LIVE STOCK CO. v. DAY et al.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 3005.

1. APPEAL AND ERROR ⟸209(1)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.
   Where, at the close of the testimony in an action tried to the court, plaintiff made no request for a finding in its favor on the issues, and by no motion or request presented the question of law whether there was substantial evidence to sustain findings for defendant, the sufficiency of the evidence cannot be reviewed on appeal.
2. PAYMENT ⟸89(5)—EVIDENCE—ADMISSIBILITY.
   The manager of a corporation whose stock was owned by plaintiff contracted to purchase cattle, the contract being placed in escrow. The contract was assigned to plaintiff, and, on discovery of a difference between an alleged carbon copy thereof delivered by the manager and the original contract, plaintiff repudiated the contract and sued to recover the payments. The court found that the contract placed in escrow was the one which the parties made. *Held*, that testimony of one of the officers of the purchasing company that the manager told him the carbon copy was a copy of the original contract was inadmissible; there being no issue of ratification, and such statement not having been made in the presence of defendants.

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 H. F. Dangberg Land & Live Stock Company against H. C. Day and S. A. Foster, copartners doing business under the firm name and style of Day & Foster. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Wm. M. Sims, of San Francisco, Cal., Olin Wellborn, Jr., and Madison Marine, both of Los Angeles, Cal., for plaintiff in error.

Wm. J. Hunsaker, E. W. Britt, Le Roy M. Edwards, and Joseph L. Lewinsohn, all of Los Angeles, Cal., and J. H. Merriam, of Pasadena, Cal., for defendant in error Day.

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

GILBERT, Circuit Judge. [1] The plaintiff in error brought an action against the defendants in error to recover $20,000, the first payment on a contract for the sale of land, cattle, horses, and millsites situate in the states of Arizona and New Mexico. The contract was entered into in Arizona on March 25, 1913, but the delivery of the property was not to be made until June of that year. The contract was made by one Dodson, as manager of the Highland Cattle Company, a Nevada corporation, the assignor of the plaintiff in error. It was placed in escrow with a bank at Duncan, Ariz. The whole contract price was $250,000. The capital stock of the purchasing company was held by Dangberg, Humphrey, and Dodson. Dangberg was the secretary. Dodson delivered to Dangberg and Humphrey what purported

to be a carbon copy of the contract. This copy, according to the testimony of Humphrey and Dangberg, differed from the original in escrow, in that it provided for a guaranty of the delivery of 9,000 head of cattle, while the original contract provided for no specific number of cattle. On the discovery that there were only about 7,000 head of cattle to be delivered under the contract, the purchaser declined to go further with the contract, and its assignee brought this action to recover the payment that had been made. A jury trial was waived, and the court below made special findings of fact in favor of the defendants on the material issues of the case. One of the findings was that on or about March 25, 1913, the Highland Cattle Company, through its duly authorized agent, entered into a contract with the defendants in error, which was the written contract which had been deposited in escrow, and that no other contract was made. At the close of the testimony there was no request by the plaintiff in error for a finding in its favor on the issues, and by no motion or request did it present to the trial court the question of law whether there was substantial evidence to sustain findings for the defendant. The sufficiency of the evidence to support the findings, therefore, is not open to review in this court. Dunsmuir v. Scott, 217 Fed. 200, 133 C. C. A. 194; Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 127 C. C. A. 332; Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622; Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. 364, 153 C. C. A. 290.

[2] There remains only the question whether there was error in the admission or exclusion of testimony. The plaintiff in error contends that as one of the principal issues in the case is whether or not the Highland Cattle Company ratified the contract which was signed by Dodson, it was error to sustain the defendant's motion to strike out the testimony of one of the officers of the purchasing company that Dodson told him that the carbon copy was a copy of the original contract. It is too plain to require discussion that evidence of the statement made by Dodson to his associates in the Highland Cattle Company, not in the presence of the defendants in error or either of them, was incompetent. No issue of ratification was involved in the case. The court having found that the contract which was placed in escrow was in fact the contract which the parties made, the case could present no question of ratification.

The judgment is affirmed.

LEE et al. v. LEVISON et al.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 3033.

1. LIMITATION OF ACTIONS ⇐130(12)—RUNNING OF STATUTE—EXCEPTIONS.

Code Civ. Proc. Cal. § 355, providing that, if an action is commenced within the time prescribed therefor and a judgment therein for plaintiff be reversed on appeal, the plaintiff may commence a new action within one year after reversal, does not warrant a plaintiff, who was nonsuited

in an action in the California state court, which judgment was affirmed on appeal, in thereafter commencing a new action within one year; the period of limitations meanwhile having elapsed.

2. LIMITATION OF ACTIONS ⊜73(9)—RUNNING OF STATUTE—DISABILITY.

Code Civ. Proc. Cal. § 352, declares that if a person entitled to bring an action be a married woman, and her husband be a necessary party with her in commencing such action, the time of such disability is not a part of the time limited for commencement of the action; while section 370 declares that, when a married woman is a party, her husband must be joined with her, except when the action concerns her separate property or her right to homestead property. A married woman, alleging damages growing out of a malicious prosecution by defendants, instituted in the California state court an action against defendants; her husband being a party. *Held* that, the husband having been joined in that action as a party, and the action having been terminated by nonsuit, the married woman could not, after the running of the period of limitations, begin a new action, her husband joining as party plaintiff, on the theory that limitations had been tolled by reason of her coverture.

In Error to the District Court of the United States, for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Action by Emma C. Lee and H. Lee, her husband, against Alexander Levison and others. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

Thomas R. Shepard, of Seattle, Wash., for plaintiffs in error.

Heller, Powers & Ehrman, of San Francisco, Cal., for defendant in error National Surety Co.

M. H. Wascerwitz, of San Francisco, Cal., for defendants in error Levison.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. [1] This was an action brought in the court below to recover damages alleged to have been sustained by the plaintiff Emma C. Lee, growing out of her alleged malicious prosecution by the defendants thereto. Among the defenses interposed by the defendants was that of the statute of limitations of the state of California, which confessedly was a complete defense, unless it was suspended by the pendency of a former action between the same parties for the same cause, by virtue of this provision of the state statute:

"If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff * * * may commence a new action within one year after the reversal." Section 355, Code Civ. Proc. Cal.

The wrong complained of in each of the actions was committed July 21 and July 29, 1909. Within a few months thereafter the former action was commenced by the plaintiffs in the present case in one of the superior courts of the state of California, where it was tried, and which trial resulted on October 9, 1911, in a judgment of nonsuit. From that judgment the plaintiffs appealed to the Supreme Court of the state, where on July 26, 1916, the judgment was affirmed. Within one year thereafter this new action by the same plaintiffs against the

same defendants for the same cause was commenced in the court below.

If the judgment in the former action had been for the plaintiffs, and had been reversed on the appeal therefrom, the present action would have been authorized by section 355 of the Code of Civil Procedure above quoted, and, having been commenced within one year after July 26, 1916, would have been brought in time; but as the judgment in the former action was against the plaintiffs, and was affirmed on appeal, it is, we think, perfectly clear that the present action was not authorized by the provision contained in section 355, without which it is not pretended that it has any basis. It need hardly be said that the court has no power to legislate, nor that decisions based upon dissimilar statutory provisions do not apply to a case such as this, where the statute is too plain to require construction.

[2] The further contention on the part of the plaintiffs in error that by virtue of sections 352 and 370 of the California Code of Civil Procedure the present action is saved from the law of the statute of limitations, we think equally without merit. The first of those sections provides that:

"If a person entitled to bring an action * * * be, at the time the cause of action accrued, either:

"1. * * *

"4. A married woman, and her husband be a necessary party with her in commencing such action.

"The time of such disability is not a part of the time limited for the commencement of the action."

And the other of the sections referred to provides that:

"When a married woman is a party, her husband must be joined with her, except:

"1. When the action concerns her separate property, * * * or her right or claim to the homestead property, she may sue alone. * * *"

If it be conceded that the disability contended for ever existed in this case, it was clearly removed by the joining in both of the actions of the husband of the plaintiff in error Emma C. Lee.

The judgment is affirmed.

COOPER GROCERY CO. v. PENLAND.

In re CHRISTIAN BROS.

(Circuit Court of Appeals, Fifth Circuit. December 6, 1917. Rehearing Denied January 24, 1918.)

No. 3074.

1. FRAUDULENT CONVEYANCES ⟸154(4)—WITHHOLDING MORTGAGE FROM RECORD.

Though under Rev. St. Tex. 1911, art. 6824, relative to the recording of deeds and mortgages, the failure to record a mortgage would not affect its validity, and though under most circumstances a mortgage to secure a valid debt cannot be held fraudulent, a mortgage given with the understanding that it would not be recorded lest other creditors take action,

and in order that the contracting of new debts might not be interfered with, might be set aside as in fraud of creditors.

2. BANKRUPTCY ⟸185—FRAUDULENT TRANSFERS—RIGHTS OF TRUSTEE.

Under Bankruptcy Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 (Comp. St. 1916, § 9654), providing that the trustee may avoid any transfer by the bankrupt which any creditor might have avoided, a mortgage fraudulent as to creditors, in that it was given with the understanding that it would be withheld from record, so as not to affect the bankrupt's credit, might be set aside at the suit of the trustee, and the four months period of limitation had no application.

Appeal from the District Court of the United States for the Western District of Texas; Duval West, Judge.

In the matter of Christian Bros., bankrupts. From a judgment in favor of G. H. Penland, trustee, the Cooper Grocery Company appeals. Affirmed.

W. L. Eason, of Waco, Tex., for appellant.

J. D. Williamson and Sleeper, Boynton & Kendall, all of Waco, Tex., for appellee.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

BATTS, Circuit Judge. The Cooper Grocery Company, having a valid debt of about $6,000 against Christian Bros., took from them a mortgage over which the contest arises. At the time the mortgagors, still active in business, were indebted nearly $40,000. Mortgagors becoming bankrupts, mortgagee filed a claim for its debt and set up its mortgage. A contest was filed; it being alleged that mortgagors, fearing the effect upon their creditors and credit, requested, at the time the mortgage was given, that it be not recorded; that the Grocery Company acquiesced, and, as a result of the understanding, did not record the mortgage until about fifteen months after its execution, and about one month prior to the bankruptcy.

[1, 2] The referee and the District Judge found that the understanding, as alleged, existed, and that the instrument was not recorded on account thereof. It was held that the mortgage, executed with this understanding, under the circumstances developed, was to "hinder, delay, and defraud creditors." The issue of fact was determined by the trial judge upon adequate evidence, and his conclusion as to the legal effect is entirely warranted. While under most circumstances a mortgage to secure a valid debt cannot be held fraudulent, when it is given with the understanding that it will not be recorded lest other creditors take action, and in order that the contracting of new debts may not be interfered with, the mortgage may be set aside. The mere failure to record the instrument would not affect its validity, though it might, as to persons protected by article 6824, R. C. S. of Texas, be ineffective. The mortgage in this case being affected by the legal fraud established, may be set aside at the suit of the trustee, under the authority conferred by section 70e of the Bankruptcy Act. The four months period of limitation has no application.

The judgment is affirmed.

UNITED STATES v. FELDMAN.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 65.

1. ALIENS ⟹54—IMMIGRATION—ADMISSION UNDER BOND.
It is proper to take a bond conditioned that an alien contemporaneously admitted into the country shall not within a time limited become a public charge, and providing that the surety shall at stipulated intervals make written reports as to the alien's residence and occupation, and such a bond is a legal instrument.

2. EVIDENCE ⟹71, 83(1)—PRESUMPTIONS.
There is a presumption of the delivery of properly addressed mail matter deposited in the United States mails; and there is also a presumption that officials of the immigration office will keep notices that they receive from the mail.

3. ALIENS ⟹54—BONDS—ACTIONS—JURY QUESTION.
In an action on a bond conditioned that an alien should not, within a stipulated time after admission, become a public charge, and which required the surety to make written reports at designated intervals to the immigration officer as to the alien's residence and occupation, where the surety testified to mailing such reports and immigration officials denied possession of the same, there are two conflicting presumptions, each based on official performance of duty, and hence the question whether the condition of the bond was broken is for the jury.

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

Action by the United States against Wolf Feldman. There was a judgment for defendant, and the United States brings error. Reversed, and new trial ordered.

The United States sued Feldman as the surety upon a bond conditioned that a certain alien, contemporaneously admitted into the country, should not, within a time limited in said bond, become a public charge, and that the surety should "within 30 days prior to the expiration of six months and one year, respectively, from the date [of the bond], make written reports to the immigration officer in charge of the port of New York, showing as to said alien (a) residence and (b) occupation." The complaint charged that Feldman had not made either of the reports specified in the condition, and demanded judgment accordingly.

Plaintiff proved that no reports were upon the file of similar documents in the office of said immigration officer, and also proved the course of business in respect of such documents. Defendant testified that he had procured other persons to write proper reports for him; that as to one report he supposed that the writer had mailed it, and the other he had himself mailed, and knew that it was addressed "Commissioner Immigration, Ellis Island, New York City." Thereupon the court directed a verdict for defendant. Such direction is assigned for error.

Melville J. France, U. S. Atty., of Brooklyn, N. Y. (Thomas J. Cuff, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Moe Shapiro, of New York City (Irwin J. Sikawitt, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The legality and propriety of the bond in suit was established by us in Illinois Surety Co. v. United States, 229 Fed. 533, 143 C. C. A. 601, an action upon an exactly similar document.

[2, 3] The testimony on behalf of the government raised a presumption that no notice had been sent, for the officers and employés of the postal service are presumed to have done their duty and made delivery of all properly addressed mail matter intrusted to their care; equally, also, are the officials of the immigration service presumed to have kept what they received. Defendant's testimony tended to show (as to at least one of the two required notices) that the same had been received, and for substantially the same reasons. Rosenthal v. Walker, 111 U. S. 193, 4 Sup. Ct. 382, 28 L. Ed. 395; Dunlop v. United States, 165 U. S. at 495, 17 Sup. Ct. 375, 41 L. Ed. 799, and cases cited. Thus a question for the jury was presented, peculiarly suitable for its decision, and it was error to direct a verdict for either party.

Judgment reversed, and new trial ordered.

In re ARMANN.

In re JUDSON.

(Circuit Court of Appeals, Second Circuit. December 18, 1917.)

No. 84.

BANKRUPTCY ⊂=461—APPEAL—PETITION TO REVISE—TIME OF FILING.

Under rule 38, Second Circuit (150 Fed. liv, 79 C. C. A. liv), a petition to revise an order in bankruptcy must be filed within 10 days after the order sought to be reviewed is entered, and a petition thereafter filed will be dismissed.

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 Charles Armann. Petition by Lucius E. Judson, trustee, to revise an order confirming a report of the referee sustaining the claim of the holder of a chattel mortgage to the proceeds of the mortgaged property. Petition to revise denied.

Frank H. Reuman, of New York City, for petitioner.

Herzfeld & Sweedler, of Brooklyn, for bankrupt.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. November 18, 1915, Armann, the alleged bankrupt, executed a chattel mortgage on three horses, some wagons and harness to secure a past-due indebtedness to one D'Alboro, payable on demand. D'Alboro instituted an action in the Municipal Court of the city of New York, Borough of Brooklyn, Sixth District, to foreclose the mortgage, in which action a judgment was entered in his

favor for $919.66 and costs. December 1st execution issued, under which the city marshal seized the property.

December 4th an involuntary petition in bankruptcy was filed against Armann. Eo die one of the petitioning creditors filed a petition in the District Court, asking for an order restraining the city marshal from selling, and D'Alboro and his attorneys from interfering with, the mortgaged property. December 11th Judge Chatfield granted the prayer of the petition, and directed that the property should be sold by auctioneers named by him and the proceeds held as a separate fund until the validity of the mortgage was determined.

December 28th D'Alboro filed a petition in the bankruptcy proceeding praying that the fund, after deducting the marshal's fees and the liveryman's charges be paid to him. February 7, 1916, the trustee filed an answer to the petition, alleging that the mortgage was given within four months of the filing of the petition in bankruptcy, for a past indebtedness, when the bankrupt was insolvent, to the knowledge of D'Alboro, who took the same with reasonable cause to believe that a preference was intended.

This issue was referred to the referee in charge as special master, who reported April 24, 1917, that D'Alboro had no reason to believe that Armann was insolvent, and recommended that the fund be paid to the petitioner. May 28th Judge Veeder confirmed the report. June 18th the trustee filed this petition to revise.

As our rule 38 (150 Fed. liv, 79 C. C. A. liv) requires that a petition to revise be filed within ten days after the order sought to be reviewed is entered, the petition is dismissed.

UNITED STATES v. MORENA.

(Circuit Court of Appeals, Third Circuit. January 29, 1918.)

No. 2219.

ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE.

As an alien, who made his declaration of intention before the enactment of Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596, was required to file his petition for citizenship within seven years after the date of that act, a certificate issued on a petition filed more than seven years after such act, without renewing his declaration, will be canceled on motion of the government.

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

Petition by the United States against Antonio Morena. From a decree dismissing the petition, the United States appealed, and certain questions were certified to the Supreme Court. Decree reversed, with directions, in conformity to the Supreme Court's answers to the certified questions (245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. ——).

E. Lowry Humes, U. S. Atty., and Benjamin M. Price, Asst. U. S. Atty., both of Pittsburgh, Pa.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. Antonio Morena declared his intention to become a citizen of the United States prior to the act of Congress entitled "An act to establish a Bureau of Immigration and Naturalization, and to provide a uniform rule for the naturalization of aliens throughout the United States," passed June 29, 1906 (chapter 3592, 34 Stat. 596), and was admitted to citizenship upon a petition filed more than seven years after the act without renewing his declaration. The United States moved the District Court to annul its order admitting Antonio Morena to citizenship and to cancel his certificate of naturalization. The motion was denied and the United States took this appeal.

In view of conflicting decisions in several jurisdictions upon the question here in issue, and with the object of obtaining a ruling that would insure uniformity in the administration of the said act, this court certified several questions to the Supreme Court of the United States (Judicial Code [Act March 3, 1911, c. 231] § 239, 36 Stat. 1157 [Comp. St. 1916, § 1216]), of which the one controlling the decision in this case is as follows:

"Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of the act?"

The Supreme Court has answered this question in the affirmative. 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. ——. The decree of the District Court, dismissing the petition of the United States, is therefore reversed, with the direction that the order admitting Antonio Morena to citizenship be vacated, and the certificate of citizenship granted thereupon be canceled.

CHARLES GREEN CO. et al. v. HENRY P. ADAMS CO.

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

No. 19.

1. PATENTS ⊂=326(4)—SUITS FOR INFRINGEMENT—SUPPLEMENTAL PROCEEDINGS FOR CONTEMPT OF INJUNCTION.
   Modifications of an enjoined device will not be dealt with on a motion to punish for contempt, unless the change is a merely colorable equivalent, and the obtaining by the alleged contemptuous infringer, after the decree, of a patent for his new device, while it does not absolutely prevent either punishment for contempt or a supplemental injunction, is a circumstance of great weight in reaching decision.
2. PATENTS ⊂=327—SUIT FOR INFRINGEMENT—SUPPLEMENTARY INJUNCTION.
   Supplemental injunctive relief, after decree adjudging infringement, like preliminary relief, is a matter of grace and discretion.
3. PATENTS ⊂=327—SUITS FOR INFRINGEMENT—SUPPLEMENTARY INJUNCTION.
   If an asserted new infringement does not plainly render a new action and another trial an expensive futility, a supplementary injunction should not issue.

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

Suit in equity by the Charles Green Company and Arthur W. Clapp and Herbert C. Newell, doing business as Oberly & Newell, against the Henry P. Adams Company. Motions for a supplementary injunction and to punish for contempt denied, and plaintiffs appeal. Affirmed.

Appeal from order entered in District Court for the Southern District of New York refusing to issue a supplementary injunction or to punish the defendant for contempt. The Green Company and others own Patent No. 1,180,141. They brought against the defendant this usual suit in equity, for infringement, and after trial had a decree sustaining all the claims and ordering injunction and accounting. Subsequently defendant made and sold a new article of the same general kind as that declared an infringement. Thereupon plaintiffs moved for a supplementary injunction specifically restraining defendant from manufacturing or vending its new product, and for an order declaring defendant in contempt for having already done the same thing. This appeal is from the refusal of the lower court to grant either relief.

C. P. Goepel, of New York City (T. Hart Anderson, of New York City, of counsel), for appellants.

Charles H. Griffiths, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The practice of reaching evasive and persistently infringing defendants by supplementary injunction we have already substantially approved. Read Machinery Co. v. Jaburg, 223 Fed. 1022, 138 C. C. A. 659. That approval we reiterate, but the propriety of granting such relief should be ascertained with due regard to settled rules regarding alleged contempt of patent injunctions.

Modifications of enjoined devices have not been dealt with on motions to punish for contempt "unless the change was a mere colorable equivalent" (Crown Cork, etc., Co. v. American, etc., Co., 211 Fed. 653, 128 C. C. A. 154), and when the alleged contemptuous infringer had (after decree) obtained a patent covering his new device, such applications have usually been denied (Bonsack, etc., Co. v. National, etc., Co. [C. C.] 64 Fed. 858, and cases cited). We do not hold that the procuring of such new patent absolutely prevents either punishment for contempt or supplemental injunction, but it is a circumstance of great weight in reaching decision.

[2] Further, supplemental, like preliminary, injunctive relief is always matter of grace and discretion. Such applications are ordinarily heard on affidavits, although there are cases where references have been ordered which practically turned a petition for supplementary injunction into a new suit. Sundh Electric Co. v. General Electric Co. (D. C.) 217 Fed. 583; Id. (D. C.) 235 Fed. 708.

In this instance the District Judge exercised his discretion against plaintiffs' application, it appearing by the motion papers that after final decree defendant had applied for a patent (the proposed claims of which were disclosed) specifically covering the alleged new infringement, and it is agreed that since the hearing below defendant's patent has issued.

[3] If an asserted new infringement does not plainly render a new action and another trial an expensive futility, no supplementary in-

junction should issue. There is always a presumption of invention, novelty, and utility attaching to any patent, unless it be proved to have inadvertently issued. Safe, etc., Co. v. Globe, etc., Co., 242 Fed. 497, — C. C. A. —. If testimony and cross-examination are required to justify the issuing of supplementary injunction, there is small practical difference between such procedure and the institution of a new suit.

There is, however, a great difference between a supplementary injunction issued upon affidavits and preliminary relief. In the latter case the restraint is pendente lite only, and trial is often expedited by the urgency of preliminary restraint; but a supplementary injunction is not followed by any trial, and puts the burden of appeal upon a defendant who perchance might upon a trial convince the court of the patentable difference between what he had done before adverse decree and what he subsequently did. We are therefore indisposed to interfere with the discretion exercised by the lower court in this instance, and, since equity acts in præsenti, we are the more inclined to affirm because defendant has now the presumptions afforded by a patent in favor of a right to do what plaintiffs complain of.

For these reasons, the order appealed from is affirmed, with costs, without expressing any opinion as to the validity, scope, or interpretation of the defendant's recently acquired patent rights.

GORDON et al. v. TURCO-HALVAH CO., Inc., et al.

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

No. 61.

1. PATENTS ⟸326(4)—INFRINGEMENT—CONTEMPT PROCEEDING.
   In cases of a colorable evasion of a decree enjoining infringement of a patent, the court has discretion either to proceed by supplementary bill or proceed directly on petition in contempt to punish the infringer.

2. PATENTS ⟸312(3)—INFRINGEMENT—CONTEMPT.
   In a proceeding to punish defendants for contempt in violating a decree enjoining infringement of a patent for a bleached sweetmeat, evidence *held* to show that defendants' change in their product was colorable and for purposes of evasion only.

3. PATENTS ⟸322—CONTEMPT PROCEEDING—REFERENCE.
   On rule to show cause why defendants should not be punished for violating a final decree enjoining infringement of a patent, the District Court on sufficient evidence passed an interlocutory order finding defendants in contempt and directed reference to a special master to ascertain the amount of the product sold in violation of the decree and profits obtained therefrom. At this hearing one of the defendants offered testimony tending to show that they were not guilty of contempt, because not having infringed the patent. *Held* that, defendants not having sought to reopen the proceedings before the court, so as to meet complainant's proof, the interlocutory order was final, and defendants' evidence contradicting it could not be considered on motion to confirm the master's report assessing the profits.

4. PATENTS ⟸312(1), 318(6)—INFRINGEMENT—ACCOUNTING.
   Where defendants infringed complainants' patent, they are entitled to deduct from profits the amount of depreciation in value of machinery

used in manufacturing the infringing device; but, where the amount is questioned, defendants have the burden of establishing the depreciation.

5. PATENTS ⊂=312(3)—INFRINGEMENT—DEPRECIATION.
Testimony by a defendant that an item appearing in their account was for depreciation and discarded machinery used does not show the amount of the depreciation, being no more than a statement of the nature of the item.

6. PATENTS ⊂=318(6)—INFRINGEMENT—CREDITS.
Where defendants violated a decree enjoining their infringement of a patent, they are entitled to deduct from their profits moneys expended in advertising the infringing product, for such sums should be considered as any other expenses in connection with sales.

7. PATENTS ⊂=318(6)—INFRINGEMENT—DEDUCTION.
Where defendants, having been enjoined from infringing a patent, infringed the same, and the manufacturing of the infringing product constituted three-fourths of defendants' whole business, defendants, on an accounting for profits, are entitled to a credit of three-fourths of the taxes and insurance on their business, there being no difficulty in apportioning the items.

8. PATENTS ⊂=318(6)—INFRINGEMENT—CONTEMPT PROCEEDING.
Where, in proceedings to punish defendants for contempt in violating a decree enjoining them from infringing a patent, complainants made expenditures for a copy of stenographic minutes, complainants are entitled to have the expenditure allowed as a reasonable disbursement, even though it could not have been taxed in the bill of costs, for, while the court cannot impose a penalty, it has power in such a proceeding to make complainants whole for all reasonable expenses to which they have been put, including counsel fee.

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

Bill by George S. Gordon, Mitchel Wolf, and Harry Cowen, individually and as copartners, doing business as the Gordon-Wolf-Cowen Company, against the Turco-Halvah Company, Incorporated, Nathan Radutsky, and others. There was a decree for complainants. On order to show cause why defendants should not be punished for contempt of the decree, defendants were adjudged guilty of contempt, and the master's report, awarding a penalty against them, was confirmed, and defendants appeal. Affirmed.

See, also, 233 Fed. 430.

This is an appeal from a final order, entered February 19, 1917, adjudging the defendants, who are the appellants herein, guilty of contempt of a final decree in the suit and confirming a master's report awarding a penalty against them. The suit was begun by bill filed in the District Court on the 16th of December, 1915, to which answer was filed on January 15, 1915, and thereafter, on March 4, 1915, by consent of both parties, a decree was entered, without hearing, adjudging that the plaintiffs were the sole owners and exclusive licensees under two letters patent, the first, 1,063,533, issued on June 3, 1913, to George H. Gordon, one of the plaintiffs, and the other, 1,074,483, issued on September 30, 1913, to Mitchel Wolf and Harry Cowen, the other two of the plaintiffs. These patents were for candies of the kind generally known as "halvah," a Turkish sweetmeat originally made up of sugar and sesame oil. The first patent, which alone need be considered in this case, described the process of mixing 35 pounds of corn syrup with 15 pounds of granulated sugar and boiling the same until it became of a pasty or mushy consistency. At this stage 2 pounds of Turkish soap root were added to render the product more white and to give it greater viscosity. Next the patentee

added approximately 50 pounds of specially prepared peanut butter, and a very small quantity, say one-half a teaspoonful, of suitable flavoring essence. The peanut butter was to be made from peanuts which were roasted until free from moisture, but not so long as to change the color of the nuts, so that the oil should not be affected by excessive roasting. The result was that the peanut butter was white, and not the usual yellowish color. Of the three claims in suit only two need be mentioned:

"1. A sweetmeat consisting of about 35 per cent. corn syrup, 15 per cent. granulated sugar, 50 per cent. of a whitish peanut butter, and a flavoring essence.

"2. A bleached sweetmeat compound, composed of approximately 35 per cent. corn syrup, 15 per cent. granulated sugar, and 50 per cent. of a whitish peanut butter."

The consent decree mentioned above further adjudged that the defendants had infringed both said letters patent and concluded with an injunction against making any candy containing the inventions in question, or either of them, "or any candy or food products like or similar to those that they, or any of them, have hitherto made."

On November 8, 1915, the plaintiffs procured an order to show cause why the defendants should not be punished for contempt of this decree. In support of this order they filed affidavits setting forth the facts hitherto recited, and also showing the purchase from the defendants of certain specimens of halvah on October 22, 1915. The composition of these samples was stated in the affidavit of a chemist, one Ludwig Saarbach, as containing approximately 35 per cent. corn syrup, 15 per cent. sugar and about 50 per cent. peanut butter, with a small percentage of soap root. So far as the affidavit further stated an infringement of the second patent, it need not be recited. In further support of the motion the plaintiffs submitted an affidavit of one Johann Wind, a former employé of the defendants, who alleged that during the months of September and October, 1915, and until November 5, 1915, he had been concerned with the manufacture of the defendant's halvah. He stated the composition of the same, which was about 49 per cent. of corn syrup, 6 per cent. of granulated sugar, 42 per cent. of peanut butter, and less than 3 per cent. of corn or maize oil, with a small quantity of soap bark. He also stated that the peanut butter then used was of a whitish color, as it had only been slightly roasted.

In answer to this motion the defendants only produced the affidavit of one Claude A. O. Rosell, a chemist and patent lawyer. This affidavit contained no dispute of the facts set forth in Wind's or Saarbach's affidavits, and confined itself to a criticism of the relevancy and pertinency of the affidavits of the plaintiff. It also alleged that the defendants were manufacturing under a patent issued to him, the affiant, No. 1,154,059, on September 21, 1915, of which the application had been made five days after the consent decree here in suit. The claims of this patent were for "a food product containing maize oil, ground oleaginous seed and sweetening agent in proportions to form a solid friable compound," and the gist of the patent lay in the fact that maize oil was to be substituted in part in the manufacture of halvah for sesame oil or peanuts or other oils of the sort. The proportions, however, were not stated in the patent itself.

Upon this showing the District Court passed an interlocutory order finding the defendants in contempt for violating the provisions of the final decree of March 5, 1915, in respect of the Gordon patent, No. 1,063,533, but not in respect of the Wolf & Cowen patent, No. 1,074,483, and directed a reference to a special master to ascertain the amount of the candy so sold in violation of that decree and the profits obtained therefrom. 233 Fed. 430. At the hearing one of the defendants, Radutsky, testified that all the halvah made by them during the period of the accounting was composed of 50 per cent. glucose and sugar, 25 per cent. peanut butter, 18 per cent. sesame seed, and 7 per cent. maize or corn oil, and that the peanut butter was not whitish, as provided in the patent, but yellow. He further testified that all the ingredients used by the defendants were the same throughout the period of the accounting,

and that the color of the peanut butter was always the same. Thereupon the master held himself concluded by the interlocutory decree from considering whether the halvah was an infringement of the decree, upon the theory that, once the plaintiffs had shown that all the halvah was homogeneous, the matter was at an end. He found the defendant's profits to be $2,129.70, to which he added the plaintiff's charges and disbursements in the contempt proceeding of $700.92, together with a counsel fee of $750, making in all damages of $3,580.62. The District Court confirmed this finding, with modification of the amount of the counsel fee, and an order was entered on February 19, 1917, against the defendants, in the sum of $2,784.16, for which execution was directed to issue. It is from this order that the appeal was taken.

James H. Griffin and Joseph H. Robins, both of New York City, for appellants.

Paskus, Gordon & Hyman, of New York City (Maurice Block and William S. Gordon, both of New York City, of counsel), for appellees.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). The first question raised is as to the propriety of a proceeding to punish for contempt, where the defendants are manufacturing under a patent of their own issued after the decree, and where the decree itself was entered by consent. We do not know the composition of the original halvah found to be within the patent on March 5, 1915, but on principle we cannot see how the fact that the defendants are manufacturing under a new patent has any bearing upon this issue. The Patent Office does not and cannot, in granting patents, regard questions of infringement; they are concerned only with conflicting claims. Were it not so, they would have to determine whether every improvement of an existing patent was or was not an infringement, which, of course, they could not do. It is undoubtedly a fact that there is much authority in the books for the proposition that the defendant's patent creates a presumption of noninfringement; but we observe that the Sixth Circuit has declined to follow the rule (General Electric Co. v. Electric Cont. & Mfg. Co., 243 Fed. 188, 193, — C. C. A. —), and certainly this is the only tenable principle, however strongly the contrary may be fixed in the books.

[1] However, we leave that question as we find it, for we do not think that in the case at bar it is necessary to pass upon it. Similarly we do not pass upon the question whether it is proper practice to proceed by contempt for a new infringement, or whether the plaintiff should apply for injunction by supplementary bill. Bonsack Machine Co. v. National Cigarette Co. (C. C.) 64 Fed. 858; Crown Cork Co. v. American Cork Specialty Co., 211 Fed. 650, 128 C. C. A. 154. We cannot approve, however, the statement in Onderdonk v. Fanning (C. C.) 2 Fed. 568, that the issue of a patent to the defendant forbids calling his product a merely colorable device. We follow rather the practice laid down by the First Circuit in National Metal Molding Co. v. Tubular Woven Fabric Co., 239 Fed. 907, 153 C. C. A. 35, and approved in our recent decision, Charles Green Co. v. Henry P. Adams Co., 247 Fed. 485, — C. C. A. —, decided November 14, 1917, that in cases of a colorable evasion of the decree the District Court had the

discretion either to proceed by supplementary bill or to proceed directly under petition in contempt. The language in Truax v. Detweiler (C. C.) 46 Fed. 117, is to be taken with that exception implied, as appears expressly in the decision of Judge Lowell in Higby v. Columbia Rubber Co. (C. C.) 18 Fed. 601, 602. Nor do we distinguish even when the decree is by consent, else such decrees would be mere nullities.

[2] We think, on the showing made before the District Judge, the change in the product was only for evasion, and fell within the exception to the general rule just stated. Saarbach's affidavit stated the approximate proportions as he found them from the samples; they were the same as those of the claims. Wind's more specific affidavit showed that the composition of all the halvah made was substantially like that of the Gordon patent, except for the admixture of less than 3 per cent. of corn oil. The proportions in the plaintiff's patent were expressly stated to be only approximate, and the addition of so trifling an amount of corn oil could not have been for any honest reason. We therefore find that the interlocutory order of the District Judge was authorized, and indeed we do not see how he could have found otherwise than he did.

[3] A different question would be raised by Radutsky's testimony, on the hearing before the master, of the composition of the halvah made during the summer and autumn of 1915, and if that testimony was relevant to the issue we should be disposed to leave the plaintiff to proceed by supplementary bill. But we do not think that it should have been considered, and we agree with the master in holding that, once the plaintiffs had shown, as they did, that all the halvah made during the period of the accounting was like the samples, it had proved its case as to the whole amount, and that the controversy was closed. The defendants had had their day in court, and had declined to contest the facts; if they had subsequently wished to do so, their only course was to ask to reopen the proceedings before the court, so as to meet the plaintiff's proof. This they chose not to do, and the decision stood as to the samples. Unless they could, before the master, dispute the plaintiffs' proof of the homogeneity of the halvah as a whole, it necessarily followed that they were accountable for all the profits. We cannot agree that, after the decision of the court upon the issue at that time before it, the whole evidence came again into hotchpot on motion to confirm the report. Hence we hold that all the halvah was within the decree.

[4, 5] There remains only the items of the accounting. Prima facie we agree that the item for depreciation was a correct credit to the defendants, had it been properly proved. We can find no proof of it, however, in the case, except the testimony of Radutsky, in answer to Q. 339, that the item appearing in the account "was for depreciation and discarded machinery, and the machinery was also used in manufacturing tachin oil and sesame seed." If the credit was challenged, the defendant had the burden of establishing it, and we do not think that this testimony was sufficient. There should have been some indication of what was the average life of the machinery, from which it might have been ascertained what the yearly depreciation would have been,

and from this yearly depreciation could have been ascertained the depreciation during the period of the accounting. The testimony is no more than a mere statement of the nature of the claim itself. We think the master was right in disregarding it.

[6] We do not, however, assent to the disallowance of three-fourths of the advertising charge of $312.20. We think it should be allowed at $234.15. The advertising of a business is a necessary expense, and, unless something to the contrary appears, must be reasonably regarded as one of the means by which the profits arise. There is no reason to distinguish between it and any other expense by which sales are made, such as salesmen's commissions, or salaries, or the like.

[7] There is undoubtedly authority for the position taken by the master and the court below that taxes and insurance are not a proper credit in accounts of this sort. Winchester Repeating Arms Co. v. American Buckle & Cartridge Co. (C. C.) 62 Fed. 278, 281; National Folding Box & Paper Co. v. Dayton Paper Novelty Co. (C. C.) 95 Fed. 991; Steam Cutter Co. v. Windsor, etc., 22 Fed. Cas. 1166, Fed. Cas. No. 13,332. There are often difficulties in apportioning such items as these to the profits for a particular part of the business in question, but here the manufacture of the halvah constituted three-fourths of the whole business of the company, and we see no reason why we should not apply the rule laid down by the Court of Appeals for the Third Circuit in Carborundum v. Electric Smelting, etc., 203 Fed. 976, 985, 122 C. C. A. 276, that they are proper credits. It is true that in that case the plaintiff was entitled to all the profits of the defendant's business realized during the accounting period, but there surely can be no difference in principle between a case where the plaintiff is entitled to all the profits and to an aliquot part. General charges of the character of insurance and taxes can only be apportioned upon that part of the profits which the infringing device affects; but, when this can be accurately done, it is in accordance with equity and good sense that the defendant should get credit for what was a necessary condition to the creation of profits at all. We therefore allow a credit of three-fourths of this sum, amounting to $268.14.

[8] As to the item of $93, for a copy of the stenographic minutes, our decision in Stallo v. Wagner, 245 Fed. 636, —— C. C. A. ——, applies only to such items when an attempt is made to tax them as part of the costs; but this is a proceeding for contempt, and, while we have no power to impose a penalty, we do have power to make the plaintiff whole for all reasonable expense to which he may have been put, including a counsel fee. As we regard the charge for copies of stenographer's minutes as a reasonable disbursement, we deem it just that the plaintiff should be made whole for that expense, even though he could not have taxed it in his bill of costs.

With the modifications above indicated, the decree is affirmed, without costs.

SUTTON et al. v. WENTWORTH.

(Circuit Court of Appeals, First Circuit. December 19, 1917.)

No. 1291.

1. PATENTS ⟸114—SUITS IN EQUITY TO OBTAIN—EVIDENCE.
In a suit in equity to obtain a patent, brought under Rev. St. § 4915 (Comp. St. 1916, § 9460), the rule is (1) that the proceeding is not an appeal, but an independent proceeding; (2) that testimony taken in an interference proceeding in the Patent Office, and out of which the subject-matter of the bill arises, is not competent as evidence, in the absence of proof establishing the right to introduce secondary evidence; (3) that the record of the proceedings in the Patent Office is likewise not competent evidence, except that admissions of the parties made in such proceedings may be received, and statements of witnesses made therein may be used for purposes of cross-examination; (4) that the plaintiff may show by the Patent Office proceedings that a judgment of priority has been rendered against him for the purpose of showing his right to maintain the bill; (5) that, to overcome the presumption in favor of that judgment, the proof must be clear and convincing.

2. PATENTS ⟸114—SUIT IN EQUITY TO OBTAIN—EVIDENCE.
Under such rules, in a suit brought after an adverse decision by the Court of Appeals of the District of Columbia in an interference proceeding, it was error for the court, on motion by defendant to dismiss, to receive or consider the judgment and proceedings in a prior interference between the parties, which were in no manner a part of complainants' bill, but a matter for defendant to plead or prove, if he desired to avail himself of it.

3. JUDGMENT ⟸634—RES JUDICATA—JUDGMENT AS BAR OR ESTOPPEL.
There is a difference between the effect of a judgment as a bar to a second action for the same cause and its effect as an estoppel in another suit between the same parties upon a different cause of action. In the former case a judgment on the merits must be pleaded, and is an absolute bar to a subsequent action; it concludes the parties, not only as to every matter which was offered and received to sustain or defeat the suit, but also as to any other matter which might have been offered for that purpose. In the latter case, the judgment in the prior action may be offered in evidence, and operates as an estoppel only as to those matters which were there directly in issue, and either admitted by the pleadings or actually tried.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by Henry M. Sutton and others against Henry A. Wentworth. Decree for defendant, and complainants appeal. Reversed and remanded.

A. S. Pattison, of Washington, D. C., for appellants.

Odin Roberts, of New York City (Roberts, Roberts & Cushman, of Boston, Mass., on the brief), for appellee.

Before BINGHAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

BINGHAM, Circuit Judge. This bill in equity was brought under section 4915 of the Revised Statutes (8 U. S. Compiled Statutes 1916, § 9460), and was filed in the District Court October 21, 1914. In it the

plaintiffs allege: That before December 27, 1906, they had invented certain new and useful improvements in electrostatic separators and in the method of separating differentiated particles of comminuted material. That on or about the 27th day of December, 1906, they applied to the Commissioner of Patents of the United States for a patent thereon, and as defined in the following claim:

"The method of separating differentiated particles of comminuted material, which consists in passing them through an electrostatic field in contact with an electrode surface, directing upon a part of the electrode surface a diffused spray discharge, and shielding another part of said surface by intercepting a portion of the effective spray discharge to allow a separation of the differentiated particles in accordance with the nature of their differentiations."

That on or about July 14, 1909 (July 25, 1911), their application was adjudged by the Commissioner of Patents to interfere with the pending application of the defendant, Henry A. Wentworth, which contained the claim above stated, "as will more fully appear from the application papers of the said Henry A. Wentworth on file in the Patent Office of the United States, and a duly authenticated copy of which is ready here in court to be produced." That the Commissioner of Patents, on or about July 14, 1909 (July 25, 1911), declared interference No. 33,578 between the plaintiffs' application and that of Wentworth, including therein the subject-matter above stated. That the plaintiffs duly prosecuted their application and claim. That the proofs of record disclose that said Wentworth did not conceive his invention until subsequent to the filing date of the plaintiffs' application. That the examiner of interferences erroneously awarded priority of invention to Wentworth. That on appeal to the examiners in chief the decision of the examiner of interferences was reversed and priority of invention was awarded to the plaintiffs. That upon appeal by Wentworth to the Commissioner of Patents the decision of the examiners in chief was erroneously reversed, and priority of invention awarded to Wentworth. That upon the plaintiffs' appeal to the Court of Appeals for the District of Columbia the decision of the Commissioner of Patents was erroneously affirmed, and priority of invention awarded to Wentworth, and the above claim was finally rejected by the Patent Office, "as will more fully appear in the duly authenticated copies of said application and of said proceedings in the Patent Office of the said United States and of the proceedings in the Court of Appeals for the District of Columbia ready here in court to be produced." That the Commissioner of Patents has refused, and still refuses, to grant letters patent upon the plaintiffs' application for the invention defined in the above-recited claim. That the plaintiffs have no adequate relief except under this bill brought in accordance with section 4915, and pray that it be adjudged: (1) That they are the first, true, and original inventors; (2) that they are entitled to receive letters patent of the United States for their said invention as specified in the before-recited claim of their application; (3) that letters patent of the United States therefore be issued to them; and (4) that they be awarded such other and further relief as the circumstances of the case may require.

On December 7, 1914, the defendant filed a motion that the plaintiffs be required to file certified copies of certain specified documents, some

of which they had offered profert of in their bill of complaint, and, on April 5, 1916, under order of the court, they filed certified copies of the required documents, being all the papers in an interference No. 30,637, declared July 20, 1909, and in the interference No. 33,578, declared July 25, 1911, together with all papers in the Patent Office filed in the plaintiffs' application down to the date of the filing of the bill, and in the file on Wentworth's application.

On May 8, 1916, the defendant moved to dismiss the bill on grounds, in substance, as follows:

1. That the judgment of the United States Patent Office refusing the patent to the plaintiffs was by an inferior tribunal with respect to which this proceeding does not lie, and was acquiesced in by the plaintiffs without appeal.

2. That said judgment was rendered more than one year prior to the filing of this bill, and became final June 7, 1911.

3. That the proceedings in the Patent Office and the Court of Appeals in interference No. 33,578 arose out of a mistake of law, but finally terminated in a judgment to the effect that the judgment of June 7, 1911, in interference No. 30,637, was conclusive against the plaintiffs.

4. That the plaintiffs have no right to a patent for the subject-matter stated in interference claim No. 33,578, because the subject-matter of that claim is not disclosed in their aplication.

The records produced from the Patent Office show that the date—July 14, 1909—in the two places where it appears in the bill of complaint was incorrectly stated; that interference No. 33,578, to which the allegations of the bill relate, was declared July 25, 1911, which fact would appear to have been overlooked in the opinion of the District Court.

The records also show that prior to interference No. 33,578 a previous interference No. 30,637 was declared July 20, 1909, on the respective applications of the parties, but upon a different claim, which reads as follows:

"The method of separating particles of comminuted material differentiated as to electrical conductivity, which consists in passing them through an electrostatic field in contact with an electrode surface, opposing the repellent effect of the electrode surface by directing thereon a diffused spray discharge, and shielding another part of said surface by intercepting a portion of the effective spray discharge; thus allowing the repelling effort on the shielded part of the surface to set free the more conductive particles, and thereafter separately collecting the differentiated components of the material."

In interference No. 30,637, declared July 20, 1909, the record in the Patent Office discloses that Wentworth filed a motion before the primary examiner to dissolve the order of interference, on the ground that the plaintiffs' application did not disclose a machine performing the process of the claim then in issue, and stated therein that repulsion was the gist and vitality of the process under that claim. He admitted, however, that the apparatus disclosed in the plaintiffs' application "would work in and according to the manner and process described in the Sutton et al. file," and was a nonrepulsion or gravity separation process. But the primary examiner denied the motion, holding that

the process of plaintiffs' application was separation by repulsion, and allowed the interference to stand.

When the matter of this interference issue came before the examiner of interferences, he held that the plaintiffs' application did not expressly disclose "the invention in issue" nor indicate "with any sufficient degree of clearness that Sutton et al. contemplated using the apparatus disclosed therein in a manner which would necessitate the practice of the method which constitutes said invention," and, in describing the process of the plaintiffs' application, he said, "When removed from the influence of the convective discharge, the large particles would be first released from the conveyor electrode, but not by repulsion, as they would drop therefrom as soon as the force of gravity exceeded the electrical attraction;" that, although the plaintiffs' machine could be made to operate in different ways by opening and closing certain electrical switches by which the conveyor electrode *2* might be connected either to the ground or to the negative terminal of the generator, it was clear that, if the conveyor electrode was grounded, its potential was zero, and it could not repel particles of material from its surface; that the operation would more nearly approach that of Wentworth if the conveyor electrode were connected with the negative terminal of the generator, and electrode *1* was connected continuously with the positive terminal; but that, even under such conditions, it was not at all necessary that in the operation of the machine Wentworth's method of repulsion should be practiced. He therefore held that the invention of the issue then in question was not patentable to the plaintiffs, because their application did not disclose separation by repulsion, and awarded priority to Wentworth.

On appeal to the examiners in chief, they affirmed the decision of the examiner of interferences, and awarded priority of invention to Wentworth, but suggested a claim embodying a method of separating differentiated particles of comminuted material, which still embodied a separation of the particles by repulsion. Wentworth asked for a rehearing, stating that whatever may be the actual operation of the plaintiffs' device there was no disclosure in their application of a separation of differentiated particles by repellent action. The petition for rehearing was granted, and the examiners in chief held, in accordance with the contention of Wentworth, that separation by repulsion was not disclosed in the plaintiffs' application, and was not of necessity a feature of their invention. In view of this holding, the examiners in chief withdrew the claim first suggested and proposed as an issue of interference the claim hereinbefore recited in the plaintiffs' bill, namely, the interference issue No. 33,578.

No appeal was taken from this decision of the examiners in chief, and the Commissioner of Patents, on June 7, 1911, entered an order declaring interference No. 30,637 finally determined against the plaintiffs, and remanded the case to the primary examiner for action on the above claim suggested by the examiners in chief and which became the subject of interference No. 33,578.

In interference No. 33,578, declared July 25, 1911, the record discloses that Wentworth filed a motion to dissolve this interference also,

on the grounds: (1) That the issue claim had different meanings in the cases of the respective parties; (2) that it is not patentable to the plaintiffs; and (3) that the plaintiffs have no right to make the claim.

The primary examiner denied the motion and ruled that the plaintiffs had the right to make the issue claim; that their disclosures afforded sufficient ground therefor; that the claim was not for the same subject-matter as that of the claim in No. 30,637; and that the decision in the prior case was therefore not res adjudicata of the claim of this interference.

Before the examiner of interferences, Wentworth renewed his contention that the plaintiffs had no right to make the claim which defines the issue of interference No. 33,578: (1) Because of the judgment in favor of Wentworth in the prior interference No. 30,637 between the same parties on the same applications, and, as he claimed, with respect to the same subject-matter of invention; or (2) because the invention covered by the claim in interference No. 33,578 was not disclosed in plaintiffs' application. The examiner of interferences assumed, without deciding the question, that the disclosure in plaintiffs' application was such as to entitle them to make a claim like the one in the interference issue, and held that the adjudication in favor of Wentworth in the prior interference was res adjudicata, not, however, because the claim in that interference was the same as the claim in the prior interference, but on the ground that the plaintiffs might have made the present claim in interference No. 30,637, and, not having done so, they were estopped to make it now.

On the plaintiffs' appeal to the examiners in chief, they held:

(1) That the claims in issue in the two interferences were not the same. They said:

"But the present claim [claim in interference No. 33,578] is not identical in effect with the claim of the prior interference. It sets forth subject-matter which is common to the applications of both parties, whereas the prior claim was limited to specific features of supposed invention found only in Wentworth's application. It is true that the difference between the claim now in issue and the claim in issue in the prior interference would not serve to avoid the bar of res adjudicata if the prior proceeding had amounted to a contest as to the priority of invention of any subject-matter presumably common to the applications of both parties. Blackford v. Wilder, 28 App. D. C. 535; Horine v. Wende, 29 App. D. C. 415; Carroll v. Hallwood, 31 App. D. C. 165. But we know of no authority holding that a party to an interference who avoids a judgment of priority in favor of his opponent by contending that the claim in issue does not define subject-matter of invention, which is common to the applications of both parties, may avoid a second interference based upon subject-matter which is common to the two applications, and either appropriate to himself a claim for such common matter or keep his opponent from obtaining such a claim." That "an interference proceeding is declared under the authority of section 4904, R. S. [Comp. St. 1916, § 9449], to determine the question of priority of invention between parties who have applications for patents which, in the opinion of the Commissioner, interfere with one another," and "it is intended that the parties shall prove their dates of invention, and that an award of priority shall be made to the party who was first to invent the common subject-matter." That if a party denies that the issue sets forth any common subject-matter, and rests his case on such denial, he "attacks the propriety of the action instituting the proceeding, instead of asserting his date of invention of any common subject-matter."

(2) That consequently the judgment of priority of invention to Wentworth in the earlier interference was improper; that the question litigated in that interference was whether the claim then in issue presented subject-matter common to the respective applications, and, the examiner of interferences having, in the earlier proceeding, decided that there was none, there was nothing determined by the issue on which to predicate a decision of priority of invention; that the question of priority of invention was not in fact litigated; that the only question put at rest was that the issue was improper, and that, as a consequence, the subject-matter of the issue in interference No. 33,578 was not res adjudicata; and

(3) That the plaintiffs' application disclosed subject-matter defined in the claim of interference No. 33,578.

On appeal the Commissioner of Patents held that, although the award of priority to Wentworth in No. 30,637 was upon the ground that plaintiffs could not make the claim there in issue because their application did not involve the subject-matter of that claim, they could have amended the claim or suggested a different one, and thus presented an issue covering a subject-matter common to both applications, if there was any, and not having done so, the judgment of priority of invention to Wentworth in No. 30,637 was binding upon them, and valid; that consequently the issue in No. 33,578 was res adjudicata; and that the prior judgment "precludes any further contest on the question of priority between these parties on their applications."

He did not pass upon the question whether the claim of interference No. 33,578 covered the same subject-matter as that of No. 30,637, upon which alone, as will hereafter be pointed out, could be predicated the proposition that the plaintiffs would be bound as to all matters that were put in issue in the prior proceeding, or that might have been put in issue therein.

On appeal to the Court of Appeals of the District of Columbia, the decision of the Commissioner of Patents was affirmed as being in compliance with former decisions of that tribunal without a review of the facts and a specific application of the principles of res adjudicata to those facts.

In the District Court it was held (1) that no bill would lie under section 4915 with respect to the subject-matter of the claim dealt with in interference No. 30,637; (2) that a proceeding under section 4915 could not be predicated upon a decision of the examiners in chief of the Patent Office, and that, if it could, the year within which it should have been brought expired in June, 1912; (3) that, so far as there was common subject-matter in the issue claims of the two interferences the plaintiffs' right to a patent therefor was not to be regarded as abandoned under Revised Statutes, section 4894; (4) that, although the claim in No. 30,637 expressly stated that the separation process was to be with reference to "particles of comminuted material differentiated as to electrical conductivity," and the claim in No. 33,578 spoke of the particles as "differentiated," without saying in what respect, nevertheless, as neither claim contemplated any other differentia-

tion than that effected by the electrostatic field, electrode surface, and diffused spray discharge, which both claims mention, neither can be regarded as having in view differentiation among the particles in any other respect than that expressly mentioned in the earlier claim; (5) that upon a consideration of the bill, and what was before the court in connection therewith, it was of the opinion that there was no substantial difference shown to exist between the two claims, and that neither claim was warranted by the disclosure made by the plaintiffs in their application, and dismissed the bill.

It will be seen on examination of the opinion of the District Court that its decision did not turn upon the question of res adjudicata or estoppel by judgment, but upon the proposition contained in the fifth paragraph above stated, namely, that the subject-matter of the claims in the two interferences was substantially the same; that their common subject-matter was separation by repellent action, and that, as in the first interference, it was decided by the examiners in chief that the plaintiffs' application did not disclose separation by repulsion but by nonrepellent action or gravity, it did not disclose the process of the claim in interference No. 33,578; and this holding was reached, notwithstanding, as above pointed out, the same examiners in chief, in interference No. 33,578, when they had before them the claim of that interference, which is the same claim the District Court was considering, held that the plaintiffs' application disclosed subject-matter defined in that claim.

The errors assigned on this appeal are in substance that the court erred (1) in dismissing the bill on defendant's motion; (2) in denying the plaintiffs the privilege of offering expert testimony to aid the court in considering the plaintiffs' application and the claims in question; (3) in denying the plaintiffs the privilege of offering testimony with respect to the question of priority of invention involved in the bill of complaint; (4) in accepting the interference record in the Patent Office as primary evidence, and basing its opinion thereon; (5) in holding that the plaintiffs' application does not disclose the process set out in the bill, and in refusing to follow the decision of the expert examiners in chief in interference No. 33,578, holding that plaintiffs' application does disclose the subject-matter of the bill; and (6) in holding as to the claims in issue in interferences No. 30,637 and No. 33,578, that no substantial difference is shown to exist between the two claims.

In view of the fact that the decision in the District Court arises out of the defendant's motion to dismiss without affording the plaintiffs a a trial in the ordinary course, and, instead thereof, receiving and using in evidence the records in the Patent Office—not only those pertaining to the applications of the plaintiffs and the defendant with reference to the interference No. 33,578 and the proceedings in the Patent Office relating to that interference and as to which an offer of profert was made in the plaintiffs' bill, but also in receiving and using in like manner the records of the proceedings in the Patent Office concerning the applications of the parties relating to the claim of interference No. 30,637 and the interference proceedings therein, as to which the plain-

tiffs did not offer profert in the bill, we think it necessary to consider whether the course pursued was correct. Had it not been for the fact that the court adopted this method, which involved a consideration of the record in respect to interference No. 30,637, there would have been nothing before it on which to predicate a consideration of the question of estoppel by judgment, or to determine the question whether the claim in interference No. 33,578 was the same as that of interference No. 30,637; for the defendant, in order to raise either of these questions, would have had to plead the judgment of priority of invention rendered in the prior interference No. 30,637, or introduce it in evidence, together with such other proofs as might be necessary to establish it, and also show that the subject-matter involved was the same as that of the claim in interference No. 33,578.

[1] According to the decisions in the case of Dover v. Greenwood, reported in 154 Fed. 854 (C. C.), and in 177 Fed. 946 (C. C.), and in Greenwood v. Dover, 194 Fed. 91, 114 C. C. A. 169, the rule in this circuit is (1) that a proceeding in equity under section 4915 is not an appeal, but an original independent proceeding; (2) that testimony taken in an interference proceeding in the Patent Office, and out of which the subject-matter of a bill in equity, brought under section 4915, arises, is not competent as evidence in the equity proceeding, in the absence of proof establishing the right to introduce secondary evidence; (3) that the record of the proceedings in the Patent Office is likewise not competent evidence, except that admissions of parties made in such proceedings may be received, and statements of witnesses made therein may be used for purposes of cross-examination; (4) that a plaintiff may show by the Patent Office proceedings that a judgment of priority has been entered against him for the purpose of showing his right to maintain a bill under section 4915; and (5) that to overcome the presumption that is to be given that judgment the proof must be clear and convincing.

[2] In this case the judgment of the Patent Office which the plaintiffs were required to allege in order to set forth a right to maintain their bill was the judgment based upon the decision of the Court of Appeals of the District of Columbia, reported in 41 App. D. C. 582, as to which the plaintiffs offered profert in their bill, not the judgment in interference No. 30,637. According to the foregoing decisions it was error for the District Court to receive or consider, on the defendant's motion, the judgment or the proceedings in interference No. 30,637, because they were in no manner a part of the bill, and could not be imposed upon the plaintiffs as a part of the affirmative case made by the bill. The judgment in interference No. 30,637 was a matter for the defendant to plead or prove, if he desired to avail himself of it. Consequently the only question before the court, on the motion, was whether the plaintiffs' application disclosed the process defined in the issue of the interference No. 33,578.

In the bill the plaintiffs allege that their application discloses the invention defined in the claim upon which they seek a patent, and, in our opinion, the question thus presented is not so clear as to justify its determination one way or the other without the aid of expert testi-

mony. The case must therefore go back to the District Court for trial on pleadings and proof.

As on a trial of the case the defendant no doubt will plead or offer in evidence the judgment in interference No. 30,637 with a view of raising the question of res adjudicata or estoppel by judgment, we regard it as advisable to state the legal principles involved in the doctrine and their application to one or another of a given state of facts as they may be found to exist.

[3] There is a difference, sometimes overlooked, between the effect of a judgment as a bar to the prosecution of a second action for the same cause and its effect as an estoppel in another suit between the same parties upon a different cause of action. In the former case a judgment on the merits must be pleaded, and is an absolute bar to a subsequent action; it concludes the parties, not only as to every matter which was offered and received to sustain or defeat the suit, but also as to any other matter which might have been offered for that purpose. In the latter case, the judgment in the prior action may be offered in evidence, and operates as an estoppel only as to those matters which were there directly in issue and either admitted by the pleadings or actually tried. Southern Pacific Railroad v. United States, 168 U. S. 1, 57, 59, 60, 18 Sup. Ct. 18, 42 L. Ed. 355.

This question was very carefully considered in the case of Cromwell v. County of Sac, 94 U. S. 351, 352 (24 L. Ed. 195), where Mr. Justice Field, in delivering the opinion of the Supreme Court, said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and

determined. Only upon such matters is the judgment conclusive in another action."

The doctrine as above set out has been many times affirmed by the Supreme Court; a late decision bearing upon the question being Barttell v. United States, 227 U. S. 427, 440, 33 Sup. Ct. 383, 57 L. Ed. 583.

If at the trial it shall be found that the subject-matter of the claim in interference No. 33,578 is the same as that of the claim in interference No. 30,637, then it would follow from the principles above enunciated that the judgment in interference No. 30,637 would be an absolute bar to the proceedings in interference No. 33,578, for, the subject-matter of the claims of the two proceedings being the same, the judgment in the prior proceeding would conclude the parties not only as to every matter which was offered and received to sustain or defeat the prior proceeding, but also as to any other matter which might have been offered for that purpose. And as the judgment in interference No. 30,637 was rendered by the examiners in chief of the Patent Office, and not by the Commissioner of Patents or the Court of Appeals of the District of Columbia, this bill, brought under section 4915, could not be predicated upon that judgment, and, if it could, the year within which it should have been brought expired in June, 1912.

If, on the other hand, it should be found that the subject-matter of the claims in the two interferences is not the same, the judgment in interference No. 30,637 would operate as an estoppel only as to those matters which were directly in issue and either admitted by the pleadings or actually tried in the prior interference. As we have previously pointed out, the fact was not litigated in the prior interference whether Wentworth's conception of the invention disclosed in his application was prior to the plaintiffs', and the sole question determined by Wentworth's motion in that interference was that the plaintiffs' application did not disclose the subject-matter defined in the claim of that issue; and, such being the case, the only fact that could be said to have been concluded by the judgment in the prior interference would be that the plaintiffs' application did not disclose the subject-matter defined in the claim of that issue, and the only effect, either as evidence or as a plea in bar, which could be accorded, in the second interference, to the judgment in the prior one, would be to estop the plaintiffs from showing that the process disclosed in their application covered separation of comminuted particles by repulsion. In such a situation this bill in equity, under section 4915, would be, in fact, based upon the judgment rendered by the Court of Appeals of the District of Columbia in interference No. 33,578, and, having been brought within a year from the rendition of final judgment therein, would not be barred by the limitation in section 4894.

Being of the opinion that the District Court erred in dismissing the proceeding, the case must be sent back for trial upon pleadings and proofs.

The decree of the District Court is reversed, and the case is remanded to that court for further proceeding not inconsistent with this opinion, with costs to the appellants.

CRONE v. JOHN J. GIBSON CO.

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

No. 30.

1. PATENTS ⊂=328—VALIDITY—STARTING DEVICE FOR GAS ENGINES.
The Baldwin patent, No. 1,009,011, for a starting device for gas engines, claims 1, 2, 4, and 8, *held* void for anticipation by the McCadden patent, No. 756,879, and claims 3, 5, 6, and 7 for lack of invention in view of the prior art.
2. PATENTS ⊂=62—ANTICIPATION—EVIDENCE TO ESTABLISH.
Written proof is not invariably necessary to establish anticipation.

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

Suit in equity by Francis G. Crone against the John J. Gibson Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 237 Fed. 637.

This is an appeal from an interlocutory decree declaring valid and infringed claims 1, 2, 3, 4, 5, 6, 7, and 8 of letters patent No. 1,009,011, issued on November 14, 1911, to the plaintiff, Francis G. Crone, as assignee of Dayton A. Baldwin, inventor. The object of the invention was to provide an improved starting device for gas engines, by which the engine could have gasoline supplied to it independently of the carbureter. It presupposed the ordinary elements of a gas engine, to wit, a gasoline tank, two or more cylinders, a carbureter, a supply pipe between the tank and the carbureter, and an intake pipe from the carbureter to the cylinders. The patented improvement consisted in taking off from the gasoline supply pipe between the tank and the carbureter a lead of pipe which passed up through a pump, and from the pump led into the intake pipe beyond the carbureter, and close to the manifold. The pump was so devised as to draw raw gasoline from the supply line through itself, and to inject it into the intake pipe, along the sides of which it should trickle downwards towards the carbureter. The pump contained check valves, so organized that upon drawing up the piston gasoline would be drawn into the cylinder of the pump, and on pressing the piston down would be forcibly injected into the intake pipe. A valve, *V*, was inserted in the auxiliary pipe just below the pump, and a spraying nozzle within the intake pipe. The pump was indicated as fixed to the dashboard of the motor. The following are the eight claims in suit:

"1. The combination of a gas engine, a carbureter, an intake pipe extending from the carbureter to the gas engine, a gasoline supply, a pipe connecting therefrom to the carbureter, a branch pipe line extending from the supply and connected to the intake pipe, and means for forcing gasoline through the branch pipe into the intake.

"2. The combination of a gas engine, a carbureter, an intake pipe extending from the carbureter to the gas engine and having branches extending to the cylinders of the engine, a gasoline supply, a pipe connected therefrom to the carbureter, a branch pipe line extending from the supply and connected to the intake pipe at the point where the same branches to the cylinders, and means for forcing gasoline through the branch pipe into said intake pipe.

"3. The combination of a gas engine, a carbureter, an intake pipe extending from the carbureter to the gas engine, a gasoline supply, a pipe connecting therefrom to the carbureter, a spraying nozzle discharging into the intake pipe, a branch pipe line extending from the supply and connected to said spraying nozzle, and means for forcing gasoline through the branch pipe into said spraying nozzle.

"4. The combination of a gas engine, a carbureter, an intake pipe extending from the carbureter to the gas engine, a gasoline supply, a pipe connecting therefrom to the carbureter, a branch pipe line extending from the supply and connected to the intake pipe, and a pump in this branch line for forcing gasoline into the intake pipe.

"5. The combination of a gas engine, a carbureter, an intake pipe extending from the carbureter to the gas engine, a gasoline supply, a pipe connecting therefrom to the carbureter, a branch pipe extending from the supply and discharging into the intake pipe, and a pump in said pipe line having valves opening toward the intake pipe.

"6. The combination of a gas engine, a carbureter, an intake pipe extending from the carbureter to the gas engine, a gasoline supply, a pipe connecting therefrom to the carbureter, a branch pipe extending from the supply and connected to the intake pipe, a pump in the pipe line having valves opening toward the intake pipe, and a valve in the branch pipe line below the pump.

"7. The combination in an automobile of a gas engine, a carbureter, an intake pipe extending from the carbureter to the gas engine, a gasoline supply, a pipe extending therefrom to the carbureter, a branch pipe line extending from the supply to the intake pipe, and a pump in this branch arranged on the dash of the automobile.

"8. The combination, with a gas engine, of a gasoline supply, an intake pipe connected with the gas engine, a branch pipe for conducting fuel from the supply to the intake pipe, and a carbureter connected with the supply and intake pipe independently of the branch pipe and between the intake pipe and the connection of the branch pipe with the supply."

The defendant raises no substantial question of infringement, but attacks the validity of the patent. At the first hearing the court held the patent invalid under the patent to Steele, 992,920, whose date of application was earlier than that of the patent in suit, but upon application later evidence was introduced to show that Baldwin's device was in fact invented earlier than the application date of Steele, and the court therefore concluded that Steele was not an anticipation. From this conclusion the defendant does not appeal, but rests its case rather upon certain other patents introduced on the rehearing, of which the most important is that issued to McCadden, 756,879, which, together with certain other patents introduced at the first hearing, it claims show anticipation. These patents are Riotte, 696,146, Robinson, 565,033, Gaskill, 742,134, and Rogers, 661,078; but this decision treats only McCadden and Riotte.

The court below considered chiefly the McCadden patent, and decided that, although it was a close reference, the plaintiff had successfully distinguished it, since McCadden had connected the priming device directly to the carbureter, thus making it in a sense a dependent upon it in priming the cylinder, instead of being independent, as Baldwin had made it.

Some hundreds of devices have been manufactured by the plaintiff under the patent in suit, but less than a thousand in all, and he has secured a contract from the Pierce Arrow Company for a royalty of 75 cents upon all motors built by them. With this exception there is no evidence in the case of any use of the patent itself.

The McCadden patent, on which the defendant principally relies, relates to carbureters for internal combustion and has three purposes: First, to provide a suction feed for the carbureter; second, to locate the fuel supply below the carbureter; and, third, for an instantaneous primer. The third feature alone concerns this case. The patent shows a tube or pipe immersed in the fuel supply at the very end of which above the tank is a bulb. The compression of this bulb drives the fuel through the tube or pipe which terminates in the upper part of the mixing chamber of the carbureter itself. The gasoline being injected into this mixing chamber trickles down its sides and probably gathers at the bottom. The intake pipe extends down into the mixing chamber to within a short distance of its bottom. The normal source of supply for the engine comes from the fuel tank past a needle of the usual kind into an aspirating chamber, where it is in part mixed with air. A valve

normally closes one side of this suction chamber, but when suction is applied from the engine this valve is unseated, and the gas and air in the suction chamber are drawn into the mixing chamber, whence they leave through the intake pipe into the cylinder itself. The most salient difference between McCadden's patent and Baldwin's rests in the fact that the opening from the priming pipe does not give directly into the intake pipe, but into the mixing chamber, and it is upon this point particularly that the plaintiff insists.

Riotte's patent exhibits a pump with check valves of the same general character as that shown in the patent in suit, directly adjacent to the carbureter tank. By the use of this pump an added supply of gasoline is brought to the aspirating needle of the carbureter itself. The defendant seeks to use the reference only to show that the kind of pump used was old in the art.

Josiah McRoberts, of Chicago, Ill. (A. Parker Smith, of New York City, and Clifford Nichols, of Buffalo, N. Y., of counsel), for appellant.

J. William Ellis, of Chicago, Ill., for appellee.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] We consider the McCadden patent an anticipation of claims 1, 2, 4 and 8. If the orifice, *u*, of Figure 1 of that patent had opened into the intake pipe, r^1, of that figure, it could not be even colorably argued that the devices were not identical as respects the features of these claims. There is no warrant for saying that the fuel supply, *s*, is an auxiliary to the main tank; only one fuel supply is mentioned, and it is the same tank as is to be located below the carbureter proper (page 1, lines 96 to 100). There is equally no warrant for saying that the device was not intended to apply to gasoline engines. The only reason given for a contrary conclusion is that the patent applies only to "internal combustion" engines, and that "gasoline" is nowhere mentioned, but rather "oil." This is not sufficient; gasoline engines were a well-known form of internal combustion engine in 1903, the date of the application, and unless there was some expression to the contrary, there would be no ground to hold that the phrase did not cover gasoline engines along with the rest. The omission of the word "gasoline" may well have been because other sorts were intended. No proof is suggested that the primer will not work with gasoline, or that the "carbureter," a term appropriate, if not exclusively appropriate, to a gasoline engine, is not suitable in its structure to such engines. The supposed heating cup, which is unmarked, does not seem to us necessarily to be such. It is quite as likely to have been the handle of a drainage plug; we incline so to regard it.

Nor do we appreciate the importance of the position that the primer must be "independent" of the carbureter. If by this is meant that the primer must work independently of the flow of gasoline into the carbureter, it is so in McCadden. If it is meant that the air must come into the mixing chamber independently of the valve, *i*, it is not so; but we cannot see that this is in any sense a feature of Baldwin's patent. The adverb "independently," in claim 8, only refers to the supply of gasoline to the primer, which must be independent of the

flow through the carbureter, as it is. We must remember that it was this auxiliary supply of gasoline which both patents sought to achieve, and not the supply of air, which was always adequate, whether the weather were cold or hot.

There is no reason to impugn the operability of McCadden's disclosure. The valve, *i*, might not open, it is true; but we must assume that it would. The patent is entitled to the usual presumption of operability; it has passed the expert examiner, and it stands without challenge in the evidence. We are certainly not qualified to pass upon that question, and we take it as we find it. So, too, of the operation of the priming device. In just what form the injection will reach the orifice, *u*, we cannot say. It may be as solid liquid, or it may be mixed with air; much would seem to depend upon the size of the pipe, t^2. Some may gather at the bottom of the mixing chamber, or it may all trickle down the sides, or be evaporated in the air. We cannot pass upon this, but we must take the apparatus as capable of doing what the patentee set out to do, because it has passed the official in charge of such matters as so capable, and no competent person has challenged his conclusion. We are not experts in such matters.

Coming, therefore, to the crux of the controversy, we see no reason to suppose that it was patentable invention to inject the priming charge into the intake pipe at the manifold, rather than into the mixing chamber of the carbureter itself. There is no place in either system where one can say that functionally the mixing chamber ends and the intake pipe begins. For example, Dorsey, the plaintiff's expert (folios 668, 669), concedes that the mixing is not completed in the carbureter proper, and that one purpose of a long intake pipe is to secure a better mixture than if the cylinder were more directly connected. We must remember that the carbureter is no more than an inclosed space into which both gasoline and air are freely drawn, so that the mixture may be established. Since the mixture continues until the two gases arrive in the cylinder, it is only an arbitrary division which sets the limit at the precise confine of the carbureter proper. We do not, of course, mean to say that the place at which the priming charge is admitted is indifferent in the operation of the primer; it may well be that Baldwin's device is superior, in admitting it where gravity will spread it over the sides of the intake pipe in greater area than is possible in McCadden. All we say is that, viewing the mechanism functionally, it is only a question of which form is the optimum in a scheme whose general purpose and means of realization are the same.

[2] If the idea of priming the engine at the manifold were of itself entirely new, more could be said for the novelty of the invention; but it was not. Bate and Birdsall had so placed the priming cups that they opened exactly at that spot, and whatever advantage came from injection just there Baldwin did not discover. The plaintiff complains of the proof upon this point in that there is no written corroboration at least prior to 1910. This is true, yet in the case of Birdsall, at least, there is no reason to question the adequacy of the oral proof. His recollection is detailed, and he has no possible motive to falsify. Written proof is not an invariable necessity. Lee v. Upson (C. C.) 43

Fed. 670, 671; Sipp v. Atwood, 142 Fed. 149, 154, 73 C. C. A. 367; Grupe Co. v. Geiger, 215 Fed. 110, 114, 131 C. C. A. 418. We may accept his testimony that he did pipe his priming charge into the manifold in 1905, and the plaintiff's invention, therefore, depends upon whether it was enough to adapt McCadden's pump and piping, so that the injection should be where Birdsall put it.

As in all cases the best test of invention is the history of the art, when that throws any light. Here the plaintiff urges that there had been a series of failures finally capped by Baldwin's success. It is true that the initial priming of a gasoline engine was a difficulty experienced from the outset not only in the motor car, but in the stationary engine. There are a number of patents designed to meet the difficulty, and if it were true that each was designed to meet the same problem as Baldwin's patent, there would be force in the assertion. We do not regard them as such efforts. The difficulty develops when one cranks the engine at the start, and the device of a few drops of raw gasoline was an obvious and early expedient. A hand pump connected with the supply might originally have been an invention—we are not prepared to deny it; but McCadden had that and Riotte did the same. Riotte, it is true, pumped into the carbureter; it was a "tickler," so called, but it obviated the necessity of opening the tank and dipping out the gasoline to charge the priming cup, which was Baldwin's chief purpose. Moreover, its location was more convenient before the days of self-starters than a pump on the dashboard. The only advance that we can see, therefore, still remains in the location of the outlet. As to this, we cannot ignore that, at about the same time as Baldwin, it was completely disclosed by Crone, Case, and Steele, a circumstance rightly considered of significance when the question arises of the necessity of uncommon originality to the problem. Elliott Co. v. Youngstown Car Co., 181 Fed. 345, 349, 104 C. C. A. 175. Such a showing suggests rather that the art had at about that time made the device presently appropriate in the development of the motor car than that it had theretofore baffled the powers of inventors. We incline to regard the patent as one of those added conveniences which have arisen and are continually arising after the main structural features of the motor became fixed, and that the necessary modifications from what went before did not call for any powers out of the common.

We are strengthened in this conclusion, first, by the fact that the patent has no presumptive validity over McCadden, which was not cited against it, and because its success has not hitherto given any warrant for the belief that it was coveted as an important feature of the equipment of a motor. Although the invention is 10 years old and has been patented for 6, Crone has sold less than 1,000, and has got a royalty of 75 cents and from only a single company, which, making, as it does, an expensive car, presumably does not sell great numbers.

Claim 3 is for a spray nozzle, which will hardly be claimed to constitute an invention over the other claims.

Claim 7 locating the pump upon the dashboard is the same.

Claims 5 and 6, of which 6 has certainly no patentable addition to 5,

are for the same kind of pump as Riotte disclosed as an auxiliary or "tickler" to the carbureter proper. It was not invention to substitute such a pump for McCadden's bulb.

The decree is reversed, and the bill dismissed, with costs.

CUTLER MAIL CHUTE CO. v. AMERICAN MAILING DEVICE CORP.

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

No. 32.

1. PATENTS ⟸328—INVENTION—MAIL CHUTE.

The Cutler patents, No. 758,128 and No. 943,183, each for improvements in mail chutes, and relating to devices for making the glass panel which forms the face of the chute removable for the dislodgment of mail matter which may have caught therein, and to locking devices for such panels, as to claims 3, 4, 5, 6, 7, 8, 14, and 19 of the former patent and claims 3, 21, 34, 39, 40, and 41 of the latter *held* void for lack of patentable invention.

2. PATENTS ⟸26(1)—INVENTION—PATENTS FOR COMBINATION.

Where all the elements of invention are old but one and the addition of that one is not invention, even a combination claim is void.

Learned Hand, District Judge, dissenting in part.

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

Suit in equity by the Cutler Mail Chute Company against the American Mailing Device Corporation. Decree for complainant, and defendant appeals. Reversed.

The action is upon two letters patent, both issued to Joseph Warren Cutler for improvements in mail chutes. Claims 3, 4, 5, 6, 7, 8, 14, and 19 of No. 758,128 are in issue, which patent is hereinafter called the first Cutler patent, and is dated April 26, 1904 (application filed September 14, 1903). Claims 3, 21, 34, 39, 40, and 41 of No. 943,183 are likewise in suit. This patent is hereinafter referred to as the second Cutler patent, and is dated December 14, 1909 (application filed December 12, 1906).

Upwards of 2,000 hotels, apartment houses, and office buildings in this country contain mail chutes of this plaintiff or its predecessors; all said devices being made under one or more of three patents now expired, and granted to the present patentee's brother. These expired patents are Nos. 284,951, 336,038, and 390,347. Of these the latest date of issue is 1888. The pioneer nature of these earlier patents is evidenced by the now widely extended use of the word "mail chute," which is found in the specification of No. 336,038, while the expired Cutler patents themselves are all for a "letter box connection." The brothers Cutler seem to have originated the thing and its accepted name, and the nature and extent of the monopoly accorded the first inventor may be best judged from the first claim of the earliest patent:

"In combination with a building of two or more stories a mail receptacle consisting of a box or receptacle located in a lower story and a conductor extending thence upward to a higher story and there provided with an inlet opening."

A mail chute is plainly of no great service unless the letters therein deposited are collected by the official letter carriers. Accordingly for years, and before the issuance of either patent in suit, the subject has been regulated by the Postmaster General, pursuant to act of Congress. Act Jan. 23, 1893, c. 41, 27 Stat. 421 (Comp. St. 1916, § 7277), Postal Regulations, § 672. Officially the mail chute consists of a "mailing chute" and a "receiving box."

These patents (so far as involved in this case) relate only to the chute portion, which receives letters falling oftentimes from a great height, and acquiring considerable velocity in descent. In 1905 the Postal Department made a regulation that all portions of the interior of the chute should be "easily reached by postal authorities, but not by other persons." This meant, of course, that some method of gaining access to the interior should be provided, not involving dismantling or disintegration of the completed chute, nor violence on the part of the investigator.

Under the expired Cutler patents plaintiff had supplied with the approval of the postal authorities the considerable number of chutes above mentioned, of a style known herein as Model B. The panel (i. e., the glass front) of such chute could not be removed from the metal body to which it was affixed without possible straining of metal parts and certain dismemberment of the shop-fitted panel and sides. The postal rule of 1905 resulted from the construction by plaintiff of a chute responding to the first patent in suit; but its operation was deferred until July, 1907, upon representations that the plaintiff had many old chutes on hand and many unfilled orders therefor.

Of the claims in issue (in the first Cutler patent) the third is the most general, and is as follows:

"A mail chute embodying a plurality of superposed tubular sections, and having an independently movable panel to permit access to the interior of the chute without removing adjacent chute sections."

The fifth claim describes the panel merely as "removable," and as having "portions projecting inwardly beyond the meeting edges of the panel and the walls of the chute."

The seventh claim restricts the opening to one side, calls for a "removable panel for closing the opening," and describes the "sides of said panel [as] projecting inwardly beyond the adjacent walls of the chute."

Claims 4, 6, and 8 may be said to constitute a class, in that they all describe as an element of invention the joints between panel and chute. Claim 6 is typical:

"A mail chute having an opening at one side to permit access to the interior thereof and a removable panel for closing the opening, the meeting edges of the panel and walls of the chute being removed from the corners of the chute and said panel having projecting portions extending inwardly beyond said meeting edges to prevent lodgment of mail matter therein."

Claims 14 and 19 are as follows:

"A mail chute embodying the channel or body open at one side having the flanges at the edges of said opening in combination with a door or closure embodying the side frames each provided with parallel flanges, and the glass panel secured between them, a portion of the door-frame extending between the flanges on the body."

"A mail chute embodying a channel or body portion open at one side and having the inwardly extending flanges at the sides of said opening and the removable panel for closing said opening and a plurality of locking devices for securing it."

Of the claims in issue of the second Cutler patent plaintiff's counsel suggests that No. 21 is typical. We find it so, and it is as follows:

"The combination with a support, of a mail chute having a removable portion or panel to permit access to the interior thereof, means for securing the chute to the support and a movable member for preventing access to the securing means and also securing the removable portion or panel of the chute in position and a key lock for securing said member in position."

The defendant is a corporation which began business in 1914. In several buildings it erected chutes, some at least of which were examined by the

plaintiff before suit, and were asserted to be infringements. There is no contest over the style of construction first employed by defendant. It will be referred to as "defendant's first form of chute."

Prior to notice of infringement, and several months before this action was begun, this first style of construction was abandoned, and what will be called "defendant's second form of chute" put on the market. Plaintiff, while denying that defendant's second form is actually made as testified to, still claimed infringement. The court below held that both of defendant's chute forms infringed all the claims in suit, and decreed accordingly; defendant took this appeal.

Frederick P. Fish, C. P. Goepel, and Harrison F. Lyman, all of New York City, for appellant.

Frederick F. Church and G. Willard Rich, both of Rochester, N. Y., and Melville Church, of Washington, D. C., for appellee.

Before WARD and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

HOUGH, Circuit Judge (after stating the facts as above). [1] We accept the statement of counsel that the objects aimed at by this patentee, and sought to be covered as to the means of attainment, by the claims in suit are three: (1) The provision of a secure, but readily removable and replaceable, panel, giving easy access to the chute interior. (2) The provision, between said panel and the fixed portion of the chute, of a joint so positioned and formed as to prevent or lessen the catching of descending letters, etc., in such necessary joint or meeting of parts. (3) Furnishing an efficient means of securing in closed or operative position the panel aforesaid. We are satisfied that he has attained them all, and defined the means of accomplishment by claims. This record presents the questions whether plaintiff's means required invention in the devising, and whether defendant, in attempting to reach the same goal (open to all), has been guilty of infringement.

The inventive worth of what is disclosed by the applicant for a patent largely depends on the extent to which the field in which he works has been fertilized by preceding laborers. The attainment of a desirable and even difficult result does not permit the court to forbear scrutiny of the means of attainment; for it is only with that department of intellectual effort that the patent law is concerned. Wood v. Kahn (C. C.) 189 Fed. 399, affirmed 198 Fed. 403, 117 C. C. A. 193. This is fundamental, even though it remains true that, if many have sought the result without success, or the thing produced supplies a real public demand therefor, the fact of success is some evidence of invention.

When a department of human enterprise has, for the term of years allowed by law, been exclusively occupied by one person, through ownership of pioneer and basic patents on which a large business has been erected, such lawful monopoly necessarily tends to divert independent inventors or improvers from a field in which their only present market is the patent owner, who is doing very well without them, and as naturally produces improvements devised by or on behalf of the owner of the business, built on the basic patents, that oftentimes rather satisfy a mercantile desire for the continuance of patent protected

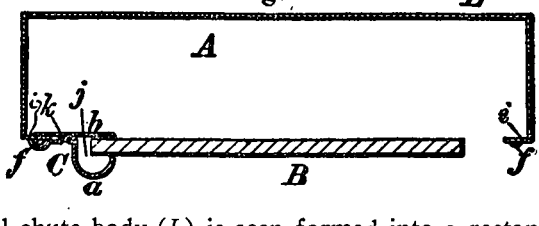
trade, than any scientific difficulty, or public demand. There is nothing unlawful about this, but when improvement patents in such long restricted, if not completely monopolized, branch of trade, are put to the test of forensic discussion, the absence of prior or even contemporary efforts in the same direction cannot, with any force, be used as evidence or argument to support them.

This plaintiff's business is the most striking example of such lawful restriction of competition, as yet presented to us. Not only did the expired Cutler patents create in effect a monopoly of the mail chute concept, but, since there was small market for the product, unless the letter box at the chute bottom became part of the postal system of the country, former departmental regulations practically required conformity to the expired patents, and the present rules confine official recognition to chutes on which we think certain of the claims in suit must plainly read, until some bold inventor finds a closure for a box, which is not a door, lid, cover, or casing. It accordingly results that the art prior to the patents in suit consists substantially of the expired Cutler patents, supra, and the plaintiff's practice under them.

We therefore briefly indicate what (material to this issue) plaintiff did under the expired patents, what the patents in suit disclose, and what defendant does or has done.

The 2,000 chutes put out by plaintiff as above stated, under (especially) No. 390,347, were formed of parts, assembled into a continuous vertical conduit, showing everywhere, except at mail entrances, the transverse horizontal section of Fig. 4 of that patent.

Fig. 4.



The metal chute body (*L*) is seen formed into a rectangle, whereof one side is omitted, except the "flanges" (*ii*); to which flanges the glass frame (*B*) is affixed, by clamp strips (*a, b*) within and without the box of the chute, and riveted together (*k*). The clamp strips were made of elastic metal as long as the chute section, secured over the flanges by the rivets, and the glass panel then slid between them, the elastic clamps yielding to let it in[1] and holding the panel in place by pressure.

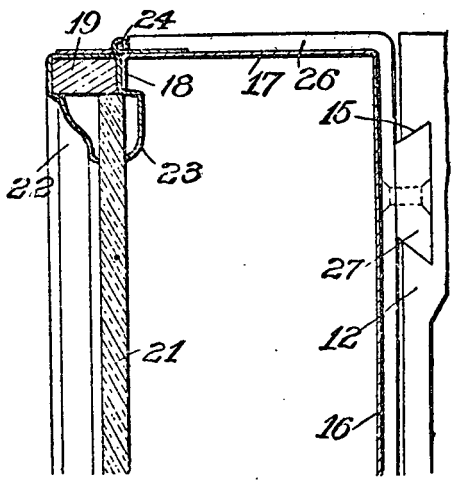
A desideratum, in any device of this kind, was and is to make an interior surface so smooth that letters would not catch in chinks, cracks, or the like, and so clog the chute. Therefore the rivets were countersunk, and the "bar" interposed between superimposed chute sections was beveled so that its lower edge projected into the chute slightly,

[1] In Fig. 4 only one clamping device is shown; that on one side being omitted to show plainly the flange construction.

like the eave of a roof. This was to deflect falling letters from the necessary crack, where one clamped panel ended and another began, as is set forth in the specification. In this construction, as may be plainly seen, the glass panel was not intended to be in the vertical plane of the chute flanges, the inner clamp (*b*) did not go into the corner, or cover the whole flange, and that clamp projected into the completed chute. As long as the rivets held, and no one disturbed the fitting of the superposed sections, there was no crack or crevice on the panel interior, except as shown above, and also where sections met, and that was protected by the bevel of the "bar" over one and under the next glass front.

Nevertheless clogs occurred, and to remove them it was necessary to remove the panel; that (says the patentee) was a simple matter, but the proper replacing "absorbed my attention," because such removal disturbed the shop fit, and if at some part of its length (several feet) the inner clamp (*b*) sprang away from the glass, a crevice appeared, fatally attractive to falling letters.

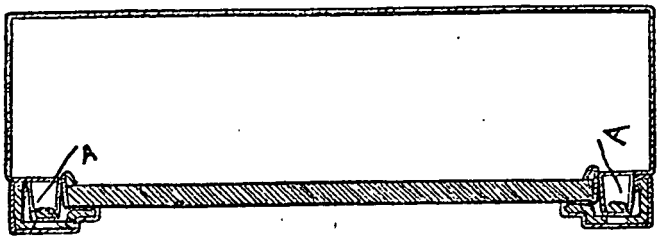
The first patent in suit discloses a movable panel, in the form described a door, hinged at one side and provided with studs on the other, which studs engage appropriate parts of a locking device arranged on the proper side of the chute body. The structural differences (so far as material) between chutes under this patent and those of the expired patent may be seen in the subjoined detail in transverse section of a hinge corner; the opposite, or locking corner is the same, so far as here important. The diagram is part of Fig. 4 of No. 758,128.



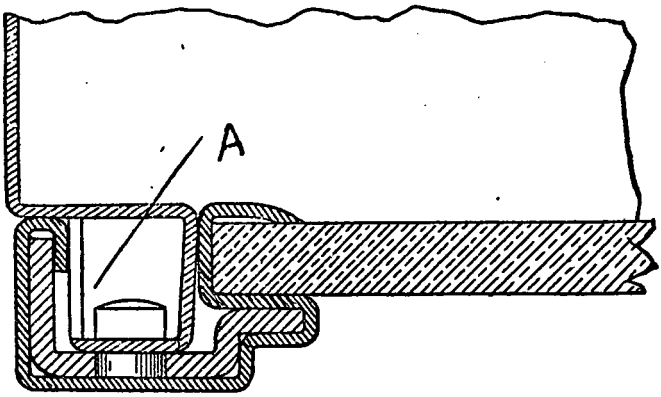
It is here seen that the chute body is flanged as before (*18*), that the panel now has a frame (*19*) around which the elastic inner and outer clamps (*22*, *23*, not necessarily integral) pass, holding the glass front (*21*) in place by pressure. This construction meets postal requirements (apparently passed to cover such construction), in that the key of the contrivance can be and is given the letter carrier, and, if a clog occurs, he opens the door of the choked section, pulls out the letters, and locks the door again. Letters still catch; this device enables them to be reached by means of a key, instead of a mechanic.

The second Cutler patent discloses a system of affixing the several chute sections to the wall by means placed underneath or behind hinged crossbars, on the panel front of the structure, which, when locked in place, at once secure the panel doors in shut or operative position, and cover up the means by which the chute is fixed to the supporting wall.

Defendant's first form of chute, gives in transverse horizontal section the form below (one corner only shown).



The second form of alleged infringement produces a corner said by plaintiff to be the following (on each corner):



Defendant's chute section has a lid or cover, seen to fit over the projection or ridge *A* in the two last diagrams, and locking is effected by a cross bar binding the top of the lid (panel) when in closed position. To remove the panel and get at chute interior, the bar is unlocked and removed (it is not hinged), which enables one to lift the panel out of its engagement at the end remote from the locking bar. All defendant's chutes are fastened to the wall by screws, with heads defaced.

The detailed statement, now concluded, seems to us to fully show, the simple, if not elementary, nature of the mechanical or scientific disclosures on which the patents in suit base exactly 100 claims. That mail chutes grew in popularity while the basic patents were alive, that the Postmaster General was glad to have a locked chute, as well as a locked letter box at its bottom, and that these facts combined to make the more elaborate and expensive construction marketable, we do not doubt; the evidence is full to the point; but neither fact proves invention; and it may be added that the now patented devices do not prevent or lessen clogging of chutes. They only provide easier access to the choked region, and facilitate cleaning chute interiors.

This cause does not require us to consider whether there was invention in any detail of the disclosed construction. That particular form (for the claims in suit) is but one embodiment of the concept of the claims, nor does the defendant's apparatus bear any resemblance worth mention to plaintiff's specific disclosures.

Of the first patent, we hold the third claim invalid, because there was no invention in putting an "independently movable" panel, door, lid, or cover on the mail chute of the prior art. The language of Victor, etc., Co. v. Hawthorne, etc., Co., 178 Fed. 455, 101 C. C. A. 439, is thought applicable to this claim.

In so far as claims 5 and 7 of this patent advance as an element of invention a panel "having portions projecting inwardly beyond" the chute walls, they suggest nothing patentable. The claims on their face describe a door or lid that projects slightly into the receptacle it closes. The fact is old to common knowledge, and there is nothing in the specification to require separate consideration.

Claims 4, 6, and 8 present the gist of controversy. Taking No. 6 as typical, the question is whether there was invention in (a) removing the meeting edge of panel and chute from the chute corner, and (b) projecting a part of the panel (substantially as specified and for the purpose stated) inward and beyond the meeting place of door and chute.

[2] The positioning of the meeting edge is just where it was in the chute of the expired patent, and the inner clamp of that patent projected into the chute; there was a vertical crack at the meeting of clamp and flange, and so is there in the construction of the claim. The only novelty shown or claimed is to treat the inner clamp strip as a part of the panel and give it the shape shown in diagram above (*23*). As pointed out, a general claim for any inward projection is invalid, and, when these more specific claims are examined, we find the old crack or meeting place still existent, and the means (i. e., projection) of minimizing its evils no more than an obvious adaptation of the bevel of the expired patent and common knowledge. That one bevel is vertical and the other horizontal is an immaterial difference. All the elements of these claims are old, and the function suggested for their combination is not reached by new method or means; nor do we think it is attained at all, as letters still stick for the same reasons as prevailed before this form of construction. We find these claims invalid for lack of patentable invention over the prior art. Where all the elements of invention are old but one, and the addition of that one is not invention, even a combination claim is void. Herzog v. Charles Keller Co., 234 Fed. 87, 148 C. C. A. 101.

We may add that, even assuming validity, the defendant's second form plainly avoids infringement.

The fourteenth claim presents no question not covered by the foregoing, while the nineteenth requires us to hold, as we do, that the addition of locking devices generically to a mail chute is not invention; the point needs no more than mention. It is not pretended that there is any similarity between the locks of the parties.

The second patent required us only to point out, that defendant does

not have any "means of securing the chute to the support" other than the screws of an art older than mail chutes: nor has it any means for at once preventing access to its screws and "securing" its "removable panel" (i. e., locking its lid), other than a bar lock, which likewise antedates the special art under consideration.

A mail chute is a long, narrow conduit, built of boxlike sections set on end. To fasten such boxes to a support, and put doors or lids on them, and then lock them, so that no one can either open them or take them down without violence, is doubtless a good thing; but a claim for the means or method of accomplishment must show invention in the mechanism. If in this claim the word "conduit" were substituted for "mail chute," the nature of plaintiff's demand would be plainer. There is no magic in "mail chute"; the mechanical question, and therefore that of invention, is just what it would be as to any other boxlike, sectional conduit for the transmission of solids by gravity, unless the inventive thought has mechanical relation to the peculiar thing transmitted. This claim has not, and the specification does not help it out; therefore it shows no invention.

The decree below is reversed, and the cause remanded, with directions to dismiss the bill for lack of invention in the claims sued on, with costs in both courts.

LEARNED HAND, District Judge. I concur in the foregoing, with the following exceptions: I think claims 4, 6, and 8 of the first patent valid, but infringed only by the defendant's first structure. I do not think claims 21, 39, 40, and 41 of the second patent infringed, and therefore do not pass on their validity. As a result I should give the plaintiff a decree upon claims 4, 6, and 8 of the first patent. The practical result of this would not be substantially different from that reached by the majority of the court.

MINER v. T. H. SYMINGTON CO.

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

No. 13.

1. PATENTS ⊜19—"INVENTION"—INCREASE IN STRENGTH OF DEVICE.
   Mere increase in strength of a mechanical structure is not "invention." [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention.]
2. PATENTS ⊜328—INFRINGEMENT—DRAFT-RIGGING.
   The Miner patent, No. 668,655, for a draft-rigging for railway cars, construed in view of the prior art, is limited to the precise construction described and shown. As so construed, *held* not infringed.
3. PATENTS ⊜328—INVENTION—DRAFT-RIGGING.
   The Miner patent, No. 668,656, for a draft-rigging for locomotive tenders, the essential feature of which is the form of the side plates of such rigging, is void for lack of invention in view of the prior art.

4. PATENTS ⊂328—INFRINGEMENT—DRAFT-RIGGING.
The O'Connor patent, No. 829,728, for a draft-rigging for railway cars, *held* not infringed.

5. PATENTS ⊂312(2)—SUIT FOR INFRINGEMENT—EVIDENCE.
In a suit for infringement in which the only issues tried are those of validity and infringement, evidence to show that defendant enticed away complainants' workmen, skilled in the making of the patented structures, is irrelevant to the issues.

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

Suit in equity by William H. Miner against the T. H. Symington Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 238 Fed. 806.

The action is upon three patents: No. 668,655 issued to plaintiff Miner (Claims 4 and 5). This patent is hereinafter referred to as the first Miner patent. No. 668,656, also issued to the plaintiff Miner (Claim 8). This patent is hereinafter referred to as the second Miner patent. These two Miner patents were applied for and issued on the same days. The first is said to relate to "draft-rigging for railway cars," and the second to "tandem spring draft-rigging for locomotive tenders."

"Draft-rigging," or "draft-gear," is a phrase meaning "the whole of the arrangements by which a car is drawn, and which resists concussions."

No. 829,728, issued on the application of O'Connor and owned by plaintiff (Claims 5, 6, and 7), is also in suit. This patent also is described as for "draft-rigging for railway cars." It is proven and hereafter assumed that mechanism of this general type and for the purpose of taking up or minimizing the effect of the jerks and concussions incidental to the operation of railway cars and tenders (so far as their hauling apparatus is concerned) is old, and the art crowded.

All of these patents relate to what is known as "tandem draft-rigging," for which a British patent was issued as early as 1865; and the plaintiff himself has received or acquired about a hundred patents relating generally to this subject.

Of the claims in suit under the first Miner patent, the fourth claim is as follows:

"The combination with the draw-bar, pocket-strap, tandem-arranged springs and followers, of a pair of flanged steel draft-beams, a pair of stop-castings secured thereto, and each furnished with three stops and upper guide-flange, a lower guide-plate for the followers and the draft-rigging to rest upon extending between said draft-beams and secured thereto by bolts passing through the lower flanges thereof, the upper guide-flanges of said stop-castings each tapering from the middle toward both ends to form a fulcrum for the pocket-strap to swing upon, substantially as specified."

The fifth claim only varies from the fourth in specifying that the lower guide plate shall have "a central longitudinal channel for the lower member of the pocket-strap." The single claim of the second Miner patent here in suit is as follows:

"8. In a draft-rigging, the combination with the draw-bar, pocket-strap, tandem-arranged springs and followers at both ends of both springs, of a pair of stop-castings having each three stops for the followers to abut against, the middle stop at its portions above and below the follower-guides being deeper than the end stops to form pivots for the draw-bar and pocket-strap to swing or turn laterally upon, substantially as specified."

Of the O'Connor patent, the fifth claim is as follows:

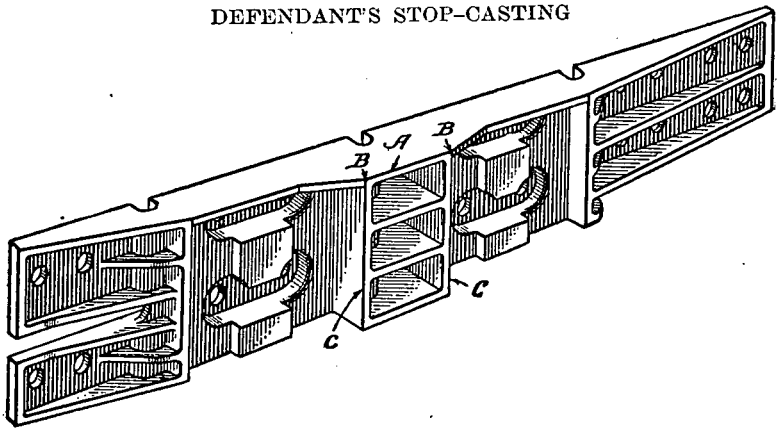
"In a draft-rigging for railway cars, the combination with the draw-bar, springs and followers, of side plates or stop-castings each consisting of a cast web of substantially uniform thickness throughout, having integral upright bends or convolutions therein forming upright stop-shoulders, and having also

horizontal convolutions therein forming longitudinal strengthening ribs or flanges, said horizontal convolutions extending between but not across said upright convolutions, substantially as specified."

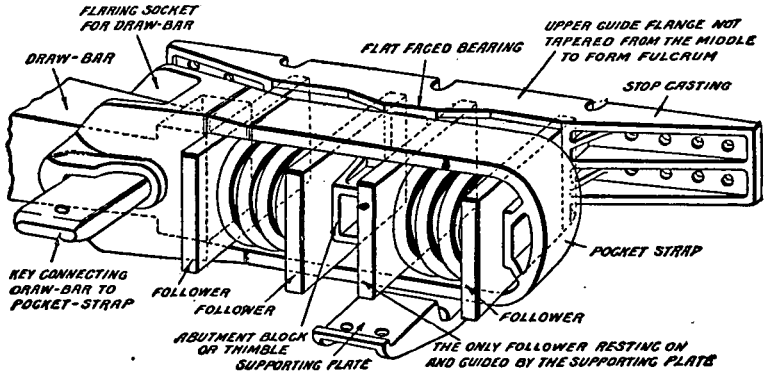
The sixth and seventh claims of this patent merely vary the form of statement chosen for the fifth, the latter being stated as a combination, the sixth and seventh describing with particularity the "draft-rigging side plate or stop-casting," which is the substance of O'Connor's invention. He did not and does not pretend to have invented or devised a complete draft-rigging; he states that he deals particularly in "improvements in the construction of the side plates" of such rigging. The lower court found all the above enumerated or referred to claims valid, and declared infringement of all of them in that the defendant company had manufactured certain draft-rigging apparatus for the New York Central, etc., Railroad upon the order of the latter, and in pursuance of its designs. The defendant took this appeal.

The particular article of manufacture said to infringe all of these claims is a stop-casting made by Symington for the railroad, and pictured below:

DEFENDANT'S STOP-CASTING

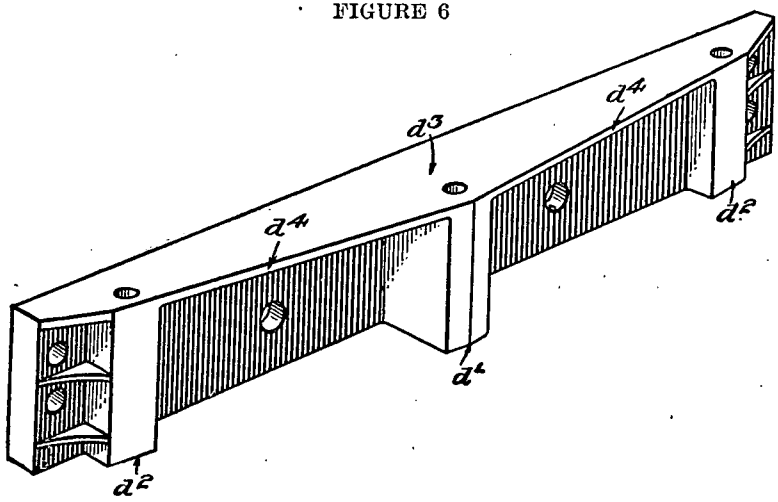


The fifth claim, however, of the first Miner patent, is more particularly said to be infringed by defendant's application to the above stop-casting of the supporting plate shown below as passing from one stop-casting to the other and underneath the after end of the pocket-strap:



The stop-casting of Miner's first patent is specifically shown in Figure 6 thereof:

FIGURE 6



James R. Sheffield, of New York City, W. S. Symington, Jr., of Baltimore, Md., and Gilbert P. Ritter, of Washington, D. C., for appellant.

E. W. Hatch, of New York City, Louis Desbecker, of Buffalo, N. Y., and Joseph Harris and Geo. I. Haight, both of Chicago, Ill., for appellee.

George S. Payson, of Chicago, Ill., amicus curiæ.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). It is said that these patents relate to the means for doing a difficult thing, viz. inserting apparatus strong enough to withstand the increasing demands of railway service into that very contracted space between the sills of a car allowed by the Master Car Builders' Association for the insertion of draft-rigging.

[1] From this premise it is argued that those who furnish such increased strength in draft-rigging without increase of size should be deemed to have displayed invention by (as counsel put it) "the solution of these difficulties." This assertion is erroneous as matter of law. Mere increase in strength is not "invention" (Planing Machine Co. v. Keith, 101 U. S. 490, 25 L. Ed. 939); and that no change in form, proportions, or degree so as to do the same thing in the same way, though with better results, is invention, has been recently reasserted in Railroad Supply Co. v. Elyria, etc., Co. (May 21, 1917) 244 U. S. 285, 37 Sup. Ct. 502, 61 L. Ed. 1136.

The patentees make no such claim for themselves. Neither of the Miner patents even suggest that the result of the invention claimed is to increase strength or durability without increasing bulk. O'Connor does declare that he wishes to avoid breakage of stop-castings (or side

plates) by producing a web of uniform thickness, and this means that his web is to be a stronger web. He does not claim, however, and no patentee can claim, that his product is entitled to patent protection on account of its strength; he can only patent the means by which he gains strength—or any other desirable quality.

[2] We assume without deciding that, in so far as the claims in suit purport to be for combinations, they set forth true combinations. Examining, therefore, the fourth claim of the first Miner patent as a combination, it is seen to combine all the parts of a draft-rigging, all generally well known to the prior art, and therein presented in many variants. The novelty of the combination and the gist of the invention reside in two elements described thus: (1) "A lower guide-plate for the followers and the draft-rigging to rest upon," and (2) a stop-casting having upper guide-flanges "each tapering from the middle toward both ends to form a fulcrum for the pocket-strap to swing upon."

The stop-casting of the claim can be readily understood by examining Figure 6 (supra), and the guide-plate as claimed is accurately presented by imagining the defendant's supporting plate (supra) extended until it covers and guides all the followers instead of only one of them.

The first question is whether the state of the art entitled Miner to a range of equivalents that would include as infringements devices not within the exact and technical meaning of the words used in the claim. Defendant's stop-casting contains a central flat-faced projection which in order to be an infringement must be found the equivalent of Miner's fulcrum, substantially as described. There is nothing to show that the word "fulcrum" is not used in its ordinary sense, viz. a prop or support for a lever. He shows and describes a true fulcrum, on which the draw-bar and pocket-strap (rigidly connected in Miner's apparatus) truly pivot, exerting an obvious leverage.

A similar rigging normally loosely aligned with the flat face of defendant's middle stop (as is the case in the alleged infringement) might pivot on either the forward or after end or edge of the stop as a fulcrum; but it could never properly be said to pivot on the entire projection.

Something more than a literal reading of the claim is necessary to find infringement, and so "fulcrum" is said to mean any projection upon any part of which a pivoting action may take place. The prior art forbids such construction. It is enough to mention expired patents to the present plaintiff, Nos. 549,207 and 570,038; which plainly disclose a draft-rigging intended to laterally swing upon centrally placed square-faced lugs, not extending the entire height of the stop-casting, but upon which, as the later expired patent states, "the draw-bar and its extension may vibrate laterally to a limited extent." So far as we can discover there was room in the art for exactly the claim made in the patent in suit, i. e., for a combination of parts generally well known, and most of them specifically old, but with a stop-casting truly fulcrumed at the middle stop. But there was not room in the art to claim a fulcrum, and then read fulcrum to cover a wide flat-faced projection, which in its entirety no one would normally call a fulcrum or pivot.

The fifth claim of the first Miner patent presents the additional ques-

tion whether the supporting plate of the defendant is in substance the channeled guide-plate of the plaintiff. It is undeniable that the function of the defendant's plate, so far as it goes, is exactly that of the plaintiff's. The question is as before, whether prior knowledge leaves it possible to construe a "guide-plate for the followers and the draft-rigging to rest upon, * * * having a central longitudinal channel for the lower member of the pocket-strap" to mean any support for the pocket-strap and contents which even partially performs the guiding function of the described and claimed plate of the plaintiff. There was certainly nothing new in supporting plates channeled or plain. The so-called "spider" of Stark, 587,376, is such a channeled plate, nor does it make any difference that Stark's draft-rigging was a single spring instead of tandem apparatus—both devices must have followers, and for the same reasons. It was successfully urged in the court below that Claim 5 could not be construed to apply only to a guide-plate, which guided all the followers, because such construction would leave Claim 2 (not in suit) identical with it, as Claim 2 specifically calls for a "lower guide-plate extending from the front to the rear follower for the followers and the draft-rigging to rest upon." Cadillac Motor Car Co. v. Austin, 225 Fed. 983, 141 C. C. A. 105. The doctrine is not applicable, because it is not true that the descriptions of the lower guide-plate are the only differences between Claims 2 and 5, but we find (whatever the result upon the compared claims) no difference in meaning between their language on this point; both specifically require a guide-plate that guides all the followers. If the word "followers" in Claim 5 does not mean all followers, it is meaningless.

Let it be assumed that a combination of familiar elements functioning in familiar ways, and new only in the introduction of a supporting guide-plate for all the followers, is valid. It is only valid, however, in its entirety, for supporting plates with channels are both old and simple. Whether it was invention to extend the supporting plate so as to guide all the followers we need not consider; but this claim cannot be read so as to find infringement in a supporting plate that does not guide exactly in the way described and claimed in Miner's patent, without losing whatever validity it possesses.

[3] The second of Miner's patents presents but a single question that we shall consider, viz.: Was it invention to disclose a side casting having a middle stop deeper, i. e., projecting further from its base, than the end stops?

There is here presented an aggravated example of a thing common in patent litigation. This second Miner patent is not for a projecting middle stop, but for a draft-rigging for tenders; its whole object is to provide an apparatus, with certain enlarged parts so as to fill up the space allowed for draft-rigging on tenders, which is much greater than that allowed for cars. Incidentally the eighth claim plainly reads (according to plaintiff) on any stop-casting having "its portions above and below the follower guides deeper than the end stops" if used in what is otherwise any draft-rigging of the prior art.

We doubt whether the disclosure of the patent, owing to clerical errors in drawing, and blind language in specification, supports the claim;

but for purposes of argument we accept the reading of appellee as just stated.

Having made this concession, we nevertheless consider the claim void upon expired patents to Miner, 570,038 and 549,207. Both of these documents show a projecting lug, upon which (as previously pointed out) the patentee declared the drawbar and its rigid extension would vibrate laterally to a limited extent. Miner disclosed this lug in his earlier expired patent and attempted substantially to claim it in his later, and was properly refused by the Patent Office. Yet Claim 8 of the patent in suit shows two lugs (i. e., projections from the middle stop) for the "draw-bar and pocket-strap to swing or turn laterally upon." Of course, the single lug was abandoned to the public when it was not claimed in the first expired patent. The action of the Office as to the second emphasized that abandonment. There was no invention in making the lug double (as the patentee shows it); and we may add it was equally without invention to make the projecting middle stop in the shape chosen by defendant. Nor was the case bettered by substituting one new element, itself showing no invention, in an apparatus otherwise old, and calling it a combination.

[4] Of the O'Connor patent little need be said, since the decision of the Circuit Court of Appeals for the Seventh Circuit in Nash v. Miner, 245 Fed. 349.

We disregard the unhappy phraseology of O'Connor's specification and claims, and look beyond words which seem to demand a patent upon an article showing "bends or convolutions" simply because that shape was chosen. This patentee also propounds a combination, functioning not otherwise than many other draft-riggings, in which the only novel element is a "cast web of substantially uniform thickness throughout," a phrase which is carried through all the claims in suit and is the burden of the specification.

As pointed out in the case cited, even the production of convolutions on the web was not new. In order to have a right to any patent it was necessary to show that the cast web, which looked as if it had been bent and was therefore convoluted in appearance, had some new quality, or arrived at the old result in a new way; for his casting, when completed, functioned like any other casting, and so did the rigging of which it was an element.

If the patentee did this, it was in one way alone; viz. he disclosed that he made his casting without T-sections. Mere inspection of the defendant's casting shows that it is full of T-sections. Therefore it is a different thing from the only new element in O'Connor's alleged combination, and consequently there is no infringement.

[5] Much of the record herein is devoted to an effort to show that the defendant enticed away from the plaintiff's contractors, laborers particularly skilled in the production of stop-castings. This evidence was duly objected to, but successfully justified in the lower court, because it was thought to show "defendant's deliberate appropriation of the plaintiff's rights." We think none of it was relevant. The plaintiff had no rights unless infringement was proven, and infringement did not depend on what particular workmen molded defendant's casting,

but on the nature of the casting after it was produced. As a ground for increased damages in addition to profits, such evidence might have been material, before the master, but it did not tend to prove infringement, which was the only issue tried below. The testimony should have been excluded; but the remarks concerning it made by counsel on both sides in the briefs submitted to us are of a lamentable acrimony, and our disapproval thereof we deem it necessary to note.

The decree below is reversed, with costs in both courts; the mandate will declare that the defendant has not infringed Claims 4 and 5 of the first Miner patent, nor Claims 5, 6 and 7 of the O'Connor patent, and that Claim 8 of the second Miner patent is void for lack of invention.

JOHNSON et al. v. LAMBERT.

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

No. 1.

PATENTS ⊂=328—INVENTION—UNION SUIT GARMENT.

The Johnson patent, No. 973,200, for a union suit garment, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by Horace G. Johnson and Henry S. Cooper against M. H. Lambert. Decree for complainants, and defendant appeals. Reversed.

For prior opinion, see 234 Fed. 886, 148 C. C. A. 484.

E. F. Samuels, of Baltimore, Md., and F. P. Warfield, of New York City, for appellant.

Livingston Gifford and Albert H. Graves, both of New York City, for appellees.

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

MAYER, District Judge. This cause is returned to this court for hearing on a supplemental record in pursuance of a mandate which directed the taking of proof as to two aspects of the case, to wit:

"(1) To take proof as to whether the Holmes garments like, or substantially like, Defendant's Exhibit G for identification, offered as a specimen of these garments, had been in use or on sale prior to the patent in suit; and

"(2) To take such testimony, if any, as it may deem advisable, to explain the construction and mode of operation of Exhibit G or similar garments, and thereupon to return the proofs to this court, with the opinion of the District Court as to (1) and as to (2), if there be any conflict in the testimony as to the manner in which the Exhibit G or similar garments were actually

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constructed, or as to the mode of operation of such Exhibit G or similar garments."

The opinion of the court on the appeal on the original record is reported in 234 Fed. 886, 148 C. C. A. 484.[1] We there stated:

"With garments made under the Muller British patent, 8,766 of 1896, the Cook United States patent, 615,632 of 1898, the Rochette British provisional specification, 1,343 of 1864, and the Tichy Austria patent, 27,283 of 1907, laid on a table before the man skilled in the art, we think there was so little opportunity for inventive ability that patentability on the record as it now stands is doubtful. We do not confine our references to those just recited. They are merely examples of the prior art, all of which we have regarded as pertinent in arriving at our conclusion. * * * This brings us to a consideration of Exhibit G for identification, which was excluded by the trial court. This was offered by defendant as a specimen of the so-called Holmes garments. We regard this as a closed crotch garment. To call it otherwise, in considering the prior art, is, we think, again drawing too fine a distinction. With this garment properly in evidence in connection with the other prior art, we think that no invention was needed to devise the particular construction shown in the patent, and hence we are satisfied that claim 1 would be void for lack of patentable novelty. Whether, therefore, this exhibit and the testimony relating to it were correctly excluded, becomes an important question in the case."

It will be noted that we referred to Exhibit G for identification as a specimen garment, it having appeared from the original record that Exhibit G for identification was offered as a sample of a type and not as an original garment. Testimony has now been adduced as to prior art garments substantially like Exhibit G for identification, and the supplemental record also contains testimony inter alia in respect of garments known as Exhibits Y, Z, and ZZ.

Claim 1 contains two elements in combination: (1) A permanently closed crotch; and (2) a posterior opening extending near the waist line to a point below the crotch in one leg only. Plaintiffs now endeavor to give a special meaning to the word "only"; but, clearly, the word "only" merely means (in connection with the context) that the extension shall be to a point below the crotch in one leg, and not in two.

The first question is whether the prior art disclosed (a) garments with closed crotches; and (b) garments with the extension to a point in one leg only. The latter, we held in our former opinion, was demonstrated by the Austrian patent to Tichy, dated January 25, 1907, and that conclusion we repeat. We also stated that we regarded Exhibit G for identification as a closed crotch garment, and, after consideration of the present contentions of plaintiffs, we remain of the same opinion.

We think that the testimony of Lacher, O'Brien, and Mrs. Cook fully establishes the existence of garments like Exhibit G for identification in the prior art. We are also satisfied that Exhibits Y and Z of the present record were in the prior art and are closed crotch garments. None of the foregoing had the extension to the leg. There is also testimony as to the manufacture of the garment Exhibit ZZ from

[1] In the reported case, 1900 (as the date of the patent) is a typographical error, and should be 1910.

a date prior to the patent date, Marsh, the manager of the Yale Knitting Company, successor of the Holmes Knitting Company, testifying:

"What we call the old Holmes type (Exhibit Z) we manufactured I should say two or three years from 1904; then we manufactured the white Exhibit (for identification ZZ). There was no gap between the manufacture of these garments, there was no gap in the manufacture from 1904 to 1914."

This is clearly a closed crotch garment, but we are not satisfied that the opening extended partly down the leg.

The final question then is whether, in view of the existence of garments respectively exemplifying each element of the claim, it was invention to combine them in one garment. We have not overlooked the argument that the prior art followed what counsel now call the crotch tab principle, but we think that this is an artificial distinction. Obviously, in an art of this kind the effort is toward gradual improvement suggested by experience. As the trade gradually learns the requirements of customers or the defects in practice of garments of this character, the manufacturer endeavors to meet the situation, so as to improve the comfort and practical usefulness of such garments.

To give to this claim the broad construction contended for, it is necessary to hold that the combination is for a permanently closed crotch with a posterior opening extending from some point near the waist line to some point below the crotch in one leg. We think such a construction cannot be accorded to claim 1, and, thus construed, that the prior art negatives invention. The most liberal view which could be taken is that the claim goes no further than is illustrated by the patent drawings, and, from that aspect, the defendant's device does not infringe.

But we do not place our conclusion on such narrow ground. We are of opinion that, in view of the prior art, the patent in suit (which seems to us not as efficient as plaintiffs' commercial garment) accomplished no more than was to be expected of the man skilled in the art and did not rise to the dignity of invention.

Decree reversed, and bill dismissed, with costs.

LYON NON-SKID CO. et al. v. EDWARD V. HARTFORD, Inc.

(District Court, S. D. New York. November 15, 1917.)

No. 152.

1. PATENTS ⊜328—VALIDITY—INFRINGEMENT.

The Lyon patent, No. 1,198,246, for an automobile bumper, consisting of two integral spring steel strips having considerably greater vertical width than thickness to render them relatively rigid while resiliently yielding in horizontal directions, *held* valid and infringed by defendant's device.

2. PATENTS ⊜328—VALIDITY—ANTICIPATION.

The Lyon patent, No. 1,198,246, for an automobile bumper, *held* valid, and not anticipated either by the prior art or previous patents for various styles of bumpers.

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

3. PATENTS ⟸26(2)—VALIDITY—INVENTION.
If a new combination and arrangement of known elements produce a new and beneficial result never obtained before, it is evidence of invention.

4. PATENTS ⟸165—CLAIMS—CONSTRUCTION.
Since all claims in a patent must be given as broad a scope as their language will bear, no court is justified in reading into a claim limitations not set forth to establish the invalidating force of a prior construction.

5. PATENTS ⟸328—VALIDITY—INFRINGEMENT.
The amended claims in the Fageol patent, No. 1,202,690, for an automobile bumper, *held* not infringed by the Lyon patent, No. 1,198,246, for such a bumper, for there can be no revamping of an abandoned or unsuccessful construction or patent application so as to invalidate a patent for a successful device.

6. PATENTS ⟸168(2)—CLAIMS—AMENDMENT.
Effect will not be given amendments filed in a patent application, in an effort to secure claims broad enough to affect a patent for a device already made public, but for which patent had not then been issued.

In Equity. Suit by the Lyon Non-Skid Company and the Metal Stamping Company against Edward V. Hartford, Incorporated, which filed a cross-bill. Decree for complainants for injunction and reference.

Harry L. Duncan, of New York City (Drury Cooper, of New York City, of counsel), for plaintiffs.

Clifford E. Dunn, of New York City, for defendant.

MANTON, District Judge. The complainants sue for infringement of patent, claiming that the defendant, in the manufacture of its automobile bumper, has infringed their patent No. 1,198,246, granted September 12, 1916. It will be referred to hereafter as the Lyon bumper.

There is a cross-action by the defendant claiming infringement by the plaintiffs of the Fageol patent No. 1,202,690, granted October 24, 1916. The complainants rely upon claims 3, 4, 5, 7, 8, 10, 15, and 18. The Metal Stamping Company is the licensee under an agreement dated February 25, 1915, manufacturing the Lyon patent, which patent was granted to the complainant, the Lyon Non-Skid Company. The defendant is a licensee of the Fageol patent dated September 3, 1912, and claims infringement of claims 8, 12, 17, and 19. The subject of making a useful commercial automobile bumper has received considerable effort by inventors, as appears by the prior art. Considerable evidence, as well as copies of prior inventions showing the state of the prior art, have been received in evidence, and will be referred to later. The general type of bumper which is being manufactured under the Lyon patent by the plaintiff and the defendant indicates a useful invention, unusual in a number of respects, but serviceable and commercially profitable. The Lyon all-spring bumper is formed of flat spring strips so as to be adjustable in width and fit any make of car. Its metal is so constructed and so shaped that it will stand bumping, and its action in resiliency will stop an automobile going at 10 to 15 miles an hour, causing a rebound without damage to the bumper or the car itself, as

the evidence disclosed occurred on a number of occasions. Indeed, the evidence indicates that the bumper itself would spring back to its original shape with little or no damage to it. This, compared with the practical experiments of the behavior of prior commercial bumpers, is ample evidence of the claim made for it, not only of improvement in the art, but of substantial invention. The experiments with prior commercial bumpers, such as the one made of channel bar or rigid round bar type, resulted in the bar breaking and destroying or seriously damaging the part of the car which came in collision with the striking part. The result of this action of the Lyon bumper, as manufactured by the Metal Stamping Company, opened a profitable commercial field. Its usefulness is indicated by the extent of its sales, for it is now said that the stamping company has an output of about 800 bumpers a day. In shape and contour, in the kind of metal used, in operation and efficiency, the Lyon and the Hartford bumpers are practically identical. They have both been favored by a well-patronizing public, and both have met with general success. Each now claims appropriation by the other, and the question for decision is which is right in its contention.

Considering the prior art, from the patents in suit, it appears that Simms was the pioneer in the bumper art. His application, filed September 26, 1905, disclosed a structure consisting of pneumatic buffer bars placed in front of the vehicle and connected thereto by spring supporting members formed of flat stock set edgewise. Harroun filed his application on March 29, 1906, showing a tubular bumper bar connected to the vehicle by sliding rods or members, springs being provided to afford yielding resistance to the shocks sustained. February 21, 1908, Sager applied for a patent upon his bumper construction, which showed a tubular bar mounted to yield against spring tension, but different from the Harroun, in that the supporting members for the bar were pivotally connected to the car. He, too, used coiled springs to take up the shock. These bumpers, while affording some spring movement, were greatly limited in their utility, and were not successful. The result of these efforts, and the efforts of others referred to hereafter, did not bring bumpers upon automobiles into considerable use. To be sure, other reasons have been ascribed for failure to use, such as the condition of the congestion of traffic and want of education of the public in the usefulness of bumpers, but the best reason for the inconsiderable use of bumpers was the failure to have an adjustable bumper, resilient in its action, which would accomplish the work of bumping successfully.

In these round bar or channel bar bumpers, as was exemplified by the type referred to, the bumper was extended across the front of the automobile, was relatively rigid, and was mounted on comparatively weak springs, resulting in a yielding to a limited extent only. This was insufficient to absorb a moderate collision impact, with the result that the bumper bar was easily broken or seriously distorted, with consequential damage to the colliding part of the automobile. Oftentimes the bar would break and go through the automobile radiator, resulting in damage or destruction to this delicate construction. And in the case of rigid bar bumpers, they too were unsatisfactory to the trade, for

riding on the automobile in rigid position resulted in a series of shocks, which ultimately caused loosening up and rattling as a result of this severe jolting.

These results indicated a failure to solve the bumper problem, for they failed to meet the requirements of a successful automobile bumper, namely, to absorb, without injury, the force of substantial collision impact. To accomplish this result, it became necessary to find a bumper which would be so constructed, in shape and material, as not to be permanently deformed or distorted by the blow, so that, if bent, it would return to its original condition, and be so resilient as to yield gradually over some considerable space whatever resistance it might meet when struck. So, also, the successful automobile bumper must be free from the objectionable and fatal vibration in loosening action, as became so pronounced in the bumpers tried out theretofore. The development of the bumpers involved in this action seems to have met with these requirements, and, therefore, with success. Another important consideration, for the success of a bumper, was to have one adjustable to all sizes of cars without sacrificing the other characteristics mentioned, and this, because the jobbers and auto-supply houses need not keep a great variety of sizes of bumpers to fit the various makes of automobiles.

[1] The Lyon claims 3, 4, 5, 7, 8, 10, 15, and 18 are as follows:

"3. The automobile buffer consisting of two integral spring steel strips having considerably greater vertical width than thickness to render them relatively rigid vertically while resiliently yielding in horizontal directions, each of said strips having a rearwardly extending attaching member to be attached to the automobile, and having a transversely extending impact receiving member and an intermediate curved resilient member, the impact receiving members of said strips overlapping to stiffen and strengthen this part of the buffer, and means adjustably connecting said impact receiving members and holding them against relative vertical movement and providing for the lateral adjustment of said strips so as to adapt the buffer for attachment to automobiles having supporting members located at different distances apart.

"4. The automobile buffer consisting of two similar integral spring steel strips having many times greater vertical width than thickness to render them relatively rigid vertically while resiliently yielding in horizontal directions, each of said strips having an inwardly and rearwardly extending attaching member to be attached to the side members of the frame of the automobile, and having a transversely extending impact receiving member and an intermediate rearwardly curved loop formed with an open inner end and extending into protective position adjacent the automobile wheel, and connecting means adjustably connecting said impact receiving members and holding them against relative vertical movement and forming overlapping members to stiffen and strengthen this part of the buffer and providing for the lateral adjustment of said strips so as to adapt the buffer for attachment to automobiles having side frame members located at different distances apart.

"5. The automobile buffer consisting of two integral spring steel strips having greater vertical width than thickness to render them relatively rigid vertically while resiliently yielding in horizontal directions, each of said strips having an attaching member to be attached to the automobile, and having a transversely extending impact receiving member and an intermediate loop, and connecting means adjustably connecting said impact receiving members and holding them against relative vertical movement and forming overlapping members to stiffen and strengthen this part of the buffer and pro-

viding for the lateral adjustment of said strips so as to adapt the buffer for attachment to automobiles having supporting members located at different distances apart."

"7. The automobile buffer comprising horizontally yielding and relatively vertically rigid elements having transversely extending impact receiving members and having attaching members to be attached to the vehicle, and adjustable connecting means connecting said impact receiving members and holding them against relative vertical movement and forming overlapping reinforcing members in the impact receiving portion of the buffer, said connecting means providing for the lateral adjustment of said buffer to adapt it for attachment to parts of vehicles located at different distances apart.

"8. The automobile buffer comprising horizontally yielding and substantially vertically rigid elements including a pair of transversely extending impact receiving members, curved resilient members comprising open-ended lateral loops and attaching members to be attached to the vehicle, connecting means connecting said impact receiving members and holding them against substantial relative vertical movement and forming in connection therewith overlapping reinforcing members in the front portion of the buffer, and means providing for the lateral adjustment of said attaching members to adapt them for attachment to parts of vehicles located at different distances apart."

"10. The vehicle buffer comprising vertically rigid lateral spring members having longitudinally extending attaching members to be attached to supporting members of the vehicle and having a transverse member secured to another transversely extending spring member of the buffer so as to be laterally adjustable with respect thereto and adapt the buffer to vehicles having supporting members located at different distances apart."

"15. The vehicle buffer comprising open-ended loops extending outwardly at the transverse ends of the buffer and connecting means at the front of the buffer to space said loops apart, said loops and connecting means being vertically rigid but horizontally yieldable and rearwardly extending attaching means on each side of the buffer and integral with the corresponding loop to mount said buffer on the vehicle frame and relatively adjustable to fit the side members of vehicle frames which are at different distances apart."

"18. The automobile buffer comprising open-ended loops extending outwardly at the transverse ends of the buffer and an impact receiving portion forming a continuation of said loops and spacing them apart, said loops and impact receiving portion being vertically rigid but horizontally yieldable and rearwardly extending attaching means to mount said buffer on the vehicle frame and relatively adjustable to fit the supporting members of the vehicle which are at different distances apart."

Fageol filed his application June 6, 1910; his patent was granted October 24, 1916. In August and September, 1916, the following amendments were filed:

"My invention further contemplates the provision of a bumper for motor vehicles and the like of such nature as to be particularly effective in deflecting the shocks from encountering obstacles in such a way as to minimize the danger of injury either to the vehicle or to the object encountered.

"A further object of my invention is the provision of a bumper which will yield in all directions both forward and back and laterally, and more particularly in which the end portions of the bumper will yield to a considerable extent, whereby the force of impact or blow received from the bumper from any angle, and particularly upon the end portions thereof which are exposed and most likely to be struck, will be dissipated through the resiliency of the bumper; and the car, as well as any object struck, most effectively protected against injury.

"Another object of the invention consists in the provision of a bumper structure of such character that the bumper itself will not be destroyed or permanently distorted or injured by the less important shocks to which a

bumper is frequently subjected, so that the bumper will not be quickly rendered useless or distorted into unsightly form.

"A further object of the invention is the construction of a bumper in such a way that it may be adjusted to render it capable of being attached to cars of various types and sizes and having different widths of frame.

"Another object of the invention is the provision of a bumper structure which will be attractive in appearance, as well as efficient and durable, and which shall tend to improve the appearance of the vehicle to which it is applied. * * * The latter result is promoted particularly by the rearward curvature of the end portions of the bumper, which are also yielding, so that if the bumper receives an impact at one side of the center thereof that side of the bumper will yield, and that the inclination thus produced in addition to the initial end curvature will guide the object laterally and rearwardly out of the path of travel of the car. This result is further promoted by forming the bumper ends of smooth metal spring bars which cause the blows to glance off in a manner which would not be so satisfactorily obtained if the front of the bumper were, for instance, formed of rubber tubing or the like.

"* * * Furthermore, owing to the yielding character of the bumper and particularly the end portions thereof, it will be seen that when the bumper is subjected to even considerable shocks, it will yield without being broken or permanently damaged. The end portions of the bumper are particularly likely to be struck glancing or other blows, and these portions, being of spring material, will at once return to their original shape without any permanent injury being caused to the bumper whatever.

"It will be seen that the bumper described includes an impact receiving member comprising the body portion *1* of the bumper and the outward extending sections of the spring end portions of the spring support *2* and *2'*, which comprise in fact extensions of the body *1*, and that this impact receiving member is formed, as to its end portions at least, of spring metal; that is, metal which will yield to a substantial extent and return to its original shape. The end portions of this impact receiving member are also reinforced and yieldingly supported by the inwardly bent parts of the spring supporting members, which assist in restoring the bumper to its original position after impact. The use of spring material in the construction of the bumper itself is of particular importance in securing durability and ability to withstand impacts without permanent distortion, thereby overcoming a defect to which bumpers made of rigid material have been peculiarly subjected."

It is claimed by the complainant that these amendments were proposed, as part of the plan of adoption of the Lyon bumper, and that these claims were improperly broadened and specifically revamped to secure pretended control of the Lyon bumper. I shall refer to this claim again.

The Lyon bumper proved to be the first successful bumper. It met the requirements and conditions of an automobile collision bumper. Its success in the market and acceptance by the trade, by very extensive use and sale, is ample proof of its distinctive novelty. The flat spring strips form loops at the sides of the automobile, and then extend backward so as to form attaching members, which in the regular bumper are clamped to the goose necks or frame members of the automobile. An examination of the way the bumper is attached to the automobile and its resilient yielding action indicates its appropriateness for discharging the functions required of a successful bumper. The striking difference between the vertical and horizontal rigidity of the Lyon bumper is secured by the use of flat spring strips having

many times greater vertical width than thickness. The commercial bumpers are made with spring strips whose width is about 6 times their thickness, giving 36 times the vertical rigidity or resistance to bending as compared to their horizontal stiffness, using the same forces. This has resulted, as experience taught, in preventing all vertical vibration under running conditions and correspondingly minimizing loosening or other undesirable action due to successive shocks, so that the bumper does not vibrate or strain itself or work loose before it is called for use in collision action. A collision impact on the central part first causes the same resilient end loops to close together, and at the same time the central spring part bends, and when the end loops are each brought together so that flat surface came into secure supporting contact, the double spring central portion continues to yield until the collision impact is absorbed in this way. The spring elements of the bumper then tend to restore themselves, and the force they exert against the colliding object forces the car backward through a space corresponding to the force of the collision. The all-spring construction of this bumper contributes to its very effective collision operation, since all parts of the bumper have a resilient yielding action under impact, for the connecting means or clamping device used to adjustably connect the spring strips together do not interfere with their resilient action under collision conditions. Since it is all spring in its action, it matters not what part of the bumper is struck. All the spring action of the bumper is brought into operation and operates in some degree in like manner. The clips or clamping devices are adjustably connected, the front spring strips or impact receiving members permit of an adjustment in width, so as to fit automobiles having frame members located at different distances apart, and also at the same time provide for a double or reinforced impact receiving member throughout the central part of the bumper, where the bending strains are greatest, and where the greatest damage would be caused if the bumper yielded so as to allow injury to the automobile. The two pieces of spring steel are the same in size and contour, so that the manufacturing problem is thus reduced.

The witnesses on both sides agree that this type of automobile bumper has solved the problem of manufacturing a successful automobile bumper.

The defendant's bumper comprises two flat spring strips, having rearwardly extending ends or attaching members to be clamped to the automobile and curving outward to form end loops in front of the automobile wheels, as in the Lyon bumper. The two inner ends of these spring strips are adjustably connected, by a connecting or coupling device, which comprises one or more splice bars or spring strips secured to the main spring members, and which re-enforce the front of the bumper at its impact receiving portion. The clamping device used comprises two clamps or screw clips engaging the spring members on either side of the center at a distance of about 10 inches apart, comprising a channel frame which serves to hold these two connecting clips apart.

While this Hartford clamping device is different in detail from the two disconnected clamping devices or clips used in the Lyon, which are supported at a greater distance in that spring bumper, yet the action of the Hartford clamping device is identical with that of the Lyon in adjustably connecting the two main spring members having the side loops and forming a re-enforced central impact receiving member for the bumper, and also in allowing the free resilient movement of all the spring members within the channel member of this Hartford clamping device. This double Hartford clamp prevents any of these parts getting out of vertical alignment. The spring strips have the same proportion vertical width to thickness, at about a 6 to 1 ratio, as in the Lyon bumper.

As in the Lyon bumper, this gives a very much greater vertical rigidity than the horizontal yielding action of the device. Therefore, it serves to prevent undesirable vibration and consequential likelihood of breaking. Under collision conditions, the Hartford bumper has the same resilient action as the Lyon did to this spring construction. Indeed, the equivalents, in action and character, between the Hartford and Lyon bumpers are generally recognized throughout the trade, and is so claimed by the defendant in marketing its goods. The record shows an easy substitution of the Hartford bumper where the Lyon spring bumper was asked for.

It is claimed by the defendant that the rigid connection of the clamping device tightly engages the spring members, and to some extent prevents their resilient action, at least to the extent of rendering ineffective the 8 or 10 inches of spring bar within the clamp, but this would do no more than render the Hartford bumper less effective in its resilient action, and since the resilient action in that 8 or 10 inches would be but a small part of the 110 inches, the full length of the spring, it would be relatively negligible. This would not relieve the defendant from the claim of infringement. Beyond this, this clamping device does not render the portion of the spring bars within the clamp resilient.

Lyon, in his claims as to construction, provides for two integral steel strips having greater vertical width and thickness to render them relatively rigid vertically, while resiliently yielding in horizontal directions, each of said strips having a vertical member to be attached to the automobile and having a transversely extending impact receiving member and an intermediate loop and connecting means adjustably connecting the said impact receiving members, and holding them against relative vertical movement and forming overlapping members to stiffen and strengthen this part of the bumper and provide for the lateral adjustment of said strips so as to adapt the bumper for attachment to automobiles having supporting members located at different distances apart. The Hartford bumper in its construction has all of these parts. It has the two spring strips with the attaching member extending rearward to be attached to the automobile; the two strips have a transversely impact receiving member, where the strips extend inward along the front of the bumper. It has an intermediate loop in

these spring strips which is the lateral loop extending in front of the wheels as in the Lyon bumper. It has the connecting means adjustably connecting the impact receiving members and holding them against relative vertical movement. Since its clamping device has the same arrangement and function, it embodies this element or feature of the Lyon claim.

The clamping means of the Hartford bumper forms overlapping members to stiffen or strengthen this front part of the bumper, and also provides for the lateral adjustment of the spring strips so as to adapt the bumper for attachment to automobiles having supporting members different distances apart.

Similarly examining all the Lyon claims, it will be found that the Hartford bumper infringes. The difference, if any, is found in the clamping device, but I am satisfied that that is a clear and absolute equivalent of the function and operation of the Lyon clamp. Therefore this successful spring bumper, after it has come into extended use throughout the trade, has been adopted, under circumstances herein stated, by the defendant and appropriated by it. There was evidence in the record which would indicate that plaintiffs' workmen were taken over to defendant's plant and put to work and its manufacturing methods copied.

[2] Nor do I think that there is any force in the claim of anticipation as urged against the Lyon bumper. The Harroun and Sager patents for bumper bars have been referred to heretofore.

The Conover patent, No. 1,000,668, of August 15, 1911, relates to the channel bar bumper consisting of a rigid channel iron extending across the frame of the automobile and mounted as the round bar rigid bumpers.

The Welton patent, No. 955,624, of April 19, 1910, is but another variation of the rigid round bar bumper construction of the prior art.

The Newcomb patent, No. 969,143, of August 30, 1910, is a trolley car fender. It comprises a series of spring bars extending in front of the trolley car and having special spring supports pivoted thereto to give increased resilience as desired.

The Fulton patent, No. 556,410, of March 17, 1896, is not intended for and could not operate as a bumper for vehicles. It shows a spring strip bumper having looped ends.

The Allez, No. 428,575, of July 30, 1909, shows the general looped or end contour of the Lyon bumper used as the front or actuating member of a street car fender. It is pivotally mounted on a crank shaft so as to have the resilient yield in a rearward direction when struck. It has no other structural features or functions which make the Lyon device practical and useful.

The Conway patent, No. 683,329, of February 11, 1912, is another buffer used on a trolley car, comprised of a curved front bar or feeler bar yieldingly supported in the front of the device by a pair of slide rods.

The Hoover shows this general looped end form of bumper of one single strip. It was granted after the Lyon patent, and the Lyon dates of invention are carried back of the Hoover application date.

Lyon, during the spring of 1911, made and tested a one-piece type of bumper and also two types of two-piece bumpers such as are illustrated in the patent in suit. Lyon disclosed his bumper in January, 1911, at the New York Auto Show, and within a few days thereafter returned to Philadelphia and proceeded to design and make a number of types of spring bumpers. In January or February, 1911, he made a looped end two-piece spring bumper of the contour shown in the exhibits offered as the bumper made patented after the one in suit. These bumpers were tested and used on automobiles in the early part of 1911. They were then made in a commercial way in the middle of 1911 and up to the first of 1912. The last half of 1914, Lyon negotiated with the Metal Stamping Company, and it resulted in the contract of February 25, 1915, under which the Lyon spring bumpers are now being manufactured by this latter company as the licensee. Lyon explains his failure to push the bumper more actively because of his inability to finance it.

The Lane bumper was made and sold in 1906 and 1907 and advertised in publications in March, 1908. It was made in Poughkeepsie, N. Y., and it is claimed by the plaintiff that it anticipated the Fageol bumper.

The Fageol bumper consisted of an impact receiving member which in construction was rigid. It was constructed in part of spring material, the spring material being disposed at the end of the bumper, where it was bent backward and inward, so as to extend for a substantial distance, parallel with the impact receiving portion and then backward at right angles to serve as a means for connecting the whole structure to the automobile. The ends of these spring members constitute the sole means of support for the entire bumper. It had the range of elasticity as afforded by this structure, no matter where the impact was received. Both end springs co-operate to resist the impact wherever received. But, it is a rigid bar type of bumper in which a round rigid bumper bar is used, extending across the entire distance between the automobile frames. This was a decided reversion from the Lane bumper. It is claimed that the end loops, because they were necessarily made of round stock to secure the adjustable connection with the bumper bar, vibrated freely in response to the successive vertical shocks under running conditions of the automobile, with a consequential breaking. This bumper was not successful. Fageol turned out about 200 in California during the first half of 1910; about 17 or 18 were sold as bumpers and the balance as junk. It did not serve the requirements of an automobile bumper. This, together with the experiments in California, demonstrate that the Fageol bumper was a failure commercially, as well as practically. It was tried by the Accessories Manufacturing Company, who advertised it in the fall of 1910, but never sold any substantial number of them, and the balance of those, which were made up in New York, were sold to a junkman in Brooklyn. Thereafter Fageol made a cement bar bumper, but this was not a commercial success, nor did it give the necessary resiliency required of a bumper. In the experiments made with the Fageol bumper and the effort to make it a commercial success, there was lost

$5,000. The Fageol patented bumper is radically different in construction from the Lyon spring flat strip bumper. It has not been successful, as has been the Lyon bumper. The idea as to shape, configuration, or contour may be similar, but that is not enough to urge at this time when the Lyon bumper has succeeded.

[3] If a new combination and arrangement of known elements produces a new and beneficial result never attained before, it is evidence of invention.

The language used in the case of St. Louis Street F. Mach. Co. v. American Street F. Mach. Co., 156 Fed. 574, 577 (84 C. C. A. 340), is appropriate in the present case, where it is said:

"The new and beneficial result accomplished by the device of the patent already referred to consisting of the more effective and less injurious way of scouring and flushing streets might afford a sufficient answer to this first contention; but there is more. The defendant company as found by the learned trial court and shown by abundant proof, upon being advised of the features of the Ottofy invention, abandoned its old machine made according to the Murphy patent hereafter to be considered, and adopted the device of the Ottofy patent. Murphy, defendant's patentee, upon being advised of the defects in his machine, and the objections made to it which Ottofy later remedied, confessed his inability to obviate them. Pickles, the engineer of defendant company, upon hearing of Ottofy's invention, claimed to be the first and original inventor thereof, applied for a patent therefor, and assigned all rights to defendant. These are all significant admissions by experts, and that, too, against interest, of patentable novelty in complainant's device. There is also evidence of more or less cogency that that device has superseded other devices in the few cities which employ scouring and flushing machines in use upon smooth or asphalt streets. These facts are entitled to weight when the question is whether the machine exhibits patentable invention. Keystone Mfg. Co. v. Adams, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 548, 106 Fed. 693, 707; Kinloch Tel. Co. v. Western Electric Co., 51 C. C. A. 362, 113 Fed. 652; Id., 51 C. C. A. 369, 113 Fed. 659, 665. In Krementz v. S. Cottle Co., 148 U. S. 556, 560, 13 Sup. Ct. 719, 720, 37 L. Ed. 558, Mr. Justice Shiras, in delivering the opinion of the court, after referring to the contention that the step taken by the patentee was one obvious to any skilled mechanic, says the contention is negatived by the conduct of defendant's president, which was in many respects like that of Murphy and Pickles. His language is: 'The view of the court below that Krementz's step in the art was one obvious to any skilled mechanic is negatived by the conduct of Cottle, the president of defendant company. He was himself a patentee under letters granted April 16, 1878, for an improvement in the construction of collar and sleeve buttons, and put in evidence in this case. * * * His improvement was to form a button of two pieces, the post and base forming one piece and then soldering to the post the head of the button as the other piece. Yet skilled as he was, and with his attention specially turned to the subject, he failed to see, what Krementz afterwards saw, that a button might be made of one continuous sheet of metal, wholly dispensing with solder, of an improved shape, of increased strength, and requiring less material.'"

[4, 5] The assignment of the Fageol patent is no protection to the defendant. After its purchase, the defendant continued to make Fageol's cement bar bumper and his channel bar bumper from 1912 to 1916. The defendant knew of the Lyon spring bumper on January 11, 1915. Thereafter the superintendent and foreman of the Metal Stamping Company was employed by the Hartford Company. Ar-

thur Mayer, a former employé of the Metal Stamping Company, is not only in charge of the sale of the Hartford bumper, but is also in receipt of a royalty on all the bumpers made, and, indeed, it would appear that Mayer brought the idea of constructing this bumper to the Hartford Company.

The defendant, by trade notices sent out, would have the public believe that Edward V. Hartford was the originator of the idea found in the Hartford bumper.

The difference in construction, as heretofore pointed out, between the Lyon bumper and the Fageol patented bumper of the rigid bar type, make it impossible for any Fageol claims to approach the Lyon construction. At best, such claims are so broad as to be clearly anticipated by the Lane, Conway, and Fulton bumpers. Under the authorities, there can be no such revamping of an abandoned or unsuccessful construction or the patent application save only for the purposes of successful attack or pretended defense against the successful invention, like the Lyon bumper. Westinghouse v. N. Y. Air Brake Co. (C. C.) 87 Fed. 882; Diamond Co. v. Consolidated Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527.

Fageol's claims in suit may be considered as relating to a device in which the end loops or members are rigidly or permanently secured to the bumper bar or body member of the device. That is, none of the general features or details of the Fageol adjustable connection of the end loops with the tubular bumper bar have any proper importance or effect in interpreting the claims in suit. Since all claims must, according to the accepted rules of patent interpretation, be given as broad a scope as their language will bear, no court is justified in reading into a claim limitations not set forth to establish the invalidating force of a prior construction. Westinghouse v. Boyden, 170 U. S. 737, 18 Sup. Ct. 707, 42 L. Ed. 1136; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800.

These radical differences in construction, co-operation of parts, and action under running conditions and collision conditions, not only make the difference between the commercial failure of the Fageol three-piece bumper and the success and extensive use and sale of the Lyon bumper, but they also mean a difference in type. Instead of the rigid bar Fageol bumper, Lyon developed an all-spring bumper which was so thoroughly successful that the Hartford Company, instead of trying to make further attempts to improve on the Fageol type, abandoned it completely, and appropriated the Lyon all-spring type of bumper with such relatively insignificant modifications as are present and referred to heretofore in the Hartford all-spring bumper against the manufacture and sale of which this suit is brought. Therefore I conclude the Fageol claims in suit are not infringed as claimed by the Hartford Company. It was held in Consolidated Valve Co. v. Crosby, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939, that a failure in the prior art cannot, by modification, be made to stand as an anticipation of a successful invention.

[6] A series of amendments were filed within a month in the Fageol application before the Lyon patent was issued, in an effort to secure claims broad enough to affect the Lyon patent, and in this way many, if not all, the claims in suit were inserted and radically modified. This may have been brought about by the successful and extensive use of the Lyon bumper. The court should not lend its aid to such an effort of an enterprising patentee. Lovell v. Oriental Co., 231 Fed. 719, 146 C. C. A. 3.

The Lyon construction and operation was new in Lyon's work in 1911, and is covered by his patent in suit. Lyon gave his valuable invention to the public. Fageol gave a different type of rigid bar bumper which proved to be impracticable and a failure commercially. It inevitably follows that Lyon should have full credit for the success and the protection of the court.

For these reasons, a decree of injunction and reference will be granted.

GEORGE D. MAYO MACH. CO. v. HEMPHILL MFG. CO.

(District Court, D. Rhode Island. December 29, 1917.)

No. 2756.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—KNITTING MACHINE.

The Mayo patent, No. 726,178, for improvements in knitting machines, claims 23, 24, 38, 41, 43, 48, 49, and 130, are of doubtful validity in point of invention and novelty, but in any event must be limited to the precise construction shown; as so limited, *held* not infringed.

In Equity. Suit by the George D. Mayo Machine Company against the Hemphill Manufacturing Company. On final hearing. Decree for defendant.

Howson & Howson, of New York City, for plaintiff.
Wilmarth H. Thurston, of Providence, R. I., for defendant.

BROWN, District Judge. Infringement is charged of letters patent 726,178, April 21, 1903, to George D. Mayo, for improvements in knitting machines. Claims 23 and 24, which relate to "sinkers and their guides," and claims 38, 41, 43, 48, 49, and 130, which relate to the distinct subject-matter called "the transfer means" are in suit:

23. In a knitting machine, a sinker cylinder having radially arranged sinker guideways and a hold-down portion above the same combined with sinkers arranged in said guideways and having portions overlying said hold-down portion.

24. In a knitting machine the combination with sinkers each having a plurality of arms, of a sinker cylinder therefor provided with guideways open at both ends for both the arms of said sinkers.

It is evident from the chart of defendant (Record, page 187) that the prior art leaves but a slight range for variation in structure in respect to the subject-matter of claims 23 and 24.

The relation of plaintiff's and defendant's combinations to the prior art may best be understood by reference to the drawings on the comparative chart. It is difficult to understand from reading the specification just what improvement the patentee thought that he had made. Mr. Livermore, defendant's expert, says:

"The sinkers and their supports shown and described in the Mayo patent are characterized or distinguished from the prior constructions, if at all, solely by certain mechanical details involving a certain procedure in the matter of manufacture," etc.

The specification describes the procedure in making the sinker cylinder of the patent in suit, and characterizes it as "extremely simple in construction." The defendant has pointed out that in this respect it has no advantages, but is less desirable than the structures of the prior art, since it requires three machine operations, whereas prior art constructions required but one machine operation in forming the same.

The plaintiff insists that the manner of forming the Mayo sinker ring cannot be read into claims 23 and 24, and that the manner of forming this ring is the subject of other claims which are not in suit. Any advantages in simplicity or economy of manufacture, therefore, may be disregarded.

In Mayo Knitting Machine & Needle Co. v. Jenckes Mfg. Co. (C. C.) 121 Fed. 110, 121, 122, the subject-matter of sinkers and holding devices was considered, and claim 11 of the Mayo patent of 1891, No. 461,357, was held void for lack of novelty. Upon appeal (133 Fed. 527, 535, 536, 66 C. C. A. 503), in an opinion by Judge Colt, it was said:

"The problem is here simply to hold down the sinkers, and the essence of the Mayo improvement lies in the location of the second ring to hold down their inner ends.

"It is not every minor change or improvement in construction in a machine composed of many different parts, like a circular knitting machine, that rises to the dignity of invention. The work of holding down the sinkers had been previously done by two rings, both located on the outer side of the hooks of the sinkers. In view of what already existed in the art, and the nature and character of this improvement, there was no invention or patentable novelty in simply changing the location of one of the rings to the other side of the hooks, or to the extreme inner ends of the sinkers."

The present question of invention in the combination of claims 23 and 24 seems of a like character, though there is a difference in the precise questions involved. The prior Randall patent, No. 542,311, is distinguished only because it—

"fails to disclose the positively held down-hold of the Mayo patent in suit and of the defendant's machine."

Defendant's counsel contends that it would not constitute a patentable invention to omit Randall's springs and make a positive connection; and this seems a reasonable contention.

The defendant, like Randall, uses a separate hold-down ring—a flat, thin annulus of sheet metal, which bears upon the inner ends of the sinkers. A hold-down ring of this old type requires the use of means to secure it against upward movement. Randall shows the use of springs for this purpose; the defendant, instead of springs, employs an inwardly projecting flange on the sinker cylinder. As defendant's

hold-down ring is located at the inner side of the sinker ring and projects inward from the inner cylindrical surface thereof, this requires a modification of the shape of the sinker, and that its lower leg should be extended inwardly so as to underlie the inwardly extending hold-down ring.

Defendant's Hemphill patent, No. 1,048,965, shows this construction.

It cannot be said that the defendant has copied the plaintiff's construction merely because he has provided a positive as distinguished from a spring connection to prevent upward movement of the old hold-down ring. If the plaintiff has dispensed with the separate hold-down ring by transferring its function to an integral part of the sinker cylinder, he cannot, for that reason alone, reasonably claim to prevent the employment of positive means for holding in place a ring of the old type, or prevent further improvement in the form of the old ring and in its connections.

I am of the opinion that the record fails to show any substantial novelty which makes the combinations of 23 and 24 patentable over the prior art, and that in any event a construction cannot be given to these claims broad enough to cover the defendant's device without being anticipated by the prior art.

The second branch of the case relates to what is termed the "transfer means," but which might more properly be called "means for preparing for transfer." This is used only in connection with the knitting of men's stockings, or half hose, which are provided with ribbed tops, which tops are ordinarily knit on a separate machine, and then transferred to the needles of a stocking machine by which the rest of the stocking is knit.

In making this transfer it is desirable first to bring all the needles, some of which, when the machine is at rest, are at a lower level than others, to a common level.

The plaintiff says that claim 38 may be taken as typical of all claims in suit relating to this topic:

> 38. A knitting machine provided with a double-acting stitch-forming cam and means to withdraw it bodily from operative engagement with the needles.

The plaintiff contends that:

> "There is no disclosure in the prior art of a rotary knitting machine having a double acting stitch cam which as a unit can be withdrawn laterally from operative engagement with the needles to permit leveling of the needles to receive the transfer of the ribbed top of the stocking."

The stitch cam is required to be withdrawn radially out of operative relation to the needle butts, in order that the depressed needles may be raised to the level of the other needles.

The defendant shows that the withdrawal of an obstructing cam or cams for the purpose of enabling the needles to be brought to a general level was old and well known in the art, and contends that there was no inventive thought in withdrawing a single, double-acting stitch cam in order to get it out of the way which was not involved in the withdrawal of any obstructing cam. The defendant relies especially upon

the prior patent to Hemphill, No. 629,503, of 1899. This shows two separate single-acting stitch cams, each of which is separately mounted so as to be radially movable, in order to permit leveling of the needles. There is evidence that Mayo carefully examined this machine and made sketches and notes before devising the invention of the patent in suit. In view of this the limitation of plaintiff's claims (except 48), by the term "double-acting stitch-forming cam," is significant. Using a single cam of this description, he needed but a single mounting for the purpose of a radial withdrawal movement.

Whether there was patentable novelty in doing for a single double-acting stitch-forming cam what had been done by Hemphill for each of two single-acting stitch cams, is doubtful; especially in view of the defendant's statement that in the Hemphill 1899 machine only one of the two radially movable cam blocks is radially withdrawn for the purpose of an operation of leveling the needles for transferring, and that this cam block carries the only obstructing cam; i. e., one of the single-acting stitch cams.

In the defendant's machine two single-acting stitch cams are both mounted on one cam block, and both are withdrawn at once.

The plaintiff contends that it makes no difference how many stitch cam surfaces may be used, provided they are fixedly mounted in one block so as to be withdrawable bodily, or as a unit.

To this the defendant further replies that two separate, single-acting stitch cams mounted on the same cam block are not the same thing as a single double-acting cam having two cam surfaces which merge at a common apex; for with the former the results and advantages obtainable with the latter, including absolute uniformity of stitch, cannot be obtained.

This is a matter specially referred to in the specification of plaintiff's patent, page 3, lines 58–69.

Omitting this feature would seem to reduce the plaintiff to claims for such advantages as might result from using one cam block, instead of two, as in the former Hemphill patent of 1899. But this disregards, also, both the specific limitation in the claims to a "double-acting stitch-forming cam" and the form thereof as illustrated in the drawings.

In view of the prior art, as illustrated in Hemphill, 629,503, of 1899; O'Neil, 387,251; Gordon, 438,686; Hemphill, 516,722—I am of the opinion that the claims in suit are of doubtful validity in point of invention, but that in any event they must be limited to the precise construction shown, and that, so limited, they are not infringed.

It may be said as to both subject-matters of the present case that there is a failure to show any novel conception, or anything more than changes of details of construction. The claims in suit are distinguished from the prior art only by what may be termed mechanical peculiarities, and the record, which is quite extended, is devoted principally to pointing out differences in structural detail rather than novel conceptions.

I am unable to say that in either case there was a novel conception which originated with plaintiff's patentee, and which defendant has

borrowed from the plaintiff's device, rather than from the prior art, or from ordinary principles of mechanical construction.

The bill will be dismissed.

SCOTT & WILLIAMS, Inc., v. HEMPHILL MFG. CO.

(District Court, D. Rhode Island. December 29, 1917.)

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—KNITTING MACHINE.
The Wardwell patent, No. 649,021, for a knitting machine, claims 29, 30, 31, 32, and 36, relate rather to details of machine building than to any novel inventive idea peculiar to knitting machines, and if they can be sustained as valid it is only by limiting them to the particular construction shown; as so limited, *held* not infringed.

2. PATENTS ⇐17—CONSTRUCTION—DISCRIMINATION BETWEEN CLAIMS—INVENTION OR MECHANICAL SKILL.
Claims in a patent for a knitting machine, which relate to the general organization of knitting machines, involving principles of operation peculiar to such machines, must be carefully distinguished from those claims which relate to details of machine building, even though the latter contain the words "in a knitting machine." This is not enough to take a detail of mechanical improvement out of the general mechanical art of machine construction, and, if this improved detail of construction is one within the knowledge and practice of mechanics, it does not matter that it was made by one who was also the inventor of new combinations, which he may justly claim as inventions.

In Equity. Suit by Scott & Williams, Incorporated, against the Hemphill Manufacturing Company. On final hearing. Decree for defendant.

Howson & Howson, of New York City, for plaintiff.
Wilmarth H. Thurston, of Providence, R. I., for defendant.

BROWN, District Judge. Infringement is charged of claims 29, 30, 31, 32, and 36 of patent No. 649,021, May 8, 1900, to C. J. A. Wardwell, for improvements in knitting machines.

[1] The specification is a long document, of 26 pages, with 13 sheets of drawings. There are 42 claims, directed to many details of the mechanism of a knitting machine which automatically knits a string of completely knitted stockings, each having a seamless heel and seamless toe, a foot and a leg.

Machines of this type are old. The foot and leg are knit in circular courses, or by round and round knitting, and the heel and toe are knit by reciprocating movements for narrowing and widening operations, which require the throwing of the needles in and out of action.

After describing the general character and mode of operation of the machine the patentee says:

"All of the foregoing results, which are accomplished by a machine embodying the present improvements, have heretofore been accomplished by automatic 'whole stocking' knitting machines; and the present invention consists in improved mechanism for achieving these results," etc.

The claims in suit relate to improvements in that part of the mechanism which moves a cam shaft that bears the cams whereby the changes in knitting are effected.

While any one kind of knitting is going on, the cam shaft stands still. When a change in the kind of knitting is to be made, the cam shaft is actuated, bringing a cam into position and into action to effect the change. The movement is produced by the engagement of a pawl with the teeth of a ratchet wheel firmly attached to the cam shaft. When the pawl is held out of engagement with the ratchet, the cam shaft is still. The pawl is brought into and thrown out of engagement, and the movements of the cam shaft thus controlled, through a pattern mechanism, which commonly makes one complete cycle of movement to the knitting of a complete stocking.

The common type of pattern mechanism comprises a chain carried by a sprocket wheel, which is advanced step by step by a ratchet and pawl. The greater number of the links of the chain are alike, and do no work. At suitable intervals links of special form are provided, which, when they arrive at the predetermined position, actuate the cam shaft, and thus the cams, through proper connections, effect the knitting changes. The character of the product to be knitted determines the position of the special actuating links upon the pattern chain. The number of courses of a particular kind of knitting desired before a change determines the number of nonactuating links before the introduction of the special actuating link.

The actuating link is followed by more inactive links corresponding to the number of courses before the next change; then follows a special link, and so on.

Claim 29 is typical:

"29. A knitting machine organized so as to knit in circular and reciprocating courses and to produce stockings having seamless heels and toes, said machine having, in combination, a time shaft which moves from time to time and by intervening mechanism controls the variations in the knitting, said time shaft being given from time to time an intermittent step by step motion and a movement through a greater extent than that of its usual steps; and automatic means controlled by a pattern mechanism for moving said time shaft, substantially as set forth."

The special feature of these claims is set forth in the words:

"Said time shaft being given from time to time an intermittent step by step motion and a movement through a greater extent than that of its usual steps."

The novelty is said to be long strokes which are employed to effect all of the changes in the knitting; short strokes which are employed as feeding movements, and also when the speed is changed.

The specification states the advantages resulting from the longer strokes—

"and to render the cam rise gradual and its action smooth and easy the ratchet *G* is moved through a large arc, which in the illustrated machine is seven times the length of the arc through which it moves in taking its usual step."

It is the contention of the defendant that it will be obvious to any one having knowledge of mechanics that the more gradual the incline on a

cam the easier the action of said cam will be, and that when the incline of a cam is made more gradual the length of movement of such cam and of the cam shaft to which it is secured must be correspondingly increased.

In view of what is conceded in the specification as to the results attained by previous machines, it would seem to follow that the cams upon their cam shafts must have been of sufficiently gradual incline to permit of successful operation, and that the time of their operation was sufficient for effecting the knitting changes. The thought of using a cam necessarily implies an incline sufficient for operation and time sufficient for operation upon the parts which it actuates, and the use of a cam shaft also necessarily implies movements to bring the cam into operative position.

The plaintiff's brief refers to no evidence to show that former machines were in these respects defective.

If it be true, as plaintiff contends, that the prior art shows only uniform step by step movements of the cam-shaft, it would seem to follow that such movements were adequate for practical operation. The plaintiff's brief does not, as is usual, point out some practical defect in the prior devices which was remedied by the patented device; nor is there anything in the plaintiff's case to show important practical results not previously attained, or to show the solution of any general problem peculiar to the art of knitting stockings by machinery. There is nothing to show that the changes in the movements of the shaft required any reorganization of the knitting machine considered as an entirety.

So far as has been made to appear, the provision of cams with gradual incline and easy action, and giving to the cam shaft movements appropriate in length for the cams thereon, and also proper feeding movements to bring the cams into operating position, involved only a special and limited mechanical problem, relating to a mechanical detail of construction, rather than any problem which properly can be considered to relate to the general organization of automatic knitting machinery. It is a problem of a machine builder, rather than a problem of a knitting machine inventor.

It is the opinion of Mr. Livermore, defendant's expert, that:

> "It is merely a matter of mechanical judgment to proportion the length of movement in accordance with the work to be done in a given moment and this might vary according to the character of the cams on the cam shaft and the mechanical connections therefrom to the parts which have to be moved," etc.

The plaintiff contends that the prior art shows no disclosure of the idea of giving to the time shaft of a rotary knitting machine long movements (longer than the ordinary step by step feed movements) to effect the variations in the knitting, and that this gives a greater length of time within which to effect these changes, and yet all within the limits of the revolution of the knitting head, and the further advantage of greater certainty in timing the operation of the different variation producing means.

As we have already said, it is essential that a cam shaft should always move sufficiently for the operation of cams. If movements of this

length are not desirable for the feeding movements, it would seem to involve only mechanical skill to shorten them.

As appears by the testimony in this case and by decisions which have been cited, there is an extensive prior art of automatic knitting machines provided with cam shafts. A claim for operating a cam shaft, with short movements for feeding or positioning and longer movements for cam action, would be a very broad claim, which would exclude knitting machine builders from what is conceded to be an old mechanical motion. Thus in Wyman's patent, No. 364,696, there is disclosed a mechanical motion device for giving short and long movements to a shaft under control of a pattern mechanism, which plaintiff admits is the equivalent of that used by Wardwell. It is used, however, in a machine of a different type; i. e., a "drop-box loom," so called. If lengthening the cams takes too much of the arc of a circle to admit of movements of equal length for the feed, it would seem to be open to machine builders, called upon to improve a machine only in respect to ease of cam action, to use what was already known in the general art of machine construction in any type of machine where it was desired to accomplish this limited purpose. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856. Mechanics who have only general mechanical skill, and who have had no part in the invention of the general organization of a machine, are called upon to remedy defects in details of construction, or to make, by application of their mechanical skill, improvements in the mechanical construction and operation of parts. For example: A mechanic who prevents overrotation of a numeral wheel in a counting machine by means of a stop does not invent a counting machine, even though he was first to use a positive stop in a counting machine. Felt & Tarrant Mfg. Co. v. Mechanical Accountant Co. (C. C.) 129 Fed. 386; W. C. Robinson et al. v. Tubular Woven Fabric Co., 248 Fed. 526, opinion of this court March 31, 1917.

[2] In a patent like that before us, claims which relate to the general organization of a knitting machine, involving principles of operation peculiar to knitting machines, must be carefully distinguished from those claims which relate to details of machine building, and such claims must be distinguished, even though they all contain the words "in a knitting machine." This is not enough to take a detail of mechanical improvement out of the general mechanical art of machine construction. If this improved detail of construction is one within the knowledge and practice of mechanics, it does not matter that it was made by one who was also inventor of new combinations which he is justly entitled to claim as inventions For what he does merely as a mechanic he stands exactly as other mechanics.

The defendant's expert testifies that the result of giving the cam shaft a greater length of movement at some steps than at others, and specifically a greater length of movement in the steps in which the cams perform their work than in those by which the cam shaft is stepped around to proper position for the cams to perform their work for the next step, is obtained in the construction shown in the Williams patent, No. 571,191, and in the Rowe patent, No. 570,059—both

automatic knitting machine patents. In the Williams patent occurs the following language:

"The object of using the disk *45* with its coarse teeth is to permit of the use of the high cam *43*, for one movement of the cam disk must carry the pin *39* from the bottom to the top of this cam, and if the extent of each movement of the cam disk was only equal to one of the fine teeth of the ratchet wheel *44*, the face of the high cam *43* would be so abrupt that it would not lift the pin. By the use of the coarse-toothed disk *45*, however, I am enabled to impart such an extended movement to the cam disk when the cam *43* is brought into action that the inclined face of the cam can be of such an angle as to easily raise the pin *39*."

This seems to disclose the idea of giving to the cam a greater extent of movement in order to enable the action of said cam to be made easier, by making the incline thereon more gradual, and also means for carrying the idea into effect, to wit, longer teeth on the ratchet wheel which moves said cam.

Mr. Livermore also states that in the constructions shown in the Williams patent and the Rowe patent the differences in length of movement of the cam shaft are obtained by having some of the teeth of the ratchet longer than the others, so that the pawl gives a greater step movement when acting on a long tooth than when acting on a short tooth.

The plaintiff points out, however, important differences in construction and operation between those devices and that of the patent in suit. But it is not necessary to deal with these in detail; for we find in the present case what seems to be an unjustified assumption that an old mechanical motion adapted to give long and short movements for the purposes of cam action, and of feeding cams to position, may be claimed exclusively for him who first used it in a machine for the automatic knitting of stockings. As there is no evidence in the case that in doing this the patentee solved any other problem than that of easing the cam action and of providing movements of the shaft appropriate thereto, and to feeding, the question of infringement cannot be determined by a showing that the defendant also, even though later, provided means for operating his cam shaft in the same way.

The plaintiff, in my opinion, is not entitled to claim broadly all mechanism for imparting different lengths of movement to the cam shaft of an automatic knitting machine for the purpose of easing cam action and providing suitable feed movements. The defendant's device cannot be held an infringement merely because its cam shaft has movements corresponding to those of plaintiff's machine. The claims must be construed in connection with the specification, and limited to a combination in which the described movements of the cam shaft are effected by means substantially similar to those described in the plaintiff's specification. It must further appear that the means so described involve patentable invention. If limited to the specific structure disclosed by Wardwell for giving the movements to the cam shaft, and if the comparison upon the question of infringement is to be, not of movements produced, but of the means whereby plaintiff and defendant respectively produce its movements, I am of the opinion that there is no infringement.

Wardwell's mechanism for giving to the cam shaft movements of different length is thus described by Mr. Arthur S. Browne, plaintiff's expert:

"As already pointed out, at intervals, the 'time shaft' is moved through a greater extent than at other times, this longer movement or stroke being important to enable easy movements to be accomplished by means of cams having gradual inclines. I will describe the mechanism of the Wardwell patent for doing this.

"During the ordinary running of the machine the pawl lever *F* (Fig. 16) has a short movement only, being limited in its movement by a stop *54*, which is encountered by a detent or arm *56* on the pawl lever *F* when the said pawl lever is pulled inwardly by the springs *49* and *50*. The upper end of the pawl lever *F* is always moved the same distance to the right (Fig. 16) by the pin *51* as the reciprocating rack *E* rises, but the movement of the pawl lever in the opposite direction under the influence of the springs *49* and *50* is determined by the location of the stop *54*. When that stop *54* is in the path of the detent *56* of the pawl lever *F* (as shown in Fig. 16), then the pawl lever has a limited extent of movement. The stop *54*, however, is capable of being lifted upwardly out of the way of the detent *56*, and when so moved the pawl lever *F* can be moved much farther inwardly by the pull of the springs *49* and *50* and until an outwardly extending projection *65* on the pawl lever *F* encounters the uplifted stop *54*. Hence, when the stop *54* is uplifted, the pawl lever and its pawls *48* and *61* have a longer stroke than when the stop *54* is in its lower position; and if, at a time when the pawl lever makes a long stroke, its pawl *61* is down in its ratchet-engaging position (as the result of the pattern chain action and that of the lifter *60*) the ratchet wheel *G* and the 'time shaft' *40* will be moved to a correspondingly greater extent.

"As described in the Wardwell patent, the stop *54* is made of elastic metal, so as to be capable of being raised and lowered, and it is lifted automatically at the desired times by means of cams *63* on the face of the ratchet wheel *G*. Only one of these cams *63* is shown in Fig. 16, but several are employed, as stated, at page 5, lines 56 to 61, and as indicated in Fig. 2. The stop *54* has a 'tongue' *64*, which depends into the path of cam *63*. Accordingly, when one of these cams *63* encounters the tongue *64*, the stop *54* is automatically lifted, thus permitting pawl *61* to make its long stroke."

Wardwell's pattern chain has no control of the length of movement of the actuating ratchet and cam shaft, but this is controlled by the position of cam *63* upon the actuating ratchet; a feature peculiar to Wardwell's construction.

In the defendant's device the movement of the pawl is of uniform length; but the length of movement given to the actuating ratchet, and thus to the cam shaft, is determined by a variedly movable pawl controller, the position of which is determined by the special character of links on the pattern chain. The pawl controller is a lifter governed by the links of the chain which, in one position, while certain links are passing, supports the pawl out of the reach of the teeth, and thus renders it inoperative, but in another position, when the proper links come into action, permits the pawl to reach the teeth and thus become operative to turn the ratchet and time shaft, the operation of which stops when the lifter is again moved to turn the pawl away from the ratchet wheel.

In the defendant's machine the pattern chain controls the pawl controller, and thus the engagement of the ratchet. The specific construction of the defendant's means for controlling the movements of the

shaft is closer to that of devices of the prior art than to Wardwell's, and is not, in any proper sense, a copy of Wardwell's construction.

The plaintiff contends that:

"The whole question of these differences between the Wardwell variable stroke motion and the defendant's variable stroke motion is completely disposed of by the fact that defendant's form as a mechanical motion (beginning with the varying size of lugs on the pattern) is shown to be old, in the Wyman patent, 364,696, and therefore made the equivalent of Wardwell's by the knowledge of the art of mechanical motions, and Mr. Livermore says they are substantially the same mechanical motions."

Being of the opinion that the defendant has the right to make the narrow mechanical improvement of easing the cam action and of providing feeding steps of shorter length than those appropriate for the cams, by the employment of known devices for that purpose, and that this would not involve invention, I am also of the opinion that the claims 29 to 32, inclusive, cannot be held valid simply because Wardwell may have been first to employ a mechanical equivalent of Wyman's mechanical motion to move the cam shaft of a knitting machine, but that these claims, if valid, must be limited to the structure disclosed in Wardwell's specification, and that, so limited, they are not infringed.

Claim 36 omits the long movement which forms an essential feature of claims 29 to 32. Claim 36 is as follows:

"A knitting machine having, in combination, a time shaft; a ratchet loose on said shaft; a chain wheel movable with said ratchet; a pattern chain engaging said chain wheel; a ratchet wheel fast to the time shaft; a pawl engaging said loose ratchet wheel to impart a step by step movement to said pattern chain; a pawl engaging said fast ratchet to give a step by step movement to the time shaft; a lifter engaging said fast ratchet pawl to normally hold it out of co-operation with said fast ratchet and adapted to drop when a variation in the pattern chain co-operates therewith, thereby permitting said pawl to engage its fast ratchet wheel, substantially as set forth."

The particular feature which is said to characterize this combination, and to distinguish it from prior art combinations, is:

"A lifter engaging said fast ratchet pawl to normally hold it out of co-operation with said fast ratchet and adapted to drop when a variation in the pattern chain co-operates therewith, thereby permitting said pawl to engage its fast ratchet wheel."

Prior means of rendering the actuating pawl inoperative, except when it was desired to move the cam shaft, comprised the provision of longer teeth on the ratchet, so that the constantly moving pawl was unable to reach the next tooth, but played idly against it until, by action of the pattern chain, it was able to reach the next short tooth on the pattern chain, and thus continue to actuate the ratchet until a long tooth was again encountered, which caused the pawl to idle until again brought in action by a link on the pattern chain whereby it was enabled to engage the tooth beyond the long tooth. This form of pawl controller is shown in the patents to Burleigh, 537,802; Stewart, 529,509; Williams & Swinglehurst, 552,806; Rowe, 570,057—in all of which the action of the pawl for turning the actuating ratchet and cam shaft is arrested by the pawl coming to one of the long teeth and merely traveling back and forth on the long tooth without turning the cam

shaft until, by the action of the pattern chain, the pawl is enabled to reach the next tooth. By these constructions the pawl at suitable times is made inoperative and operative.

In McMichael and Wildman, No. 508,965, the pawl *R* of the actuating ratchet *K* has a lateral extension on the working end of the pawl, as shown in Fig. 5. This extension overlies the chain wheel *J* and is in position to engage the links of the pattern chain *J'* as they pass along beneath said extension.

The greater part of the pattern chain is made up of high links, which, as they pass beneath the extension of the pawl *R*, lift said pawl out of reach of the teeth of the actuating ratchet and render the pawl inoperative. When a low link arrives under the pawl, it is no longer supported, but drops into engagement with the teeth of the ratchet, and becomes operative. The function of the lateral extension of the pawl *R* is that of a pawl lifter. That it is attached to the pawl itself, instead of being supported independently of the pawl, seems to be a formal difference, not affecting the fact that it is a distinct element, with the distinct function of lifting the pawl in co-operation with the pattern chain, and of permitting it to drop into engagement with the ratchet teeth upon the arrival of the low link.

Mr. Browne, plaintiff's expert, says of this device:

"The pawl *R* is controlled directly by the links of the pattern chain."

But the lateral extension of the pawl is designed to co-operate with the chain, and, even though made integral with the pawl, it must be regarded as a distinct element, which is a pawl lifter under control of the pattern chain.

Upon the whole case it may be said that the claims in suit relate rather to details of machine building than to any novel inventive idea peculiar to knitting machines. If they can be sustained as valid, it is only by limiting them to the particular constructions shown; and, so limited, they are not infringed.

In view of the conclusion on the merits, it is unnecessary to consider the defense of laches.

The bill will be dismissed.

SHRAUGER & JOHNSON v. PHILLIP BERNARD CO.

(District Court, N. D. Iowa, W. D. November 7, 1917.)

No. 43.

1. TRADE-MARKS AND TRADE-NAMES ⇐72—FEDERAL COURTS—JURISDICTION.
While the federal courts, regardless of diversity of citizenship, have jurisdiction of a suit for infringement of a patent or registered trademark, such tribunals are without jurisdiction of a suit between corporations of the same state for infringement of an alleged common-law trademark and unfair competition.

2. PATENTS ⇐172—VALIDITY—PROTECTION.
Under Rev. St. § 4886 et seq. (Comp. St. 1916, § 9430 et seq.), one who discovers that a useful result will be produced in any article, machine, or

manufacture, by the use of certain means is entitled to a patent therefor, provided he shall specify the means he so uses to produce the result in a manner so full that any one skilled in the art to which it pertains can by using the means so specified, without any addition thereto or subtraction therefrom, produce precisely the result so described, but if this cannot be done by the means described the patent is void, and the patentee is not entitled to have his claims construed, so as to include that which was rejected by the Patent Office or is disclosed by prior devices.

3. PATENTS ⟸328—VALIDITY—DESCRIPTION IN CLAIM.
The Shrauger patent, No. 1,134,642, for improvements in window frames, the only claim of which described the improvement as "a frame comprising one-piece frame members, having flat portions frame members having formed thereon upwardly extending supporting portions," etc., *held* invalid on account of the vagueness and ambiguity of the description of the only claim; the patentee not being allowed to construe the claim, so as to include therein what was rejected by the Patent Office or is disclosed by prior devices.

4. PATENTS ⟸161—CONSTRUCTION—SCOPE.
An application for a patent for a narrow improvement in an old and well-developed art should be strictly construed.

5. PATENTS ⟸16—"INVENTION"—WHAT CONSTITUTES.
A mere mechanical improvement, which could be termed but a shade of an idea, is not an invention which is patentable.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention.]

6. PATENTS ⟸328—VALIDITY—INVENTION.
The Shrauger patent, No. 1,134,642, for an improvement in metallic window frames, *held*, in view of the prior art, to be void for want of invention.

In Equity. Petition by Shrauger & Johnson, a corporation, against the Phillip Bernard Company, a corporation. On final hearing. Petition dismissed.

The plaintiff, an Iowa corporation, brought this suit against the defendant, the Phillip Bernard Company, another Iowa corporation, May 24, 1916, for the alleged infringement of United States letters patent No. 1,134,642, issued to Darius E. Shrauger, president of the plaintiff corporation, April 6, 1915, upon an application therefor filed in the Patent Office August 25, 1913, for improvements in "metallic window frames." The petition is in one count, and also alleges that plaintiff during the year 1912, "adopted the word 'Sunshine,' as a trade-mark applicable to the metallic window frames that were being manufactured and sold by plaintiff under said letters patent," and that it was entitled to the exclusive use of said trade-mark; that defendant also unlawfully infringed said trade-mark as the name of "metallic window frames" which it was making and selling in infringement of plaintiff's said patent, and claims damages of the defendant in the sum of $35,000, for the unlawful infringement of plaintiff's letters patent, and more than $25,000 for its alleged infringement of plaintiff's trademark, and prays judgment in treble damages therefor, and for an accounting and costs. October 26, 1916, the plaintiff amended its petition by adding thereto a paragraph alleging that defendant was guilty of unfair competition in trade in the use it was making of plaintiff's trade-

mark, in its advertising matter whereby defendant was fraudulently inducing the public to believe that the metal window frame it was making and selling was in fact the plaintiff's window frame, and it prays an injunction against the defendant, restraining it temporarily and permanently from infringing plaintiff's said patent and trade-mark, and from further continuing its unfair competition in trade.

The defendant answered the petition and amendment thereto: (1) Admitted the issuance of the patent in suit; (2) denied infringing the same; (3) alleged its invalidity for want of patentable novelty; (4) denied that it was guilty of unfair competition in trade; (5) denied the validity of plaintiff's alleged trade-mark; and (6) denied the jurisdiction of the court to entertain the suit so far as plaintiff claims for infringement of its alleged trade-mark, and for unfair competition in trade—and moves to dismiss the petition for want of jurisdiction of the court to hear or determine such claims, and for costs.

Orwig & Bair, of Des Moines, Iowa, for plaintiff.

Thomas F. Griffin, of Sioux City, Iowa, and E. G. Siggers, of Washington, D. C., for defendant.

REED, District Judge (after stating the facts as above). After taking its preliminary proofs, the plaintiff moved for a temporary injunction restraining the defendant during the pendency of this suit as prayed in the petition and amendment thereto, which was set for hearing before Judge Wade, who upon the hearing of such motion overruled the same. Shrauger & Johnson v. Phillip Bernard Co. (D. C.) 240 Fed. 131. Thereafter the final proofs were taken, and the cause is now before the court for final hearing upon the merits.

[1] The defendant renews its motion to dismiss the suit for want of jurisdiction of the court as to plaintiff's claims for infringement of its alleged trade-mark, and for unfair competition in trade. So far as the suit is to recover from the defendant for the alleged infringement of the patent, and to restrain further infringement thereof, it is not denied that so much of the suit as so claims is within the jurisdiction of this court, irrespective of the citizenship of the parties thereto. But so far as it seeks to recover for the alleged infringement of plaintiff's trade-mark, and for unfair competition in trade, it is well settled that the federal courts have no jurisdiction of such controversies between citizens or corporations of the same state. Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Warner v. Searle & Hereth Co., 191 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145; Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 134 Fed. 571, 67 C. C. A. 418, affirmed 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710; Ungles-Hoggette Mfg. Co. v. Farmers' Hog & Cattle P. Co., 232 Fed. 116, 146 C. C. A. 308.

In Leschen & Sons Rope Co. v. Broderick Co., above, both complainant and defendant were corporations of Missouri engaged in manufacturing and selling wire rope in that state. The complainant had registered a trade-mark under the act of Congress of March 3, 1881, (21 Stat. 502, c. 138), under which it claimed the right to use said trade-mark as indicative of its manufacture. The appellant, who was the

complainant below, filed its bill to restrain the defendant from infringing said trade-mark. The trial court sustained a demurrer to the bill and dismissed the suit. On appeal the Court of Appeals said:

"Much is said in the brief of appellant to the effect that the defendant has been guilty of unfair trade competition by palming off on the public rope of its manufacture as complainant's rope. This is a subject, however, over which the federal courts have no jurisdiction. Complainant and defendant are both citizens of the same state, and for this reason jurisdiction is confined to the trade-mark as registered. If that mark is invalid, the federal courts are without authority to grant any relief on the ground of unfair trade competition."

The court found that the trade-mark was invalid, and that the court rightly dismissed the bill, and its decree was affirmed. In affirming this decree the Supreme Court, in Leschen Rope Co., v. Broderick, 201 U. S. 166, at page 172, 26 Sup. Ct. 425, at page 427 (50 L. Ed. 710), said:

"Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark valid under the act of Congress, and for the reasons above given, we think it has not."

And the decree of the court was affirmed.

It is unnecessary to pursue this question further, for the plaintiff has no registered trade-mark, and the suit is wholly between corporations of the same state. The defendant's motion to dismiss the petition as to claims for infringing the plaintiff's alleged trade-mark, and for unfair competition in trade must be and is sustained for want of jurisdiction.

[2, 3] The remaining questions are: (1) Has the plaintiff a valid patent upon its "metallic window frames" made and sold by it? and (2) has the defendant infringed the same? As already stated, the application for the patent was filed in the Patent Office August 25, 1913; and four claims were made therein for patents upon plaintiff's device. These four claims were all rejected by the Patent Office upon reference to the following named prior patents: Wehrle, No. 181,547, date August 29, 1876; Campbell, No. 196,784, date November 6, 1877; Durkin, No. 202,160, date April 9, 1878; Campbell et al., No. 228,443, date June 8, 1880; Fitzberger, No. 463,963, date November 24, 1891; Ham, No. 614,386, date November 15, 1898; MacGregor, No. 1,002,290, date September 5, 1911; French patent, No. 423,450, date February 16, 1911. In rejecting these claims the examiner said:

"Claims 1, 2, and 3 present no invention over Durkin, Campbell et al., Campbell, Wehrle, Fitzberger, or the French patent, above cited. Claim 4 merely aggregates with claim 3 the matter of the screen and specifies securing means. The addition of a screen broadly to protect any pane of glass is obvious, while the substitution for the cap-securing means of Fitzberger or French patent of devices shown to be old in Ham and MacGregor involves a mere substitution of equivalents."

To overcome the objections thus made by the Patent Office, the applicant then presented a single claim for a patent upon his device, which claim reads as follows:

"A frame comprising one-piece frame members, having flat *portions* frame members having formed thereon upwardly extending supporting portions

adapted to serve as a support for a cap and screen, spaced downwardly extending portions forward on said supporting portions, said last described portions having upwardly opening channels formed at their lower ends, adapted to support a glass pane and carry water, a protecting screen supported on said upwardly extending portions, clamping devices extended upwardly between said upwardly and downwardly extending portions and through said screen."

Which claim was finally allowed by the Patent Office in lieu of the four rejected claims. Of the claim so allowed, Mr. Finckel, defendant's expert, testified that the claim is ambiguous, that it necessitates the addition of some further words in order to relieve the ambiguity, and unless the claim is so corrected it will not read upon the disclosure of the patent. The plaintiff's expert, Mr. McElroy, also admits in his testimony that there is an ambiguity or defect in the claim, and that it could be construed two ways. He first suggested the addition of the word "said" before the word "frame" in line 2 of the claim, and later suggested the insertion of "two or more of said" before the word "frame."

As originally presented, the word "portions" at the beginning of line 2 was not in the claim, and of the claim as presented the Commissioner of Patents, in his letter of November 4, 1914, to counsel for the patentee, said:

"The claim as now presented cannot be understood in view of the fact that something has apparently been omitted in line 2 of said claim. Further action on the merits is impossible until an intelligible claim is presented."

November 13, 1914, counsel for the applicant wrote the Patent Office as follows:

"In response to office action November 5 [4], 1914, in the claim, line 2, after 'flat,' insert 'portions.'"

November 24th the Patent Office wrote counsel for the applicant as follows:

"In response to amendment of November 17 [13], 1914, the brief description of Fig. 4 has not been supplied. The drawings filed show a view designated Fig. 4. This view is apparently a section taken on a plane parallel with that on which Fig. 3 is taken, but not cutting the clamping devices."

November 27th counsel for the applicant again wrote the Patent Office as follows:

"In response to office action of November 24, 1914. Page 2, after line 10, insert: Figure 4 is a sectional view taken on a plane parallel, with that on which Figure 3 is taken, but not cutting the clamping devices." (This insertion seems not to have been made, but that is not deemed important.)

On April 6, 1915, the patent, with a single claim as above set out, was issued.

The above correspondence between counsel and the Patent Office is furnished by counsel for the plaintiff, from which it seems that the claim of the patent as issued, when first presented, was unintelligible to the expert examiners of the Patent Office, and the only correction made in it was to insert the word "portions" after the word "flat" in line 2 of the claim, and, as so corrected, the claim was allowed.

It was early held by the Supreme Court that whoever discovers tha

a certain useful result will be produced in any article, machine, or manufacture by the use of certain means is entitled to a patent therefor, provided he shall specify the means he so uses to produce the result in a manner so full and exact that any one skilled in the art or science to which it appertains can, by using the means so specified, without any addition thereto or subtraction therefrom, produce precisely the result so described, and if this cannot be done by the means so described the patent is void. O'Reilly v. Morse, 15 How. 62, 119, 14 L. Ed. 601; Tilghman v. Proctor, 102 U. S. 707, 727, 26 L. Ed. 279. This in effect is the requirement of section 4886 et seq. of the Revised Statutes of the United States (Comp. St. 1916, § 9430 et seq.), and is a settled rule of the patent law. The substituted claim 4, which was finally allowed as the only claim of the patent in suit, is not alone sufficiently definite and certain to sustain such patent, and the plaintiff cannot now be heard to insist that the claim allowed shall be so construed as to include therein what was rejected by the Patent Office, or is disclosed by the prior devices. Corbin v. Eagle Lock Co., 150 U. S. 38, 40, 14 Sup. Ct. 28, 37 L. Ed. 989; Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 617, 27 Sup. Ct. 307, 51 L. Ed. 645; National Hollow B. B. Co. v. International B. B. Co., 106 Fed. 693, 714, 45 C C. A. 544; Boss Manufacturing Co. v. Thomas, 182 Fed. 811, 813, 105 C. C. A. 243.

[4-6] The making of skylight windows and frames for photograph galleries and various other buildings had long been practiced throughout the United States before the plaintiff's assignor entered the field in making such devices. His application is for a narrowly limited improvement in old devices and must be strictly limited to the claims of the patent. The only element upon which the claim of the patent as finally allowed can rightly be upheld as an invention is the upwardly and downwardly extending devices upon certain of the flat members of the frame, adapted to support a glass pane, a screen to protect the same, and clips or clamping devices to hold the same in place. As the Patent Office said of original claim 4:

"It merely aggregates with claim 3, the matter of the screen and specific securing means. The addition of a screen broadly to protect any pane of glass is obvious, while the substitution for the cap securing means of the Fitzberger or French patent, in devices shown to be old in Ham and MacGregor, involves a mere substitution of equivalents."

In view of the ambiguity and uncertainty of the claim, as held by the Patent Office, and as testified by the experts of both plaintiff and defendant, the insertion of the word "portions" (whatever they may be) at the place indicated, at the instance of the patentee, does not relieve it of its ambiguity and uncertainty. As finally allowed the claim differs somewhat in its phraseology from the claims of the Fitzberger patent; but it is intended to accomplish the same results and in substantially the same manner, and in view of the prior art is not invention. As applicable to the claim of this patent, as finally allowed, I may quote from the recent decision of the Supreme Court in Railroad Supply Co. v. Elyria Iron & Steel Co., 244 U. S. 285, 293, 37 Sup. Ct. 502, 505 (61 L. Ed. 1136), as follows:

"Clearly persuaded as we are that the slight variations claimed for the patents in suit from the plates which had gone before do not constitute patentable invention, * * * we content ourselves with adopting as comment not to be improved upon in such a case as we have here the following from a former decision of this court: 'The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. * * * It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.' Atlantic Work v. Brady, 107 U. S. 192, 200 [2 Sup. Ct. 225, 27 L. Ed. 438]."

The testimony in this case shows without substantial dispute that a skylight frame or device substantially like that now made by the plaintiff, and which it claims is infringed by the defendant, was made and used at different places in the United States more than two years prior to the filing of the application for the patent in suit; but, in view of the indefiniteness and uncertainty of the claim in question, the invalidity of the patent is not made to rest alone upon this ground, as I am constrained to hold the patent in suit void for indefiniteness and uncertainty of the claim, and its lack of invention.

The petition, so far as it seeks recovery for infringement of the patent, is also dismissed for want of equity, and at plaintiff's costs. It is accordingly so ordered.

BARBER v. OTIS MOTOR SALES CO.

(District Court, N. D. New York. December 27, 1917.)

1. PATENTS ⇐324(6)—INJUNCTION AND ACCOUNTING—VACATING DECREE—CONDITIONS.

Where, with the permission of the Circuit Court of Appeals, an interlocutory decree for injunction and accounting in favor of complainant, and an order of affirmance entered pursuant to the original mandate of the Circuit Court of Appeals, are to be vacated for a new final hearing on additional evidence, it will not be made a condition of such vacation that the evidence taken on an accounting previously had may be received and considered on any new accounting in case complainant obtains a decree, where the expenses of the former accounting have been provided for, and are to be paid by defendant as a condition of vacating the decree.

2. PATENTS ⇐324(6)—VACATING DECREE—CONDITIONS.

In such case, where no injunction pendente lite has been granted, and the only bonds given were a bond on appeal from the decree for complainant and a bond to stay issue of injunction pending the appeal, it will not be made a condition of the vacation of the decree and order of affirmance that defendant execute and file a new bond to stay the issue of injunction.

In Equity. Suit by William Barber against the Otis Motor Sales Company. On settlement of an order on the amended mandate of

the Circuit Court of Appeals. Application by complainant for the imposition of certain conditions on the vacation of the interlocutory decree, and order of affirmance denied.

See, also, 231 Fed. 755; 245 Fed. 945.

On settlement of the order on the amended mandate of the Circuit Court of Appeals permitting this court to vacate its order of affirmance entered pursuant to the original mandate handed down by the Circuit Court of Appeals, and also to vacate its original interlocutory decree and grant a new final hearing, at which either party may introduce such pertinent additional evidence as may be offered, the complainant requests this court to insert a provision to the effect that, in case on such rehearing the plaintiff has a decree in its favor, all evidence taken by the special master on the accounting had in part herein on the decree entered pursuant to such mandate as originally filed be received and considered on any new accounting herein, and also a provision that defendant execute and file a new bond, in the sum of $15,000, to stay issuing of injunction, etc., and vacating the bond hereafter filed, and which bond shall be conditioned to pay complainant all damages, profits, and costs finally awarded him in this suit, and upon any accounting that may be awarded him pursuant to any future decree of this court. The defendant objects to such provision.

Fred Francis Weiss, of New York City, for plaintiff.
Wetmore & Jenner, of New York City, for defendant.

RAY, District Judge (after stating the facts as above). [1] I do not see justification for including the proposed provisions in the order. The interlocutory decree in favor of the complainant is to be vacated, for the purpose of granting a new final hearing, when additional evidence is to be received, and a new decree of this court entered, which may be the one way or the other. The old accounting falls and comes to naught, with the vacation of the decree which authorized such accounting. Moreover, the expenses of that accounting have been provided for, and are to be paid by the defendant as a condition of vacating such decree. The new accounting herein, if one is ordered, will be a new proceeding, and I cannot now impose new conditions of vacating such decree, or at least ought not to do so.

[2] As to the provision for a bond, the only bonds heretofore required or given were, one on appeal from the decree of this court above referred to, and the other to stay issue of the injunction prior to the decision of the Circuit Court of Appeals affirming the said decree of this court. This court, by the amended mandate of the Circuit Court of Appeals, having been reinvested with full and complete jurisdiction of the cause, it must be that the appeal from the decree of this court about to be vacated falls and goes for naught. The present bond on appeal falls with the decree and appeal. If the complainant succeeds on the rehearing, there must be a new interlocutory decree, a new appeal, and a new bond. This court cannot require such bond in advance of the new decree and appeal, or as a condition of vacating the decree of this court about to be vacated, and which it has decided it would vacate on payment of certain costs and expenses, and which have been provided for by deposit with the clerk. To do so would be to impose new and additional conditions for opening and vacating the said decree in favor of complainant heretofore entered, and also re-

quire a bond to stay injunction in advance of a decree which may never be granted or entered, or on an appeal which may never be taken.

As the decree of this court awarding an injunction and an accounting is now vacated,or about to be vacated, there will be no authority for an injunction. No injunction pendente lite has been granted, and there is no authority or necessity for a bond to stay the issuing of an injunction. The only injunction heretofore authorized was based on the decree, which is now about to be vacated.

CONTINUOUS EXTRACTING PRESS CORP. v. BALTIMORE PEARL HOMINY CO.

(District Court, D. Maryland. June 7, 1917.)

PATENTS ⟸328—VALIDITY—CONTINUOUS PRESS.

The Fiddyment & McNally patent, No. 816,446, for a continuous extracting press, is void for lack of invention, in view of the prior art and analogous arts, and also for use of the patented structure for more than two years prior to the application.

In Equity. Suit by the Continuous Extracting Press Corporation against the Baltimore Pearl Hominy Company. On final hearing. Decree for defendant.

Frank, Emory & Beeuwkes, of Baltimore, Md., and Charles L. Sturtevant and Eugene G. Mason, both of Washington, D. C., for plaintiff.

John Watson, Jr., of Baltimore, Md., and William W. Dodge, of Washington, D. C., for defendant.

ROSE, District Judge. This is a suit on letters patent No. 816,446, issued March 27, 1906, to Fiddyment & McNally. The plaintiff, while resisting the dismissal of its bill, has offered no evidence in its support. The defendant has gone thoroughly into its case.

"Continuous presses," comprising a cylinder with feed inlet at one end and controlled outlet at the other, and an axial screw for moving the material through the cylinder and applying the requisite pressure thereto, are found in the prior art of record. Vide French patent, No. 173,944, to Perrett, February 3, 1886, with its addition of July 22, 1886; United States patent, No. 583,021, to Birkholz, May 25, 1897; United States patent, No. 647,354, to Anderson, April 10, 1900. All of these employ perforate cylinders, and are used to express moisture out of various substances. The prior art also discloses, in presses for making brick, tiles, etc., a like construction, except that the cylinder is not provided with perforations or openings for escape of liquid. Vide United States patent, No. 293,000, to Fate & Freese, February 5, 1884.

Although the two classes of presses are used to make different products, or to do different work, their general structure and principle of operation is very similar. It appears that, whether the material handled be fruits, grains, or other matters containing juices, oils, or

other liquids, or is such a substance as clay, the more or less plastic mass under treatment is liable to become so compacted between the respective turns of the screw as to wedge or bind therein, and to rotate bodily with the screw, instead of being moved forward by the same. The difficulty is the same in kind, though the substances treated are in other respects unlike. The proofs show that this difficulty has been met and overcome by like means in the two general classes of continuous screw presses noted; that is to say, one or more rigid baffles, blades, or knives are arranged to project inward from the cylinder of the press towards the axis of the screw, which baffles, by preventing the bodily rotation of the mass under treatment, enable the screw to move the substance towards the discharge end of the cylinder, and to exert thereon the requisite pressing action.

This construction, the essence of claims 13, 14, and 15 of the patent in suit, and alleged to be infringed, if found in the Anderson presses or expellers of the defendant, is likewise shown and described in United States patent to Birkholz, No. 583,021, which is for a continuous screw press for extracting moisture and having a perforate cylinder. It is also shown and described in United States patent to Fate & Freese, No. 293,000, which discloses baffles, blades, or knives arranged in a longitudinal series. Though the Fate & Freese machine is intended for handling clay, while the machines of plaintiff and defendant handle grains, fruits, or other substances, from which the liquid contents are to be expressed, the analogy between them seems complete so far as concerns the mode of operation, the difficulty encountered and the means for obviating it, and it is to these matters that claims 13, 14, and 15 relate. The proofs also sustain the defense of prior manufacture, sale, and use of the subject-matters of claims 13, 14, and 15 within the United States, more than two years prior to the application for the Fiddyment & McNally patent in suit.

It follows that the bill of complaint herein must be dismissed.

ILLINOIS CUDAHY PACKING CO. v. KANSAS CITY SOAP CO.

(District Court, D. Kansas, First Division. January 11, 1918.)

No. 1844.

1. EVIDENCE ⟸9—JUDICIAL NOTICE.
That crude glycerine is a product derived from animal fats is a scientific fact, of which the courts take judicial notice.

2. CORPORATIONS ⟸372—POWERS—CONSTRUCTION.
A corporation authorized to buy and slaughter cattle, hogs, and sheep, and deal in provisions and all classes of packing house products, has authority to purchase crude glycerine; it being derived from animal facts and being a common product of the meat-packing industry.

3. ASSIGNMENTS ⟸117—CONTRACTS—EFFECT.
Though plaintiff assigned an executory contract with defendant for the purchase of goods, the original parties were not released from the contract, unless a new obligation was entered into between plaintiff and defendant on the theory of novation, and, none having been entered into, plaintiff might maintain an action for breach.

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

4. CORPORATIONS ⇐578—REORGANIZATION—EFFECT.
Where plaintiff corporation, which contracted with defendant for the purchase of glycerine, tendered defendant the full purchase price, demanding the glycerine, plaintiff's action for damages, it having purchased glycerine in the open market at a price above the contract price, was not lost by reason of a transfer of its assets to the newly formed corporation; for, though plaintiff stockholders formed a new corporation and transferred its assets to such company, plaintiff remained in existence for the purpose of winding up its corporate affairs.

At Law. Action by the Illinois Cudahy Packing Company, a corporation, against the Kansas City Soap Company, a corporation. On motions of respective parties for directed verdicts. Verdict directed for plaintiff.

J. E. McFadden and O. Q. Claflin, Jr., both of Kansas City, Kan., and Defrees, Buckingham & Eaton, of Chicago, Ill., for plaintiff.

J. H. Brady and E. H. Henning, both of Kansas City, Kan., for defendant.

POLLOCK, District Judge. The facts in this case are not in dispute. They are briefly summarized as follows:

On September 30, 1915, the parties entered into a contract in writing by the terms of which defendant sold to plaintiff and agreed to deliver f. o. b. Kansas City, Kan., to plaintiff, not less than 90 and not to exceed 100 drums of crude glycerine at the price of 22 cents per pound, delivery to be made between October, 1915, and December 31, 1916, in carload lots of 30 or 31 drums per car. Under the terms of the contract defendant did deliver to plaintiff, and plaintiff received, 54 drums of the glycerine contracted for, for which plaintiff paid defendant the contract price. However, as the market price of crude glycerine, on account of changed conditions, greatly increased after the making of the contract, defendant wholly failed and refused to deliver the remaining 36 drums stipulated in the contract. Thereupon the plaintiff tendered the full contract price and demanded performance of the contract by defendant. On defendant's refusal to perform its contract with plaintiff, or to receive the contract price, plaintiff went on the open market and purchased said 36 drums of glycerine at the then market price of $7,172.94 in excess of the contract price agreed to be paid by plaintiff, and brings this action to recover its damages so sustained by defendant's breach of the contract.

Defense of the action is made on three grounds: (1) Because the contract is ultra vires and void on the part of the plaintiff; therefore defendant is not bound by its terms. (2) Because, after the making of the contract, plaintiff company sold, assigned, and transferred its corporate assets, including its rights under the contract in suit, to the Cudahy Packing Company of the state of Maine; therefore, it is contended by defendant, plaintiff is not the real party in interest, and has no right to bring or maintain this action against it. (3) That plaintiff sold and assigned all of its corporate assets to the Maine company after its formation, and thus disqualified itself to carry out

and perform the contract on its part; wherefore defendant is not bound by its terms.

A trial of the case was entered upon before the court and a jury. After the completion of the evidence, by stipulation of the parties made in open court, the jury was withdrawn and the case submitted to the court on motions of both parties for instructed verdicts in their behalf. The case comes now on for decision on said motions and the briefs and arguments of counsel herein.

[1, 2] As to the claimed ultra vires character of the contract it may be said: Under its charter received from the state of Illinois the plaintiff possessed the following powers:

"The object for which said corporation is formed is to purchase for slaughter and slaughter cattle, hogs, and sheep, and manufacture and dispose of the products thereof; also to buy, sell, and deal in meats, provisions, and all classes of produce and packing house products."

That crude gylcerine is a product derived from animal fats is not only a scientific fact, of which courts take judicial notice, but the evidence found in the record abundantly establishes crude glycerine to be a common product of the meat-packing industries of this country.

[3] As to the contention made by defendant, whereas, the plaintiff assigned the contract in action to the Maine corporation, therefore plaintiff is not the real party in interest and is not entitled to bring and maintain this action, it may be said:

It will be noted this is not a case in which the assignee of an executory contract brings an action thereon to recover for its breach, but is a case in which the action is between the original parties to the contract. Hence all questions relating to the assignment of executory contracts without the consent of one of the parties thereto, or the novation of contracts, are not involved in this case. If plaintiff assigned the executory contract involved to the Maine corporation without the knowledge, consent, and acquiescence of defendant, it is clear defendant could not have been held to the performance of the contract by the Maine corporation, for in such case, if an action by the Maine corporation to recover damages for its breach from defendant, a sufficient answer to defendant would have been: "We do not know you; we never contracted with you, and are not liable to you." On the other hand, had defendant, learning of such assignment being made, attempted to proceed against the Maine company for either breach of the contract or to recover the purchase price stipulated therein, on delivery or tender of delivery of the glycerine to said corporation under the terms of the contract, the Maine company would have defended on the ground it did not accept defendant as a party contracting with it, nor did it by the terms of the assignment made assume the obligation incurred by the plaintiff in the making of the contract, hence is not bound by its terms.

In any event, it is quite clear, under the settled rule of decision, the assignment of the executory contract in dispute by plaintiff to the Maine corporation did not operate to release or discharge the original parties thereto, from its binding obligation, unless a new obligation was entered into between plaintiff and defendant, on the theory

of novation, which is not claimed in this case. As illustrative of the foregoing principles stated, see American Paper Bag Co. v. Van Nortwick, 52 Fed. 753, 3 C. C. A. 274; Illinois Car & Equipment Co. v. Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504; Lisenby v. Newton, 120 Cal. 576, 52 Pac. 813, 65 Am. St. Rep. 203.

It follows, notwithstanding the assignment made or claimed to have been made to the Maine corporation by plaintiff, and regardless of the rights of plaintiff and said Maine corporation created by virtue of such assignment inter sese, as this action is instituted by the only party entitled to bring or maintain it, of necessity the plaintiff is the real party in interest.

[4] The remaining contention of defendant is: As plaintiff by the reorganization of its business, on the formation of the Maine corporation and the transfer of its assets to said corporation, as shown by the record, disqualified itself from compliance with its obligation under the terms of the contract, therefore thereafter the contract was not mutual, and defendant is released and discharged from its further performance. In this regard it may be said there would appear many answers to this contention. It is sufficient to say plaintiff company was neither dissolved nor its property rights abandoned by the act of its shareholders in organizing the Maine corporation and the transfer of its corporate assets to said company as was done in this case. On the contrary, its corporate existence still remained for the purpose of winding up its corporate business affairs, and plaintiff still lives and exists. After the admitted breach of the contract involved in this suit by defendant, plaintiff demanded its performance, and tendered and offered to pay defendant the full contract price of the glycerine, which demand for performance and tender defendant refused; from all of which it is made clear the defenses to this action are as technical and without merit as would have been a defense based on like grounds, had the price of glycerine fallen far below the contract price, instead of having risen, and the plaintiff, refusing to comply with its contract and receive the product purchased by it, on breach of the contract, had been proceeded against by defendant for damages.

It follows the motion of plaintiff for an instructed verdict must be sustained, and the clerk is directed to prepare sign and file such verdict for plaintiff, and enter judgment thereon, as by plaintiff prayed in its petition. The motion of defendant for directed verdict is overruled and denied.

It is so ordered.

PENN MUT. LIFE INS. CO. v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. February 4, 1918.)

No. 3724.

1. STATUTES ⇐245—CONSTRUCTION—REVENUE LAWS.

While taxing statutes are to be strictly construed, this merely means that neither the courts nor the executive may, through judicial or administrative construction, impose a tax not imposed by Congress, and, when Congress has indicated its purpose and intent to tax, the law is not to be

strictly construed, but is to be given that construction given to remedial statutes.

2. INTERNAL REVENUE ⟸9—INCOME TAX—DEDUCTIONS.
Revenue Act Oct. 3, 1913, c. 16, § 2, G(b), 38 Stat. 173, provides that mutual marine insurance companies shall include in their return of gross income gross premiums collected and received, but shall be entitled to include in deductions amounts repaid to policy holders on account of premiums previously paid and interest upon such amounts, and that life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such policy holder or treated as an abatement of premium within such year. *Held* that, where a mutual life insurance company exacted the advance payment of an estimated reasonably safe maximum premium and returned to policy holders the excess after the actual cost of the insurance was known, it was entitled to exclude from its gross income all moneys so repaid to policy holders within the year, if previously received for premiums, whether received during the year or not.

3. STATUTES ⟸216—CONSTRUCTION—OPINIONS OF MEMBERS OF CONGRESS.
While an act of Congress must be accepted for the purpose of interpretation in the form in which it was finally passed, and cannot be altered or amended to conform to the meaning given it by individual members who advocated its passage, or by a committee which may have discussed it in a report, such expressions of opinion are entitled to weight in construing the law.

4. INTERNAL REVENUE ⟸9—INCOME TAX—DEDUCTIONS—"DIVIDEND."
Under Revenue Act Oct. 3, 1913, § 2, G(b), a mutual life insurance company, limiting premiums to actual cost, but exacting the advance payment of an estimated reasonably safe maximum premium, and returning the excess after the actual cost is known, is entitled to exclude from its gross premiums the amounts so paid to policy holders, though there have been some accretions by way of interest or other profit, and though the statute forbids the taxable income to be reduced by dividend payments, as the word "dividend" merely means a unit portion of something which has been divided, and does not necessarily include the thought of profit, and the dividends referred to are not to be deducted because they have once been excluded.

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

5. CONSTITUTIONAL LAW ⟸70(3)—JUDICIAL FUNCTIONS—WISDOM OF LEGISLATION.
In construing a law, the judicial inquiry is not into what enactment Congress should have made, but into what enactment Congress did in fact make.

6. INTERNAL REVENUE. ⟸9—INCOME TAX—DEDUCTIONS.
Under Revenue Law Oct. 3, 1913, § 2, G(b), a mutual life insurance company, limiting premiums to the actual cost of the insurance, but exacting the advance payment of an estimated reasonably safe maximum premium, and returning the excess after the actual cost is known, is entitled to exclude from the gross income amounts so repaid to policy holders, though representing the return of premiums received before the enactment of the statute, as the act is to be construed as a system of taxation, as if it had always been in force and had never had a beginning.

At Law. Action by the Penn Mutual Life Insurance Company against Ephraim Lederer, Collector of Internal Revenue. On trial hearing before the court sitting without a jury. Judgment for plaintiff.

George Wharton Pepper, of Philadelphia, Pa., for plaintiff.
Francis Fisher Kane, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Trial by jury was, by stipulation made in accordance with the acts of Congress on the subject, waived by the parties. The facts, in the sense of the evidentiary facts, are not in controversy, nor indeed is there much, if any, conflict over the ultimate fact findings. The case is really one involving only a question of law arising out of differences in the interpretation of the Revenue Act of October 3, 1913, and is to all substantial intents and purposes a case stated. The atmosphere in which, under the present war conditions, every responsible interpreter of revenue laws finds himself, induces a disposition to incline to that interpretation of the revenue laws which will result in producing revenue. Congress, however, is to be presumed to have been influenced by a like attitude, and to have taxed everybody and everything which were deemed proper subjects of taxation. There is, in consequence, no call upon the courts to extend by construction the taxable lists as made up by Congress. Neither of these observations, however, involves the thought of a change in the proper rule of the construction of statutes.

[1] We have been reminded by counsel for the plaintiff that the accepted rule is, as the doctrine is sometimes phrased, "that taxing statutes are to be strictly construed." Care must be exercised in the use of this phrase, as of all other general expressions, so as not to permit the true doctrine to be misunderstood. It does not mean, as it is sometimes thoughtlessly assumed to mean, that the courts, in construing such statutes, should lean strongly toward the taxpayer, and add the weight of all their power and authority to a resistance to the collection of the tax. The doctrine is more fundamental, and has a historical basis to be found in the political history of our people. It is the American doctrine that the people govern themselves, and a vital part of that principle is that they, and they only, tax themselves. No tax can in consequence be imposed except by their representatives in Congress, and a further negative consequence is that no tax can be imposed by the courts or the executive, through judicial or administrative construction of statutes. This is the sense in which tax laws are to be strictly construed. When, however, Congress has indicated its purpose and intent to tax, the tax must be paid, and the courts cannot refuse to enforce that purpose and intent merely because, in the expression of its will, Congress has failed to dot or to cross some of the letters which make up the written words in which that mandate is recorded. In this sense laws for the raising of revenue are not to be strictly construed, but are to be given that construction which is given to remedial statutes. In other words, the doctrine is a broad and not a picayune one.

With this prelude, we come to the reading of this statute. It clearly contains the general command to this plaintiff, and other like corporations, to pay a tax. We cannot understand just what payment is commanded to be made, unless we first understand what these corporations are and the nature of the business which they transact. This is in an emphatic sense part at least of the subject-matter of the law. It

will be found that they are somewhat complex in character and their business partakes of a like complexity.

The "mathematician" of the plaintiff has presented this phase of the question in a very intelligible and clear-cut way by presenting groups of typical transactions in a numbered series, so that we can get, at almost one glance, a view of all the phases which the general question presents. It will contribute something to our clarity of view if we take up one by one the consideration of each of these elements into which the character of these corporations and the general business they do may be analyzed.

In the first place, they are insurance companies; but they are as well mutual insurance companies. This means they receive premiums, but these premiums are limited to the actual cost of the insurance. The practical conduct of such a business requires of them to exact the advance payment of an estimated reasonably safe maximum premium, and to return to the policy holders the excess after the actual cost of the insurance is known. This may be and is properly done annually. The elements which go to make up this excess we do not see to be of importance, although they do have some illustrative value. The practical workings of this plan make evident a result, which is indeed suggested by the plan itself, that the premium receipt and the excess return seldom take place within the limits of the same fiscal or calendar year, although a year would measure the time interval. The receipt of the advance premium suggests the further thought, which actual practice confirms, that the policy holder may not desire the return of his excess refund, but may wish to apply it to what is called "the purchase of additional insurance." To provide for this the contract has ingrafted upon it the thought of the face amount payable under the policy automatically increasing accordingly. Although called (and properly so) life insurance companies, they do not always adhere strictly to this plan; but it is modified to the extent of being made an insurance, not against death, but against death occurring within a named term of years, and the insured sum becoming payable at the end of the period. The language of life insurance thus comes to furnish us with the terms "plain life" and "endowment" policies. The essentials of the plan are not, however, changed by this.

At this stage in the recital of what is done, the hearer would doubtless be impressed with the thought that the policy holder, having once made his election, was bound by it, and could not afterwards demand the refund to which he would have otherwise been entitled. Whatever the contractual or other right of the company to retain the money, it does not (and the motive for this is apparent) insist upon, but accords, the free right of the policy holder to withdraw at any time the whole or any part of what we will call his "deposit." The use of this word serves to present the thought that the company, having these deposit moneys, has put them at work, and there is in consequence an accretion by way of interest or other profits, and that this also belongs to the depositor. The companies thereupon become or partake of the nature to this extent of savings fund companies, and are subjected to the administrative expenses which are thereby incurred. The introduc-

tion of paid-up policies and other forms of matured insurance contracts, in which there is the thought of the maturing, in the sense of the fixing, of the obligation to pay at a future time without further premium payments, and also in the sense of the obligation to pay at once, adds to these companies some of the characteristics of building associations, and the leaving with the company of insurance moneys then demandable, with the allowance of interest thereon or other return, the issue of trust certificates and the added feature to policies of not paying a round sum to the beneficiary, but granting him an annuity instead, as well as other modifications of the simple life insurance contract, all give a complexity to the character and business of these companies, such as that even an otherwise concise statement of them would run into undue length.

One other of such modified forms of contract does, however, have perhaps a direct relation to the legal question before us. These companies, to the extent to which their practical dependence upon the laws of the different states in which they do business will permit, make of themselves managers of a lottery. This springs from the issuance of tontine, semitontine, and other modified forms of what is known as tontine insurance. The essential thought is that these accumulations of moneys, in part contributed by a given group or class of policy holders and in part accretions to the moneys thus contributed, are shared in whole or part, not by the contributors, but by the persistent livers and premium payers among them. Their title, such as it is, is by right of survivorship.

This gives us a sufficiently adequate idea of the corporations which Congress sought to tax and of the business done by them. Let us, in furtner aid to a proper interpretation, attempt to get the viewpoint of the draughtsman of the act. What may be called the first or original draftsman had evidently a clear-cut, well-defined idea of whom and what he intended to tax, and had in mind an orderly and logically developed method of reaching the amount of the tax. What he had in mind to tax was what is understood by the phrase "net income." To reach this he took into account gross income, excluding therefrom, however, certain elements or items, and from this remainder he permitted to be deducted certain other clearly defined elements or items, and the balance was to be the taxable net income. This distinction between what was to be excluded by not being included in gross income, and what was to be deducted from the gross income thus stated, was preserved throughout what may be recognized as the original draft of the act. A mere verbal contrast of "not including" with "deducting" would call for the comment of "distinction without difference"; but there is none the less a real practical difference worked through and by the distinction. The distinction, however, works no difference in the final result of determining the amount of the tax. It has, moreover, not been always clearly observed throughout the whole statute. We find the departure in some of the provisos of the act. We have the right to call upon our knowledge of the practical workings of legislation for the explanation of this. Further "exclusions" or "deductions" than those appearing in the original draft were suggested. These took

the form of being expressed after the phrase "Provided further," or equivalent words. As the result was the same, the distinction was to some extent lost, and was dropped in some of the provisos. This explanation, if a probably good one, is of some aid to us, because the distinction is clearly observed in dealing with marine insurance companies, and is not observed, or at least so clearly observed, in the next following clause, which deals with mutual life insurance companies.

This doubtless unduly long explanation brings us at last to the act of Congress to be construed. Act Oct. 3, 1913, c. 16, 38 Stat. 114. The clause is:

"Provided further, that mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policy holders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or credited to such individual policy holder, or treated as an abatement of premium of such individual policy holder, within such year." Section 2, G(b), 38 Stat. 173.

[2] This clause relates both to mutual marine insurance companies and to mutual life companies. The part of the proviso which relates to the former is admittedly sufficiently clear in the expression of its meaning. What it means, and the effect of such meaning upon the clause relating to life companies, will be considered hereafter. Reading the latter clause by itself, in the sense of an enactment removed from its setting and away from the light afforded by the context, it may be read as counsel for plaintiff reads it. If we grant that it may also be read as counsel for the United States read it, the decision to be made is presented. To decide it we may adopt the corrective caution of the old surveyors, which golfers follow upon the putting greens. We will thus seek to verify or correct the foreview by reversing the line of sight and by taking a hindsight. So viewed, the clause reads that moneys which have within the year been paid back to policy holders, or so treated, shall not be included in the gross income return of the companies, if such moneys were previously received from the policy holders as premiums. When so read, it becomes clear that the clause cannot be given the meaning which the United States gives to it without adding an expression of the thought that the moneys so paid back within the year shall have also been received within the year. If the right to add this further thought or make this interpolation be denied to the reader, then the clause must be read as counsel for the defendant reads it, to wit: That all moneys which have been paid back to the policy holders within the year shall be excluded from gross income, if these moneys shall have been previously received for premiums, whether received during the year or not.

[3] Recurring now to the marine clause, the two classes of corporations will be found in this respect to be put upon the same footing, except in certain particulars, one of which is that the return premiums paid on marine policies are deducted from the total income, and those

paid on life insurance contracts are excluded from gross income. Although it is, of course, true that an act of Congress must be accepted for the purposes of interpretation in the form in which it was finally passed, and cannot be altered or amended, so as to conform to the meaning given to it by an individual member who advocated its passage, or by a committee which may have discussed it in a report, nevertheless the expression of opinion thus given is entitled to weight by any one called upon to judicially construe the law. This is for two reasons. One is that such an expression of opinion should be given the weight which is given to the opinions of text-writers, members of the bar, and the obiter dicta of judges. Another is that such an expression of opinion makes clear that a construction which is in accord with such opinion is neither a strained construction nor an afterthought, because it is evidence of a contemporaneous construction given to the law at the time of its passage. We know from the records of Congress that the committee, reporting the bill, in discussing the clause in question, which had been added to the bill in committee, reported to the House that the purpose of adding the clause was to place life insurance companies on the same footing as marine companies. The weight of the opinion thus expressed is felt.

The thought thus inadequately expressed leads to the conclusion, from a statement of which the thought itself can be more clearly gathered, that the defendant had the right to exclude from its statement of gross income for any year all moneys which within that year it had returned to policy holders, provided the moneys thus excluded were parts of the moneys which had been previously paid to the company for premiums, whether they had thus been received by the company within the year or before.

[4] We are led to this conclusion because, to re-express the same thought, we cannot get the meaning out of the clause which the United States gets out of it without adding to the clause something which is not in it. In other words, the act of Congress says to the plaintiff the moneys which you exclude must have been paid back to policy holders within the same year from the return for which you have excluded them. That is in the act. The moneys you exclude must have been previously paid to the company by policy holders for premiums. This, also, is in the act. Finally, the moneys must have been thus paid to the company "within the same year." It is this final thought which is not in the act. When, however, we come to what is to be thus excluded, we find another difference between the returns which marine and life companies are respectively to make. Marine insurance companies are to deduct, not only the premiums thus repaid, but also all accretions by way of interest to the unused premiums while in the hands of the company. This is expressly stated. In the case of life companies, there is not only an absence of any equivalent expression, but it is expressly stated that the excluded sum shall be limited to such portion of the "actual premium" as shall have been both received and paid back.

The conclusion asked to be drawn from this is that all accretions to the fund which is left with the company during the interval between

the receipt and return of the premiums should not be excluded from gross income, but remain to swell the sum of the gross income return, and thus be made to swell the taxable net income.

Confirmation of the soundness of this second finding asked to be made is thought to be found in an earlier provision of the act which forbids the taxable income to be reduced (and this is meant to cover both "exclusions" and "deductions") by "dividend" payments. The phrase is "sums other than dividends paid within the year on policy and annuity contracts" shall not be included in taxable income. The clear implication is that there shall be no deductions because of "dividend" payments. As readers and hearers we should be ever on guard to prevent our minds playing any tricks upon us by being affected by what a famous writer has happily called the "polarization" of words. The word "dividends" partakes somewhat of the character of such words. To the ears of those fortunate enough to be placed within hearing distance of the word, it has a pleasant sound suggestive of the "cutting of a ripe melon." It means a share of profits. Sums so paid, of course, should neither be "excluded" nor "deducted" in the ascertainment of net income. Such "dividends" mean merely the distribution of the whole or part of the "net income" to the happy individuals who have a right to share in it.

As a consequence, counsel for defendant manifest an inclination to dwell upon the word "dividend," and to speak of what policy holders receive as a "dividend." Counsel for plaintiff show a tendency to avoid the use of the term, or, when they do employ it, they are fond of qualifying it by a slighting phrase. It is a "so-called" dividend. We do not share either in this fondness for or aversion to the use of the word. It is clear that the profit-sharing thought is altogether an applied meaning, which the word at times properly has. It may, however, be properly employed when the thought of profit is wholly absent, and the word has its etymological meaning of a unit portion of something which has been divided. The confirmation claimed, however, loses all its value when we find that, in making up the return of mutual insurance companies, they are directed to exclude from gross income the dividends referred to, and, having been once "excluded," they are not later to be "deducted," because this would result in an undue, because doubled, reduction to that extent in the final sum reached.

Disregarding the confirmation of the thought, and coming back to the thought itself, there is this to be said. The income of mutual life companies has as its first source premium payments advanced by policy holders. The temporary possession of the fund thus accumulated, and the nonreturn to some policy holders, supplies a second source of income through accretions to this temporary fund by way of interest or other profit. In consequence, the moneys returned to policy holders may be said to be, not the return of a portion of the "actual premiums" payment, of which they had previously made, but as made up in part, or indeed perhaps wholly, of the policy holder's share of profits. As, however, the basis of the payment finally exacted of the policy holder is his share of the net cost of insurance, had this cost been known in advance of payment the sum paid would have been less than was paid,

and this difference, when returned to him, may well be said to be a return of a portion of the "actual premium" paid. The real truth is that what is done is not done so that any trace is left of the process, but it is one of those things done of which we may have a mental concept as done in one way or done in another. The best answer to the question of whether the policy holder receives back a portion of the "actual premium" paid by him, or whether he receives part of the profits which his company has earned, can be given by expressing a concept of what was done, such as to present the substantial results of what was done. The thought is expressed by the phrase to which there is a common resort when confronted with such a dilemma. The phrase is, "That is what it comes to," or "amounts to." The decision of the question partakes more of the nature of a rescript than a reasoned result, but the necessity of reaching such more or less arbitrary conclusion is forced upon us. We have a sufficiently clear indication of the will of Congress with respect to marine insurance companies. Speculation would be idle over why Congress differently expressed its will in the case of life insurance companies, if like treatment was meant to be meted out to both. The words of the act, however, may be so read, and there would seem to be good grounds of belief that Congress so intended.

The view we have expressed is in accord with the ruling made in Mutual Ben. Life Ins. Co. v. Herold (C. C.) 198 Fed. 199, affirmed in 201 Fed. 918, 120 C. C. A. 256. We think it is to be assumed that this ruling was in the mind of Congress when it came to choose its words in the act of 1913, and again in 1916. It thus appears that the payment of more than the lawful tax was exacted of the plaintiff. If this be true, we understand it to be conceded that the plaintiff is entitled to judgment, so that no other features of the plaintiff's case need be considered.

The discussion of the questions involved in this case is doubtless already overfull. We find ourselves, however, in disagreement with the views of those who have to do with the administration of these tax laws, and with the views of counsel who have given to their study much more thought and time than is possible to give to them in the press of litigation. Because of this we think it the due of counsel that the several positions at which they take their stand should be squarely faced, even at the cost of a repetition of our views. As a prelude this may be stated. Back of the whole discussion is the fact that moneys which have been received, but which are required to be returned, if returned, form no part of real income. The taxing authority need not recognize the propriety of a reduction merely because there is an obligation to return. Several very practical considerations would support this refusal. When, however, the obligation to return has ripened into an actual return, and both the return and the amount of the return become fixed facts, the supports of such refusal are removed. There is really no difference in the basic thought presented by the respective counsel and sought to be contrasted. The difference is in the practical results following different modes of applying the thought. The thought springs out of the fact, already several times stated, that the

policy holders make a deposit out of which the moneys required to meet the cost of insurance are taken and the overplus is returned. The part retained is properly income received; the part returned is in no real sense either income or received. So far there is agreement. Counsel for the United States, however, in applying this basic thought present three subthoughts:

(1) Unless the part returned is returned in the same year in which it was received, it is to be treated as not returned at all.

(2) Deposits thus made before the passage of the act are separated as by a wall from deposits afterwards received, and no drafts made upon these earlier deposits to reimburse policy holders for any excess in such deposits can be permitted to affect (by reducing) the income later received.

(3) The fact that the deposits have been swelled, while with the company, by interest, by tontine, and by other accretions, results in demanding the finding that the moneys returned to policy holders are not moneys previously paid by them, but (in part at least) profits or earnings made by the company and distributed among its stockholders which the policy holders then become.

The three positions thus taken involve propositions which have already been discussed, but, in order to squarely meet them, we will summarize the views already indicated.

[5] 1. The arguments of both plaintiff and defendant partake of the nature of arguments which are more properly addressed to Congress than to the courts. Each is planted, to some extent, upon what may be deemed the principles of natural justice. Plaintiff urges the inequity, if not iniquity, of double taxation. Defendant points out that the taxpayer is seeking to escape the payment of taxes by reducing an income, subject to the tax, by claiming reductions which properly lessen, not the income which is subject to the tax, but an earlier income which is not subject to the tax. The judicial inquiry, it is clear, is not into what enactment Congress should have made after a just balancing of these considerations, but into what enactment Congress did in fact make. Our conclusion or finding of what Congress did do has already been several times stated; but we restate it, so it will here appear. The gross income is to be reduced by the amount of premiums returned, if previously received, no matter when received.

[6] 2. Our finding upon the second point need not be further discussed than by its restatement. A distinction might well be made between the return of premium receipts, which have never figured in taxable income because received before the act, and those which have been since received. Because, however, the distinction might have been made, or indeed well made, it does not follow that it was made. In determining whether it was made, we may fall back upon the principle that the act is to be construed, as a system of taxation, as if it had always been in force and had never had a beginning. It is further to be assumed that, if Congress had not had in mind that this principle was to be applied, they would have so enacted. The conclusion reached is that Congress has made no distinction between the income return

for the first year (or the ten months part of the year) and the returns for the succeeding years.

3. The third proposition is open to the same comment. There is, it must be admitted, a more or less arbitrary choice made, in the acceptance of either of the two concepts of what it is which is returned to policy holders—whether it is a return wholly of a portion of the premium deposits previously made by them, or whether it is in whole or part a distribution of profits among them. The choice we have made is not, however, wholly arbitrary, because we have chosen that one which is in harmony with the other concept of a mutual life insurance company as an association of policy holders who insure themselves by ultimately paying the net cost of carrying their own life risks, although for very practical reasons they pay down in advance a round sum which would be limited to this actual cost, if the cost were known at the time of payment. Not being so known, they pay a sum large enough to safely cover it, with the understanding that the excess will be returned to them. So viewed, what they get back is a part of what they have previously paid.

This in principle decides the case before us. We do not have at hand the figures expressive of the sum for which plaintiff is entitled to judgment, in accordance with the general findings made, nor have we been informed whether counsel ask for special findings. There was an unavoidable interval between the trial and the consideration of the briefs submitted. It may be that there are features of the case, which enter into the ascertainment of the sum for which judgment should be entered, which the above discussion does not cover, and which would affect the amount of the judgment. To meet this situation, counsel have leave to submit requests for findings from which the amount for which judgment should be entered can be determined, together with any requests for special findings they may wish to submit, if any.

Formal judgment will then be directed to be entered.

HARRISON v. CITY OF TAMPA.

(District Court, S. D. Florida. January 19, 1918.)

1. MUNICIPAL CORPORATIONS ⇐354—SEWER CONTRACTS—ACTIONS—VALIDITY.
Where the original contract for the construction of a sewer, which was valid, authorized modifications, and they were made pursuant to that clause, failure of the municipality to advertise the modifications did not render the contract as modified invalid, and hence a plea in an action on the contract as modified, setting up that the modifications were invalid because made without advertisement, is defective, and subject to demurrer.

2. CONTRACTS ⇐237(2)—CONSIDERATION—MODIFICATION.
Where there was ample consideration to sustain the original contract, and the contract authorized modifications by the parties, a modification for the purpose of facilitating the work under the contract is not subject to attack on the ground that it was unsupported by a consideration; the original consideration extending to the modification.

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3. MUNICIPAL CORPORATIONS ⊂=374(3)—CONTRACT—BREACH—EFFECT.
While a party to a contract may abrogate it upon breach by the other party, or may waive the breach and proceed with the execution, he cannot waive the breach and afterwards base an abrogation upon it; and hence, where plaintiff, having begun the construction of a sewer, ceased operations and sued for the value of work done and materials furnished, on the ground that defendant, the municipality, broke its contract, a plea setting up plaintiff's continuance of the work after defendant's commission of the alleged breach states a good defense.

4. CONTRACTS ⊂=338(1)—ACTION FOR BREACH—PLEAS—DEMURRER.
Pleas in an action on contract, which fail to negative all of the breaches alleged, are subject to demurrer, not being defenses to the whole declaration.

5. PLEADING ⊂=364(6)—MOTIONS TO STRIKE—PROPRIETY.
Any portion of a pleading which is surplusage, or tends to prejudice a fair trial of the action by making immaterial issues of fact for trial by the jury, should be stricken, when the same is called to the court's attention.

At Law. Action by Louis B. Harrison against the City of Tampa, a municipal corporation. On demurrers and motion to strike certain of the defendant's pleas, together with motion by defendant to strike portions of the declaration. Demurrers and motions to strike in part sustained.

Howard P. Macfarlane and N. B. K. Pettingill, both of Tampa, Fla., for plaintiff.

John P. Wall and C. B. Parkhill, both of Tampa, Fla., for defendant.

CALL, District Judge. The plaintiff in his declaration sues for damages caused by an alleged breach of contract on the part of the defendant. The case made by the declaration may be succinctly stated as follows:

The defendant, after due advertisement, let a contract for sewer construction in three sections, as theretofore planned, to a firm, who subsequently with the consent of the defendant assigned the contract for sewer construction in two of these sections to the plaintiff, and thereupon the plaintiff and the defendant entered into a contract for such construction, containing the same terms as the contract with the original contractor would have, had it been entered into with them. This contract provided for progress payments on certificates of the engineer of the amount of work done of 80 per cent. After commencing work upon the construction, under a provision of the contract, these progress payments were by written agreement increased from 80 per cent. to 90 per cent., and it was further agreed that 90 per cent. of the value of all iron pipe delivered, whether laid or not, should be paid. Defendant breached this contract as modified, first by the arbitrary refusal of the engineer to certify the full amount of the work performed and iron pipe delivered, and the arbitrary refusal of defendant's board of commissioners to pay for same. Other breaches set up are that defendant on certain days refused to make progress payments in cash, but insisted upon the plaintiff accepting written promises to pay; that defendant modified its written contract with the original contractors, thereby changing the progress payments from

semimonthly to monthly payments, and thereafter insisted that this modification applied to plaintiff, and refused to make payments, except monthly. The written promises accepted in lieu of cash were to be paid out of the first available funds coming to the board, yet the board failed to so use the first available funds. In consequence of these breaches the plaintiff, after notice, on August 19, 1914, declared the contract abrogated, and sues in the first count for the full value of work done and materials furnished, including the value of iron pipe delivered, in the second count for damages suffered by reason of the forced abrogation of the contract, in the third count for extra work required to be done by the engineer, in the fourth count for certain drayage, and in the fifth count for interest on the several amounts demanded in the first, second, third, and fourth counts.

To the first, second, and fifth counts the defendant interposed eight pleas. A motion is made by the plaintiff to strike the fourth of these pleas, which motion will be granted.

[1] The first plea alleges as a defense that the modification of the contract by which the progress payments were increased to 90 per cent., instead of 80 per cent., and providing for the payment of 90 per cent. of the value of iron pipe delivered, was not made in conformity to the charter provisions as to advertisements, etc., and is therefore void; that on the day the plaintiff undertook to abrogate the said contract certificates had been made and 80 per cent. paid. It then goes further, negativing certain of the breaches, and setting up waiver of other breaches. This plea is attacked by demurrer and motion for compulsory amendment.

If this modification of the original contract is void under the circumstances stated in the pleas, the pleas are not susceptible to the motion to strike or the demurrer. There is no contention that the original contract was not duly advertised. This original contract provided that the same might be modified as the work progressed. The declaration alleges this modification was made pursuant to this clause, and the plea does not negative this allegation, nor does it state facts showing fraud in the original advertisement, nor in the contract modified. I am of opinion that the failure to advertise the modification is not a violation of the charter provisions and does not avoid the modification. The suit is upon the contract as modified, and therefore the first plea is amenable to the demurrer.

[2] The second plea alleges that the modification was without consideration, and therefore void, because it was made solely for the benefit of the plaintiff, and without any advantage to the defendant, and not for a valuable consideration; the other allegations being virtually the same as in the first plea as to the breaches alleged. This plea is also attacked by demurrer and motion for compulsory amendment. The question, therefore, to be decided upon this plea, is: Do these allegations of the plea show that the modification is nudum pactum and unenforceable? I do not think so. The consideration for the original contract is unquestioned. The parties under its terms had a right to modify as provided therein as the work progressed, and it was deemed advisable by the parties to make this change. I do not

think, under these circumstances, a new and independent consideration was required to support the modification. The contract as modified was supported by the original consideration. The demurrer to the second plea will be sustained.

[3] The third plea alleges that the contract provided that, in order to prevent disputes and litigation, the engineers shall determine the amount of the several kinds of work which are to be paid for, and the board shall determine all questions in relation to said work which may arise in relation to the execution of the contract. Such estimates and decision shall be final and conclusive, and in case any question shall arise shall be a condition precedent to the right of the contractor to receive any money under said contract. It then alleges that prior to the attempted abrogation the defendant had paid to the plaintiff more than 90 per cent. of the engineer's estimate of work performed, materials furnished, and iron pipe delivered, and that said estimates included all work done, etc. It then proceeds, after negativing certain breaches, and alleges that, after the acceptance of the promises to pay in lieu of cash, the plaintiff continued the execution of the work and received payments under the contract.

A demurrer was interposed to this plea on the ground that all the breaches are not negatived, and the facts set up do not show a waiver of the breaches. A motion is also made to strike out certain portions of this plea. If this motion to strike out the portions of the plea attacked by the motion should be granted, the plea would be demurrable. I therefore take up that motion first.

After carefully considering those portions of the plea attacked by the motion, I am of opinion that they are material to the proper decision of the issues between the parties. The plaintiff in this case elected to abrogate the contract on August 18th, and bring his suit for work done, materials furnished, and damages resulting to him. I recognize that upon the breach of a contract by one party the other may continue the work, and is not precluded from claiming any damages such breach may have occasioned him. But that is not this case. I do not recognize any principle by which one party to a contract, after a breach by the other party, may continue acting under such contract to some future time, and then abrogate the contract by reason of such former breach; and that is the case made if the allegations of the plea are true. As I understand the law, one party to a contract may abrogate it upon a breach of said contract by the other, or he may waive such breach and proceed with the execution of the contract. He must do one or the other. He cannot waive the breach and afterwards declare an abrogation upon such waived breach. The motion for compulsory amendment will be denied. The demurrer will also be overruled.

The defendant, in addition to the pleas above noticed, filed three additional pleas to the first and second counts to which those were pleaded, and one additional to the fifth count. Motions to strike, for compulsory amendment, and demurrers were filed to all these pleas.

[4] The first and second additional pleas to the first and second counts fail to negative the third additional breach alleged in the declaration, and, not doing so, are not defenses to the whole declaration, and

are therefore amenable to the demurrer. The third additional plea in my judgment does negative all the breaches, or pleads a waiver to those not negatived. The motions to strike and for compulsory amendment and the demurrer will therefore be overruled.

To the fifth count the defendant pleaded one additional plea, which is in effect the plea of nil debet, which is forbidden by the rules of court. Rule 68, Supreme Court Rules in Common-Law Actions. However, no motion is made to strike said plea, but a motion for compulsory amendment, by striking therefrom certain words incorporated by reference to other pleas. This motion will be granted.

The demurrers to the first and second pleas to the third count and the first and second pleas to the fourth count will be sustained. The incorporation of the allegations of the first and second additional pleas add no strength, but incorporate the weakness of said additional pleas and make them demurrable.

The demurrers to the third plea to the third and fourth counts will be overruled, and the motions denied.

[5] On November 24th defendant filed a motion to strike certain portions of the declaration, being subdivisions A, B, and C of paragraph 6 of the declaration, being the additional breaches alleged. I am of opinion that the court should strike any portion of a pleading which is surplusage, or tends to prejudice a fair trial of the action, by making immaterial issues of fact for trial by the jury, when the same is called to its attention. Subdivisions B and C of paragraph 6 of the declaration fall under this head. Subdivision B happened prior to the attempted abrogation, and the written promises accepted in lieu of cash, which the plaintiff could have then demanded, and, upon refusal to pay by the defendant, abandoned his contract and brought suit. He did not do this, but accepted them under protest. This I do not think helps him. The motion to strike subdivisions B and C of paragraph 6 will be granted. The motion to strike subdivision A of said paragraph will be denied.

I have considered the pleadings and files as of the time of filing the same. The granting of the defendant's motion to strike certain portions of the declaration will necessitate a reformation of the pleas now standing in that regard.

PITTSBURGH, C., C. & ST. L. RY. CO. v. FREEDOM OIL WORKS.

(District Court, W. D. Pennsylvania.)

1. CARRIERS ⟸100(1)—CARRIAGE OF GOODS—REGULATIONS—DEMURRAGE.
   As the prompt movement of cars is necessary to carry on the business of carriers, as well as to prevent discrimination among shippers, a carrier may impose demurrage charges on privately owned tank cars used in its business.
2. CARRIERS ⟸100(1)—DEMURRAGE CHARGES—OWNERSHIP OF PRIVATE TRACKS—"TRANSPORTATION."
   Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 1, 6, 24 Stat. 379, 380, as amended by Act June 29, 1906, c. 3591, §§ 1, 2, 34 Stat. 584, 586 (Comp.

St. 1916, §§ 8563, 8569), defines transportation as including all services in connection with the receipt, delivery, elevation, transfer in transit, ventilation and refrigeration, storage and handling of property transported and forbids a carrier to extend to any shipper or person, any privileges or facilities, except such as are specified in the tariffs. Plaintiff railroad company filed with the Interstate Commerce Commission tariffs and schedules providing for demurrage and storage charges on shipments of explosives on car lot and less than car lot shipments. Under an agreement with defendant, plaintiff constructed a side track located partly on its property and partly on that of defendant; the contract providing that plaintiff should have the right to use, without cost, the whole or any part of the siding in connection with other business than that of defendant, provided that such use should not interfere with defendant's business. Privately owned tank cars, on which plaintiff paid a rental computed by mileage, were held by defendant on the siding for longer than the free time. *Held* that, as the purpose of the Interstate Commerce Act is to prevent discrimination, or the giving of services or facilities to special shippers or persons, plaintiff was entitled to charge demurrage and storage on such privately owned tank cars, though they were stored on the track on the siding, title to part of which was in defendant.

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

3. CARRIERS ⊜100(1)—DEMURRAGE—STORAGE CHARGE—CAR SHIPMENTS.

The tariffs and rules of plaintiff railway company filed with the Interstate Commerce Commission provided under head "Storage" that carload shipments of explosives or other dangerous articles should be subject to both demurrage and storage charges, while another rule provided that on less than carload shipments of the more dangerous explosives unloaded in or on railroad premises 25 cents per 100 pounds should be charged for storage for each day of 24 hours in which the articles were held in excess of the free time, while on carload shipments $5 per day, in addition to the regular demurrage charges, should be collected. Less charges were prescribed for the storage of the less dangerous and relatively safe explosives. *Held* that, under the rules, the railroad company could, where gasoline was stored in tank cars on siding, collect both demurrage charges and storage; the rule being different as to less than carload lots unloaded on the railroad premises.

At Law. Action by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, against the Freedom Oil Works, a corporation. On rule for judgment for want of sufficient affidavit of defense. Rule made absolute.

R. H. Hawkins, of Pittsburgh, Pa., for plaintiff.

F. G. Moorhead, of Beaver, Pa., for defendant.

THOMSON, District Judge. In this action plaintiff seeks to recover certain storage charges, accruing under interstate shipments and by virtue of storage rules and charges applying to interstate shipments, which rules are duly filed with the Interstate Commerce Commission. An affidavit and supplemental affidavit of defense being filed, plaintiff moves for judgment for want of sufficient affidavit of defense. The facts of the case, which are either expressly admitted or not denied by the defendant, are as follows:

The plaintiff corporation is engaged as a common carrier of freight and passengers into and through the states of Pennsylvania, West Vir-

ginia, Ohio, Indiana, and Illinois, and in the transportation of freight and passengers to and from various points in other states by reason of connections with other carriers. The defendant is a corporation of Pennsylvania, having its principal place of business at Freedom, Beaver county, Pa. The line of the plaintiff's railroad extends through Newark, Ohio, at which point the defendant company has a private siding, constructed so as to furnish transportation facilities to the defendant's plant to and from the tracks of the plaintiff company. The said siding was constructed under the terms of a written agreement between the parties, dated March 1, 1905, which is attached to and made a part of the plaintiff's statement. The siding so constructed runs for 180 feet on the land of the railroad company and for a distance of about 90 feet on the land of the defendant company; the ownership of the track being so vested that each party owns that part of the track which is upon its own property. The plaintiff, between February 15 and December 28, 1916, delivered to the defendant at Newark five carload shipments of gasoline, which had been transported over the line of the plaintiff's road and upon the lines of connecting carriers from points beyond the state of Ohio. The cars were not owned by the railroad, but by other corporations, the names of the owners, the numbers of the cars, the date and hour of their arrival, the date the same were placed in storage, the date when they were released, and the rate of storage, being set forth in an exhibit attached to the statement of claim.

Under Official Classification No. 43, issued on January 1, 1916, and effective until February 1, 1917, gasoline, when transported in tanks and by carload lots, is listed and classified as a so-called "dangerous article," and the said classification was duly issued, published, and filed by the railroad company with the Interstate Commerce Commission. The plaintiff company issued, published, and filed with the Interstate Commerce Commission, its "local freight tariff of storage rules and charges applying at stations on" its line of railroad, including its line at Newark, Ohio. The same was filed with the Interstate Commerce Commission as "P–675," and provides for "charges for storage on explosives and other dangerous articles"; and rule 6 thereof provides that "storage will be charged at the following rates per day of twenty-four hours or fraction thereof, on explosives or other dangerous articles held in excess of free time allowed." Rule 6b makes the charge "on carload shipments two dollars per day (Sunday and legal holidays excluded) in addition to the regular demurrage charges." A copy of the plaintiff's tariff so filed is attached to the plaintiff's statement. The storage sued for is for storage upon that part of the siding located upon the land of the defendant company.

[1, 2] The Interstate Commerce Act defines transportation as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Comp. St. 1916, § 8563. No carrier is permitted "to extend to any shipper or person any privileges or facilities of transportation except such as are specified in such tariffs." Section 8569. The act is intended to prevent discrimination or the

giving of services or facilities to special shippers or patrons. Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836. As the railways do not have sufficient tank cars of their own, it is a general practice to secure them from private owners; the carrier paying mileage at the rate of three-fourths of one cent per mile. Official Classification No. 44, Rule 29.

In this case, as appears by the contract, while each party owns the track on its own property, the railroad has the right to use without cost the whole or any part of said siding in connection with other business than of the defendant, when the same is not occupied by it; provided that such use of the siding does not interfere with the business of the defendant. The defendant also agreed that it would not permit or authorize the use of said track by or for the benefit of any person not a party to the contract.

In St. Louis, I. M. & S. Ry. Co. v. National Refining Co. (D. C.) 226 Fed. 357, under a very similar agreement, it was held that demurrage should be paid upon private cars while kept upon the siding; that the law seeks to secure service by railroads to all parties without discrimination, and that the tariffs are to be interpreted in the spirit of the law which seeks to accomplish that end; that the office of the demurrage charge is not merely to prevent congestion of cars, and to secure their prompt return, but to assist in lessening the advantage which large shippers might have over those of smaller facilities.

In Proctor & Gamble Co. v. United States (Com. Ct.) 188 Fed. 221, the court held that carriers might impose as a condition of hauling private cars reasonable regulations, and that the exaction of demurrage charges for such cars was not arbitrary or unjust; that the carriers have a right to require that there be a reasonably dependable supply, and that such cars shall not be withdrawn at will to serve private purposes, but must be kept in active use that transportation facilities may be supplied, not to one shipper only, but equitably and without discrimination, to all. This the demurrage charge, by making delay expensive, is calculated to overcome, and hence may be justly imposed.

In Pennsylvania R. Co. v. Waverly Oil Works Co., 58 Pa. Super. Ct. 154, it was held that a railroad company could collect demurrage charges on private cars while detained on a private siding, although the railroad company had no ownership or interest in the siding; that the fact that the private siding was used did not give the consignee control over the cars of other corporations or parties.

These decisions are in line with the holding of Commissioner McChord in Pittsburgh & Ohio Mining Co. v. B. & O., 40 Interst. Com. Com'n. R. 408. The Supreme Court of the United States in Swift Co. v. Hocking Valley Ry. Co., 243 U. S. 287, 37 Sup. Ct. 287, 61 L. Ed. 722, held that the cars, though privately owned, while on the switch in question were on the track owned by the railroad company, and were therefore still in the railroad service while under lading; that transportation, within the meaning of the act to regulate commerce, had not ended; and that a charge for detention of a private car and use of a railroad track, made under such circumstances, was reasonable. The court in this case did not pass on the correctness of the rul-

ing of the Supreme Court of Ohio, which held, assuming the track in question to be a private track, that:

"Demurrage rules, relating to private cars employed in interstate commerce and the charges assessable thereunder, are matters properly included in the tariff or schedule required to be filed and published. This tariff, containing the demurrage rule, having been filed and published according to law, was binding alike on carrier and shipper, and so long as it was in force was to be treated as though it were a statute. * * * This rule having been approved by a federal tribunal, acting within the scope of its authority, its decision must be followed by the courts of this state and is to be given full force and effect." 93 Ohio St. 143, 112 N. E. 212, L. R. A. 1917E, 916.

[3] I am of opinion that the facts of the case, so far as they relate to the private ownership of the cars, and the relation of the parties to the track on which they were stored, are not sufficient to prevent a recovery. But, beyond this question, it is claimed by the defendant that the railroad company is not entitled to collect both demurrage and storage at the same time, and that, the demurrage having been paid, storage cannot be collected; that demurrage applies from the expiration of the "free time" until the car is unloaded, and that storage begins when the commodity is unloaded and continues until it is taken away by the consignee; that rule 6 contains no provision in regard to storage of loaded cars. I cannot agree with this conclusion. Under the head of "Storage," rule 1a provides:

"Carload shipments of explosives or other dangerous articles are subject to both demurrage and storage rules. (See rule 6.) B. Other carload freight, held in cars for delivery and subsequently unloaded, is subject to demurrage rules while in cars and to these storage rules after it is unloaded."

Thus a clear distinction is made between explosives, or other dangerous articles, and other carload freight. Turning to rule 6, we find the following provisions:

"Storage will be charged at the following rates per day of twenty-four hours or fraction thereof, on explosives or other dangerous articles held in excess of free time allowed:

"A. On less than carload shipments of the more dangerous explosives [naming them], unloaded in or on railroad premises, twenty-five cents per hundred pounds.

"On carload shipments five dollars per day in addition to the regular demurrage charges.

"B. On less than carload shipments of the less dangerous and relatively safe explosives [naming them], or less than carload shipments of dangerous articles other than explosives, unloaded in or on railroad premises, ten cents per hundred pounds.

"On carload shipments two dollars per day (Sundays and holidays excluded) in addition to the regular demurrage charges."

From this rule, it is clear that a distinction is made as to storage charges between carload and less than carload shipments on explosives and dangerous articles, in two particulars: (1) On less than carload shipments, storage is charged only when unloaded on railroad premises. In that case, when the demurrage ends, the storage charge begins; while in carload shipments the storage charge is not dependent on the unloading of the car, but is made in addition to the regular de-

murrage charges. From the foregoing considerations, it follows that the plaintiff is entitled to judgment for its claim.

The rule for judgment for want of a sufficient affidavit of defense is therefore made absolute.

In re PATTERSON LUMBER CO.

In re BELMONT TRUST CO.

(District Court, E. D. Tennessee, N. E. D.)

No. 239.

1. BANKRUPTCY ⊂⊃18—ANCILLARY PROCEEDINGS—POWERS OF COURT—MORTGAGED PROPERTY.

Under Bankruptcy Act July 1, 1898, c. 541, § 2, 30 Stat. 545, as amended by Act June 25, 1910, c. 412, § 2, 36 Stat. 839 (Comp. St. 1916, § 9586), by the addition of clause 20, providing that courts of bankruptcy may exercise ancillary jurisdiction over persons or property within their respective districts "in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy," a court of ancillary jurisdiction, which has taken possession of mortgaged property in aid of a bankruptcy court of primary jurisdiction, has no authority to determine, regardless of the court of primary jurisdiction, whether the mortgage shall be enforced through the bankruptcy court or in independent proceedings by the mortgagee, nor to release the mortgaged premises to the mortgagee for the purpose of such independent foreclosure.

2. BANKRUPTCY ⊂⊃18—ANCILLARY PROCEEDINGS—SALE OF MORTGAGED PROPERTY.

Even if the ancillary court has such authority, it should, in the exercise of its discretion, refuse to authorize an independent foreclosure suit, especially where the court of primary jurisdiction has determined that the best interests of the estate require that the mortgaged property be sold in the bankruptcy proceedings free from liens.

In Bankruptcy. In the matter of the Patterson Lumber Company, bankrupt. On petition of the Belmont Trust Company for leave to file bill to foreclose mortgage. Denied.

See, also, 228 Fed. 916.

Shoun & Trim and S. J. Milligan, both of Greeneville, Tenn., and E. R. Taylor and Rufus M. Hickey, both of Morristown, Tenn., for petitioner.

Wm. L. Talley, of Nashville, Tenn., and Williams, Folsom & Strouse, of New York City, for trustee.

SANFORD, District Judge. The situation under which this petition has been filed is as follows:

Upon an involuntary petition in bankruptcy filed in the United States District Court for the Southern District of New York against the Patterson Lumber Co., that court, on October 5, 1914, appointed receivers of its property. On October 16, 1915, this court, under an ancillary petition, appointed a receiver of the assets of the alleged bank-

rupt within this district "in aid of the receivers appointed in the United States District Court for the Southern District of New York and of any trustee that may hereafter be appointed in said bankruptcy proceeding in the Southern District of New York." Among other assets is a tract of 6,500 acres of land situated in this division of the Eastern District of Tennessee, upon which the alleged bankrupt had, on April 14, 1909, executed a mortgage to the Belmont Trust Co., a Pennsylvania corporation, to secure an issue of bonds, of which $20,000 are still unpaid. This property is also subject to second and third mortgages executed to one Strouse as trustee to secure debts aggregating at least $20,000. The Patterson Lumber Co. having been adjudged a bankrupt in the original proceedings in the District Court of New York, a trustee was duly elected and qualified. The Trust Co. having by its counsel given notice in the proceedings in New York that it intended to foreclose the mortgage to it, the trustee in bankruptcy applied to the District Court of the Eastern District of Pennsylvania for an order restraining the Trust Co. from instituting proceedings to foreclose its mortgage; whereupon that court granted such restraining order until the Trust Co. should have obtained leave "from the court having jurisdiction of the mortgaged premises" to foreclose the mortgage. After the handing down of the opinion of the Pennsylvania Court and before the entry of its order, the referee in bankruptcy in the New York proceedings, without notice to the Trust Co., but with the consent of the trustee under the second and third mortgages, entered an order authorizing the trustee in bankruptcy to sell the property in question at public or private sale, free and clear of liens of the three mortgages, and enjoined and stayed all proceedings on the part of lien holders or creditors pending such sale. The Trust Co. has now filed this petition in the ancillary proceeding in this court, praying leave to file a bill for the foreclosure of said mortgage, against the bankrupt, the trustee in bankruptcy, the holders of the second and third mortgages and the bondholders under the first mortgage.

The holders of the second and third mortgages have joined in the prayer of this petition. Notice of this petition having been given, the trustee in bankruptcy, the trustee under the second and third mortgages, and others have appeared and moved to dismiss the petition of the Trust Co. for want of jurisdiction, and have also answered the same.

[1] The general rule is well settled that mortgaged property in possession of a bankrupt at the time the petition is filed is brought into the custody of the court of bankruptcy, which acquires exclusive jurisdiction over it and may determine whether it will itself enforce the security or surrender the property to the mortgagee, with permission to foreclose the mortgage aliunde. 1 Lovel. Bank'cy (4th Ed.) 171, and cases cited. The general rule is not seriously questioned here; the insistence being, however, that where the mortgaged property does not lie within the bankruptcy court of primary jurisdiction but in a bankruptcy court in another district which has seized the property in the exercise of ancillary jurisdiction, the determination of this question as to the method of foreclosure is thereby vested in the

court of ancillary jurisdiction rather than in that of primary jurisdiction.

Prior to the amendment of 1910 there was for a time a diversity of opinion whether a bankruptcy court of primary jurisdiction could directly exercise its jurisdiction over property situated in another district, or whether such jurisdiction should be exercised through ancillary proceedings in the court of the district in which said property lay; it being questioned whether the court of bankruptcy of the district in which such property lay could exercise ancillary jurisdiction in aid of the court of primary jurisdiction. However, in Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, and Elkus, Petitioner, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407, it was definitely determined that courts of bankruptcy in other districts had ancillary jurisdiction to make orders and issue process in aid of proceedings pending in the bankruptcy court of primary jurisdiction. It was, however, not held or intimated in either of these cases or in any other adjudicated case, so far as I am aware, that such ancillary jurisdiction extended further than to aid the proceedings in the court of primary jurisdiction and in subordination thereto. Subsequently, by the Act of June 25, 1910, section 2 of the Bankruptcy Act was amended by adding clause 20, specifically authorizing courts of bankruptcy to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy." Comp. St. 1916, § 9586.

It is earnestly contended in behalf of the Trust Co. that when this ancillary jurisdiction is exercised by a court of bankruptcy under this section of the Act by seizing property within its jurisdiction, as in the present case, such court of ancillary jurisdiction thereby becomes vested with plenary power to determine all questions of priority as to the property seized by it, including the question whether or not a mortgage upon such property should be enforced by the court of bankruptcy itself or permission given to the mortgagee to foreclose the mortgage dehors the court. In support of this contention the petitioner relies upon Fidelity Trust Co. v. Gaskell (8th Circ.) 195 Fed. 865, 115 C. C. A. 527. In that case, however, the sole question was whether the court of ancillary jurisdiction, having seized certain property as the property of the bankrupt, had jurisdiction to determine the right of an intervenor claiming the property as his own. In deciding this question affirmatively, the court further said that not only is a court of ancillary jurisdiction authorized to determine such adverse claim to the property, but (195 Fed. 873, 115 C. C. A. 527) that the ancillary jurisdiction vested by the amendment of 1910 also included the power to hear and adjudge the claim of intervenors to "legal or equitable liens upon, the property it takes, or holds in its legal custody, by virtue of that jurisdiction, and to send the proceeds to the court of original jurisdiction, or to apply it to the discharge of the claims of intervenors in accord with its decision." This latter expression of opinion was, however, obviously merely obiter, the case not involving any question of a lien upon property or the disposition thereof in the en-

forcement of such lien, but merely the question as to the right of the ancillary court to determine whether the property which it had seized was in fact the bankrupt's property. The right to seize property of the bankrupt necessarily involves, however, as an incident to the exercise of such jurisdiction, the right to determine whether property so seized is in fact the property of the bankrupt; since otherwise the court has no authority to seize it. The determination of this question, however, does not involve the very different question whether, if it be determined to be the property of the bankrupt, the court, having seized it by virtue of its ancillary jurisdiction in aid of the court of primary jurisdiction, has the right, regardless of that court, to determine and dispose of liens upon it, as it may see proper, and merely transmit the final proceeds to the court of primary jurisdiction. And while mindful of the great weight attaching to the dictum in this case and to the views of the learned and distinguished judge who wrote the opinion, which are always entitled to great weight, I am constrained to conclude that the view expressed obiter in this opinion that the court of ancillary jurisdiction had such plenary power in the administration of liens upon the property of the bankrupt, is in conflict with the subsequent opinion of the Supreme Court in Lazarus v. Prentice, 234 U. S. 263, 266, 267, 34 Sup. Ct. 851, 58 L. Ed. 1305, in which it was said that the filing of the petition and adjudication in the bankruptcy court of original jurisdiction brought the property of the bankrupts whereever situated into custodia legis, so that the court of original jurisdiction "acquired the full right to administer the estate under the bankruptcy law," and that under the amendment of 1910 the court of ancillary jurisdiction had authority to appoint a receiver and take charge of the bankrupt's estate within its jurisdiction "in order that the same might be turned over to the bankruptcy court having jurisdiction for administration." As to the authority of a court of bankruptcy to order the sale of the bankrupt's land in another district, see Robertson v. Howard, 229 U. S. 254, 261, 33 Sup. Ct. 854, 57 L. Ed. 1174, and Orinoco Iron Co. v. Metzel (6th Cir.) 230 Fed. 40, 46, 144 C. C. A. 338.

I therefore think it clear that both under the express terms of the amendment of 1910, which merely confers ancillary jurisdiction "in aid of" a receiver or trustee appointed in the court of primary jurisdiction, and the broad rule stated in Lazarus v. Prentice, supra, where the court of ancillary jurisdiction takes possession of mortgaged property in aid of a bankruptcy court of primary jurisdiction, it has no authority to determine, regardless of the court of primary jurisdiction, whether the mortgage upon such property should be enforced through the bankruptcy court or in independent proceedings by the mortgagee or to release the mortgaged premises to the mortgagee for the purpose of such independent foreclosure; such proceeding obviously not being in aid of the receiver or trustee in the court of primary jurisdiction, but in my opinion in derogation of the rights and authority of the court of primary jurisdiction, which is vested with sole authority to determine this question in the administration of the bankruptcy estate, and in derogation of the rights of the trustee appointed by it.

I find nothing in conflict with this view in Re Farrell (6th Circ.) 201 Fed. 338, 119 C. C. A. 576, in which it was merely held that an ancillary court of bankruptcy was authorized to hear and determine a plenary suit brought by a trustee in bankruptcy against parties claiming to hold property of the bankrupt as custodian for lien claimants who had brought suit to enforce the lien in a State court more than eighteen months prior to the filing of the bankruptcy; the right of the State court under such circumstances to retain jurisdiction of such suit and property obviously going merely to the right of the ancillary court to seize the property at all as the property of the bankrupt, and not involving in anyway the question of the enforcement of such prior liens in the bankruptcy court or any administrative question arising in the primary bankruptcy proceeding.

[2] Furthermore, even if this court had authority to allow the foreclosure of the mortgage, without regard to the determination of the court of primary jurisdiction, it is clear that whether such independent foreclosure should be permitted involves many questions in reference to the nature and value of the property, the amount of liens upon it and other considerations which are to be determined as administrative questions arising in the bankruptcy proceedings, and for the purpose of realizing the greatest amount obtainable from the property for general creditors of the bankrupt estate without prejudice to the rights of the mortgage holders. These questions, however, which are of a purely administrative character, can obviously be best determined in the court of primary jurisdiction having the legal custody of all the assets of the bankrupt and full knowledge of the condition of the estate. And I therefore conclude that even if the court is authorized to grant the relief requested, it should not, in the exercise of sound discretion, grant such leave, but should remit the petitioner to make application for such leave to the court of primary jurisdiction. This is especially true when the court of primary jurisdiction has, through its referee, determined that the best interests of the estate require that the mortgaged property should be sold by the court of bankruptcy itself free from all liens. It is, of course, not intended by this to adjudge that the New York court of bankruptcy may directly enforce such order of the referee without notice to the Trust Co., or without the aid of ancillary proceedings in this district; but it is obvious that if the substantial rights of the Trust Co. are in any way prejudiced by the order of the referee, complete relief may be had by it by intervention in the New York proceedings and proper application therein for review of the order of the referee.

I may add that I do not regard either the opinion or order of the District Court of the Eastern District of Pennsylvania as in conflict with the view herein expressed, that court not having determined either in its opinion or in its order whether the court "having jurisdiction of the mortgaged premises" was the District Court of New York or this court; while on the contrary a decision of this question was apparently expressly intended to be reserved, as shown by the statement in the opinion of the court that the "tribunal best situated to pass upon the question involved is the court having control of the assets of

the bankrupt estate or the court within whose jurisdiction the property is situated."

An order will accordingly be entered dismissing the petitions of the Trust Co. and others, and denying leave to file an independent bill, as prayed.

THE CARISBROOK.

(District Court, D. Massachusetts. December 12, 1917.)

No. 772.

1. SHIPPING ⊂⊃209(3)—LIABILITY FOR DAMAGE TO CARGO—HARTER ACT.
   In order to avail himself of the exemption from liability for errors in navigation or in the management of the vessel, under section 3, of Harter Act Feb. 13, 1893, c. 105, 27 Stat. 445 (Comp. St. 1916, § 8031), a shipowner has the burden of proving affirmatively that the ship was seaworthy and properly manned, equipped, and supplied at the beginning of the voyage, or that due diligence had been exercised to make her so.
2. SHIPPING ⊂⊃124—LIABILITY FOR DAMAGE TO CARGO—ERRORS IN MANAGEMENT OF VESSEL.
   Evidence *held* to show that due diligence was exercised by the owner to make a ship seaworthy at the beginning of a voyage, and that damage to the cargo of sugar from seawater resulted from an error in the management of the vessel for which the owner was not liable, in that the carpenter forgot to replace the caps on certain sounding pipes before sailing, with the result that during very heavy weather, which was encountered on the voyage, water entered through such pipes.

In Admiralty. Suit by the American Sugar Refining Company against the steamship Carisbrook. Decree for respondent.

Carver, Wardner, Cavanagh & Walker, of Boston, Mass., for libelant.

Kirlin, Woolsey & Hickox, of New York City, and Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (John M. Woolsey, Charles R. Hickox, and Harry D. Thirkield, all of New York City, of counsel), for steamship Carisbrook and claimant.

HALE, District Judge. The libelant seeks to recover for damages to a cargo of sugar on a voyage from Preston, Cuba, to Boston, in June, 1913.

[1] The answer sets up that the bill of lading, issued for the goods on behalf of the United Fruit Company, the time charterer, contained, among others, exceptions for the act of God and perils of the seas. It alleges, as a further defense, that, on the voyage, the ship met with weather of extraordinary severity; that during this time sea water came in contact with some of the cargo, owing to the failure of the carpenter to screw the brass plugs in the sounding pipes of the ship; and that the damage sustained by the cargo was due to these causes, and was within the exceptions in the bill of lading; and that for the fault in management the steamship and her owners are exempt from liability under the Harter Act. The third section of the Harter Act provides:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence

to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

[2] Under this statute, in order for the shipowners to avail themselves of the exemption from liability for errors in management or navigation, the burden is on them to prove affirmatively that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so. The theory of the law is that, when the owner can show that he has discharged his duty of providing a ship that is in all respects seaworthy and properly manned, equipped, and supplied for the voyage, or that he has used due diligence to this end, he shall then be relieved from errors of navigation and management on the voyage. The Wildcroft, 201 U. S. 378, 388, 26 Sup. Ct. 467, 50 L. Ed. 794. The test of seaworthiness is held by the Supreme Court to be whether or not the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The Silvia, 171 U. S. 462, 464, 19 Sup. Ct. 7, 43 L. Ed. 241. On the question of seaworthiness, the second officer testifies that he inspected the holds of the ship before the cargo was loaded; that they were in perfect condition for receiving sugar; that the bilges were sounded before the cargo was taken in, and after the cargo was loaded, two hours before the vessel left the port. The chief engineer testifies that the holds were in good condition, and that the bilges were all cleaned out before taking in cargo.

The libelant sharply attacks the proof of seaworthiness, and urges that the testimony is superficial and insufficient to prove the fact of seaworthiness, or that due diligence had been exercised to make the ship seaworthy, and cites The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65; The Manitou (D. C.) 116 Fed. 60, and other cases. The libelant has offered nothing, however, to satisfactorily meet the evidence of seaworthiness. From all the evidence I must find that the claimant has shown affirmatively that he exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped, and supplied, before she began her voyage.

The main contention arises on the question whether the cause of the damage was a fault in the management of the vessel within the meaning of the Harter Act. The boatswain and carpenter of the ship, Joseph Montesserin, testifies that, on the ship's arrival at Preston, he unscrewed and put away the brass caps from all the sounding pipes, with the exception of those in the tunnel, which were fastened by chain; and that he put in wooden plugs; and that he did this to prevent the sounding pipes being stolen; that, when the ship left Preston he replaced all these caps, except the two from the pipes leading to No. 2 bilge. He said the reason for this omission was that he had work to do, and forgot. Pierce, the second officer, testifies that it was the practice, when the steamer arrived in port, to take off the sounding pipes and put wooden plugs in the holes; that this was done to prevent the brass caps from being stolen; and that it was done at Preston in June, 1913, by the boatswain.

The testimony in behalf of the ship shows that she encountered rough seas on June 23, 1913; that the water flooded the decks fore and aft; that the next morning the carpenter sounded her bilges, and found that the wooden plugs had been washed out of the sounding pipes, and that water was breaking over the bridge deck. He screwed the brass plugs in place, took soundings at No. 2 bilge, found over four feet of water in that bilge, put a record on the blackboard in the engine room, for the engineer's information, that the pumps might be started pumping; but he said nothing to anybody as to the cause of the water being there. The second officer testifies that the ship was rolling and pitching during the bad weather, and that it was hard to obtain accurate soundings; that, on the morning of June 25th, the bilges in No. 2 hold were again dry. There is testimony that drainage from the sugar made a further pumping out of those bilges necessary on the next day.

The libelant contends, and offers evidence tending to show, that the damaged sugar did not, in fact, come out of No. 2 hold, but came out of No. 3 hold. The learned proctor for libelant urges that the whole testimony should lead the court to believe that it would be impossible for the amount of water which must have gone into the hold to have gotten there through the sounding pipes. He contends that only about 30,000 gallons could have gotten into the hold through these pipes, even though the pipes were continuously submerged to a depth of one foot. When we examine the testimony touching this point, it is found that one of the witnesses testifies that he had figured the diameter of the sounding pipes as something over half an inch. Later he said that he had figured it on a basis of an inch and a half to an inch and three-quarters. Another mathematical expert testifies on the basis of the sounding pipes being an inch in diameter, and figures that 30,000 gallons were taken into the hold. The whole testimony offered by the libelant is unsatisfactory on this point. Precisely what the diameter of the sounding pipes were is not made clear by the evidence, but that they were probably not over two inches nor less than an inch and a half. There is substantial evidence that water did get into the bidge and into the hold. Upon the whole testimony, I am satisfied that sufficient water ran through the sounding pipes to account for the damage for which the suit is brought.

The learned proctor for the libelant urges that great weight should be given to the apparent discrepancies of the soundings. It must be remembered that the ship was rolling, and the sea breaking over her, and that such conditions made it very difficult to obtain accuracy. It is not remarkable that the liquid in the hold remained stationary or even increased in quantity. Testimony in behalf of the ship has shown that the thick molasses water would run slowly through the limber holes.

Libelant seeks to show that the water in the hold might be due to an obstruction in the nonreturn valves. I think this is not sufficiently shown; but, even if it is, such obstruction in a nonreturn valve is held to constitute negligence on the part of the ship's employés, and to ex-

empt the ship from liability under the Harter Act. The Wildcroft, supra.

A sharp attack is made upon the testimony of Montesserin, the boatswain and carpenter. This witness is an uneducated man of a somewhat low order of intelligence. He has testified in a direct, straightforward manner (and I find no reason for believing that he has told anything but the substantial truth) that before sailing he had replaced all the caps, except the two on the sounding pipes leading into No. 2 hold; that, the next day, when he discovered that, through his negligence, water had reached the sugar, he was afraid of losing his job and of meeting further punishment; that he noted the fact on the engine room blackboard that No. 2 hold needed pumping; and that he said nothing to anybody about either his negligence or the result of it.

I think it unnecessary to refer in detail to further testimony. The case seems to me to present a very similar state of facts to those found in The Newport News (D. C.) 199 Fed. 968.

I am constrained to find that the owner of the Carisbrook exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped, and supplied, when she began her voyage; and that the damage alleged in the libel was caused by error in management of the ship within the meaning of the statute, and that the ship and her owner are exempt from liability under the third section of the Harter Act.

It follows that the libel must be dismissed, but, under the circumstances, without costs.

CENTRAL TRUST CO. OF NEW YORK v. MISSOURI, K. & T. RY. CO.

(District Court, E. D. Missouri, E. D. December 10, 1917.)

No. 4564.

1. RAILROADS ⊂⊃152—BONDS—PLEDGE—RIGHTS OF TRUSTEE—HOLDER OF BONDS AS COLLATERAL.

The pledge by a railroad company with a trust company as trustee of its own bonds as security for an issue of short term notes did not give the trustee such interest in the general affairs of the railroad company as to entitle it to attack the validity of a subsequent pledge of other bonds of the same issue, not covered by the trust agreement, but which were free assets of the railroad company, to a bank as security for a bank loan and as additional security for certain of the short term notes held by the bank.

2. RAILROADS ⊂⊃152—BONDS—PLEDGE—RIGHTS OF TRUSTEE—HOLDER OF BONDS AS COLLATERAL.

The fact that the bank, which already held the pledged bonds, in joining with other holders of notes in an agreement for their extension, did not inform the other assenting holders of its special security, was not a concealment which affected the validity of the renewed pledge as to the trustee.

In Equity. Suit by Central Trust Company of New York, as trustee, against Missouri, Kansas & Texas Railway Company. On motion by

the Mercantile Trust Company, intervener, to strike out parts of the answer of complaint to its petition. Motion granted.

See, also, 246 Fed. 154.

Edward Cornell and Chas. E. Hotchkiss, both of New York City, and Edward C. Eliot, of St. Louis, Mo. (Davies, Auerbach & Cornell, of New York City, and Eliot, Chaplin, Blayney & Bedal, of St. Louis, Mo., of counsel), for complainant.

Samuel A. Mitchell and Edward J. White, both of St. Louis, Mo., for intervener.

HOOK, Circuit Judge. This is a motion by the Mercantile Trust Company to strike out parts of the answer of the plaintiff, Central Trust Company, to the petition of the former filed in this cause with leave of court. The petition of the Mercantile Trust Company sets forth the following:

On May 1, 1913, it acquired $578,000 of the so-called short time notes of the defendant Missouri, Kansas & Texas Railway Company, due May 1, 1915. These notes were part of an issue of $19,000,000 secured by collateral deposited with the plaintiff as trustee under a collateral trust agreement. On September 1, 1914, the Mercantile Trust Company also made an ordinary bank loan to the railway company on the note of the latter, secured by a pledge of $800,000 of its consolidated bonds. The last installment of this note became due at the same time as the short time notes. As part of this transaction it was agreed that the $800,000 of consolidated bonds should also be held by the Mercantile Trust Company as security for its $578,000 of short time notes. Shortly before the maturity of these obligations the railway company sought an extension for one year of its issue of short time notes with the consent of the various holders, and also a renewal of the bank loan of the Mercantile Trust Company. As an inducement to the former the railway company deposited with the plaintiff as trustee under an extension agreement additional collateral ($1,300,000 par value) for the further security of those holders of short time notes who assented to the extension. It also increased the interest rate from 5 to 6 per cent. The holders of $18,053,000 assented, and their original notes were stamped accordingly. The Mercantile Trust Company became a party to the extension, and also renewed the bank loan, but upon the condition, to which the railway company agreed, that the $800,000 of consolidated bonds above mentioned should be held as security for both debts as before. Afterwards, September 25, 1915, a receiver of the railway company was appointed. There is due the Mercantile Trust Company upon the short time notes $578,000, and upon the bank loan $128,375.43, with interest on both sums. The petition of the Mercantile Trust Company is mainly for the adjudication and enforcement of its liens.

[1] The sixteenth paragraph of plaintiff's answer avers that the agreement between the Mercantile Trust Company and the railway company that the former should hold the $800,000 of consolidated bonds as security for its short time notes was not communicated to the other holders of such notes who participated in the extension, but con-

stituted a secret agreement by which it obtained a security the others did not receive, and was a fraud upon them. This is the affirmative defense of the answer. The motion of the Mercantile Trust Company is to strike this paragraph, and also designated parts of preceding paragraphs, from the answer. At the argument, counsel for the plaintiff contended that these other parts were referable to the defense of the sixteenth paragraph and should not be taken independently. That construction will be adopted.

In approaching the principal question for decision, it should be observed that the capacity in which the plaintiff is now before the court is as trustee under the collateral trust agreement securing the $19,000,000 of short time notes and under the extension agreement covering the $18,053,000 of those notes that were extended. The $800,000 of consolidated bonds pledged to the Mercantile Trust Company are not embraced in or subject to either of those instruments. When pledged to the Mercantile Trust Company they were free assets of the railway company. The object of the plaintiff, as disclosed by its answer and brief, is not to exclude the Mercantile Trust Company from participation in the extension agreement and the additional collateral pledged in accordance therewith, but seems to be to deprive that company of the security of the $800,000 of consolidated bonds while holding it to its extension of its short time notes. Though the plaintiff was not a party to the transaction between the Mercantile Trust Company and the railway company, and has no lien upon the $800,000 of consolidated bonds, it claims a right to interpose upon two grounds. Inversely they are:

First. That the holders of all short time notes, after exhausting the collateral pledged to plaintiff as trustee, will be entitled to a deficiency judgment against the railway company, and that the general estate of that company responsive to such a judgment would be benefited by defeating the pledge of the $800,000 of consolidated bonds. But the interest of the plaintiff as trustee under the two trust agreements is too remote to support an attack upon detached transactions of the railway company affecting only its free assets. If it were otherwise, the mortgage or pledge of specific property of a railroad company for a specific debt would qualify the trustee to question every act of the company by which it created other debts or secured them with other property. Certainly the plaintiff would not wish to be charged with such duties. What individual creditors might do in a bankruptcy or other winding-up proceeding might be another question.

[2] Second. That the security for the entire amount of short time notes consists of consolidated bonds of the same issue as the $800,000 pledged to the Mercantile Trust Company, and the less such bonds outstanding the greater the value of those remaining. This does not seem to be greatly different from the ground first stated. The consolidated bonds deposited with the plaintiff were part of a definite, authorized issue, and it is not clear that it has sufficient interest as trustee to contest the disposition by the railway company of the remainder, unless the disposition is contrary to the terms of the mortgage securing them, or the terms of the trust agreements under which it acts. The court approves in principle of an active interest by trustees in matters affect-

ing property held in trust for bond and note holders, and, though the ground for action here may not appear very firm, it will be assumed as sufficient. Besides, it is well to consider the effect of the transactions as a whole, because it may be hereafter asserted that, if the Mercantile Trust Company holds to its $800,000 of consolidated bonds, it forfeits its right to share in the additional collateral under the extension agreement.

The plaintiff invokes the rules of a composition between creditors and their debtor which make for equality of advantage and against secret preferences. The mere extension by the Mercantile Trust Company of its short time notes and the renewal of its bank loan did not change its prior position. The debts and security were continued, not then newly created. Any change of right must rest upon the fact that other short time note holders joined in the extension, and in judging that the circumstances of the original transaction should be regarded. The purchase by the Mercantile Trust Company of the short time notes was essentially a loan to the railway company. The agreement that the $800,000 of consolidated bonds should stand as security for the notes was an ordinary banking transaction, valid in every respect. The railway company violated no duty to other short time note holders, or other holders of consolidated bonds. It had a right to give the security, and the Mercantile Trust Company had a right to accept it. The transaction was not in contemplation of insolvency or receivership. About eight months later the Mercantile Trust Company assented to the extension of its notes. In doing so it did not inform the other assenting holders of its special security, but in no other way can it be said there was concealment. Concealment under such circumstances implies a duty to inform, and the duty should have its source in a general consciousness of equity and fair dealing. It is not reasonably conceivable that the officials of the Mercantile Trust Company ever thought of such a duty, or that, had full information been given, it would have changed the course of the others. The security was not given to the Mercantile Trust Company to induce it to participate. It was a fact accomplished before the extension plan arose. No preference or advantage over other participants was given that company as a consideration for its assent, or, in the sense of the doctrine of composition, at the time of or in connection with the extension.

Many cases of composition with unlawful preferences have been cited by counsel, and certain features similar to some in the case at bar are pointed out. But the similarities are those of mere circumstance, and not of the essence of preference in composition. The conclusion is that the sixteenth paragraph of plaintiff's answer, supplemented by the parts of the preceding paragraphs in question, does not state a defense.

The motion will be sustained.

In re AGREE.

(District Court, E. D. Michigan, S. D. January 18, 1918.)

No. 3782.

BANKRUPTCY ⊂=387—COMPOSITIONS—RIGHT TO WITHDRAW OFFER.

Bankruptcy Act July 1, 1898, c. 541, § 12, 30 Stat. 549 (Comp. St. 1916, § 9596), declares that a bankrupt may offer terms of composition to his creditors, that an application for confirmation may be filed in the court of bankruptcy after it has been accepted in writing by a mapority in number of all creditors whose claims have been allowed which number must represent a majority in amount of such claims, that a date and place with reference to the convenience of the parties in interest shall be fixed for the hearing on such application for the confirmation and such objections as may be made, and that the judge shall confirm a composition if satisfied that it is for the best interests of the creditors, that the bankrupt has not been guilty of any act or failed to perform any of the duties which would be a bar to his discharge, and that the offer and his acceptance are in good faith. Section 13 (Comp. St. 1916, § 9597) declares that the judge may, upon application of the parties in interest, filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear that fraud was practiced in procuring such composition, and knowledge came to the petitioners since confirmation. After a bankrupt's offer of composition had been accepted by a majority in number and amount of his creditors, and after the consideration to be paid had been deposited and an application for confirmation been filed by the bankrupt, together with one creditor's specifications in opposition, the bankrupt petitioned for leave to withdraw his offer of composition. *Held*, that as the statute relating thereto makes no provision for withdrawal of an offer of composition, and as the creditors in reliance thereon change their position, permission for a bankrupt to withdraw his offer of composition should be denied, particularly as the contrary rule would tend to waste the time of the bankruptcy court.

In Bankruptcy. In the matter of the bankruptcy of Samuel Agree. On petition by the bankrupt for leave to withdraw an offer of composition. Petition denied.

Finkelston & Lovejoy, of Detroit, Mich., for bankrupt.

Selling & Brand, of Detroit, Mich., for objecting creditor.

TUTTLE, District Judge. This matter comes before the court on a petition by the bankrupt for leave to withdraw an offer of composition made under the terms of section 12 of the Bankruptcy Act. It appears that after the making of this offer, it was accepted by a majority in number and amount of the creditors whose claims had been allowed. The consideration to be paid thereunder had been duly deposited, and an application for a confirmation thereof had been filed by the bankrupt, all as provided in said section 12. It appears, also, that one creditor had filed specifications in opposition to the confirmation of such offer. The bankrupt now seeks permission to withdraw his offer of composition, and another creditor has filed objections to the withdrawal thereof.

The sole question presented is whether under these circumstances the bankrupt should be permitted to withdraw such offer of composi-

tion. The provisions of the Bankruptcy Act relating to the subject of compositions are contained in sections 12 and 13 thereof. Section 12 provides that:

"(a) A bankrupt may offer * * * terms of composition to his creditors. * * *

"(b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

"(c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

"(d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden."

Section 13 is as follows:

"The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition."

It will be noted that the statute makes no provision for a withdrawal of an offer of composition although it provides quite fully the procedure and practice after the filing of such offer. It is therefore at least doubtful whether, in the absence of some such express provision, the right to withdraw such an offer can exist by implication. It is, however, unnecessary to determine this question for the reason that after a careful consideration of the matter I have reached the conclusion that Congress could not have intended to confer such a right as against the objections of interested creditors, at least in the absence of fraud or a showing that such withdrawal is for the best interests of the creditors.

It would, in my opinion, seriously embarrass and interfere with the proper administration of bankrupt estates, and in many cases thwart the purposes underlying the provisions of the Bankruptcy Act relating to compositions, if, after the bankrupt has made an offer and the deposit required by the act, and thereby induced a majority in number and amount of the creditors to accept such offer and perhaps to change their position in reliance thereon, the bankrupt were permitted to then withdraw his offer. A construction of the act which would lead to such a result would enable a bankrupt, not only to trifle with the court and waste the time of its officers, but also to harass or injure creditors relying in good faith upon such offer and their acceptance thereof. If the language of these sections is to be given effect in accordance with

its clearly expressed meaning, the court and creditors have a right to assume that when, as in the present case, an offer of composition has been made in accordance with the act and the necessary money deposited thereunder, and the requisite majority of creditors have duly accepted such offer and an application for the confirmation of such composition has been filed by the bankrupt, then, as the next step prescribed by section 12, "a date and place * * * shall be fixed for the hearing upon such application," and "the judge shall confirm" the composition if satisfied that—

"(1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided or by any means, promises or acts herein forbidden."

It seems clear from a consideration of the language and of the purposes of these provisions that Congress thereby intended that after this offer had been so made and accepted the court should, on the application for confirmation, either reject or confirm the composition on the grounds referred to in the language just quoted. No such grounds are here alleged as a reason for the withdrawal of the composition, the only reason therefor apparently being the fact that a creditor other than the one here objecting to the withdrawal, although represented by the same counsel, has objected to such confirmation. This, of course, is, so far as the creditor here objecting to the withdrawal is concerned, wholly immaterial, and the creditor just referred to cannot be prejudiced or affected by the action on the part of the other creditor mentioned.

No authority has been cited, and I have been able to discover none, precisely in point, as this question appears to have been raised here for the first time. What, however, seems to me to be the same principle was involved in the case of In re Levy (D. C.) 110 Fed. 744. In that case the necessary majority of creditors had accepted an offer of composition, and thereafter some of such creditors asked leave to withdraw their acceptance on the ground that when they signed such acceptance, they were not aware of all the facts in the case. In denying such leave the court said:

"These creditors voluntarily came into court, accepted the proposed composition, and asked the court to act in the matter, and confirm the composition. They procured the court to act, and they are now estopped from interfering with the further conduct of the case in the matter of this composition. Had they alleged fraud or misrepresentation in the procuring of their signatures to the acceptance, the case would be different. They are presumed to have had the same knowledge when they signed as they have now. The application for their withdrawal will be refused, and the court will proceed to pass upon the merits of the proposed composition. If it is not for the best interests of the creditors, it can be shown on the hearing before the referee."

It seems to me that this language is applicable to the present case. If, for the creditors in that case, the bankrupt be substituted, the language correctly states the situation in the present case, and I see no distinction in principle between the two cases, and it seems to me that the rule there followed is equally applicable here. I have carefully

considered all of the contentions so earnestly urged by counsel for the bankrupt, but I am unable to agree with such contentions. It follows that the application for leave to withdraw the offer of composition will be denied, and an order entered in conformity with the terms of this opinion.

DONOHUE v. DYKSTRA et al.

(District Court, E. D. Michigan, S. D. January 9, 1918.)

No. 5942.

1. NEW TRIAL ⇐71—CONFLICTING EVIDENCE.
   A verdict on conflicting evidence will not be disturbed by the trial court on motion for new trial where there is substantial evidence in its support.
2. BANKRUPTCY ⇐166(4)—PREFERENCE—SUSPICION.
   A creditor's mere suspicion that a debtor who makes a payment or gives security is insolvent does not, where the transaction occurs within four months of bankruptcy, render it preferential; for it is necessary that the creditor have a reasonably founded belief of the debtor's insolvency before such payment or giving security would amount to a preference.

At Law. Action by Eugene C. Donohue, trustee of the American Silica Company, a corporation, bankrupt, against Joseph W. Dykstra and Alexander Zindlor, copartners doing business as J. W. Dykstra & Co., to recover an alleged preference of the bankrupt made within four months of bankruptcy. On motion for new trial after verdict for defendants. Motion denied.

Max Kahn, of Detroit, Mich., for plaintiff.
Clarence E. Wilcox, of Detroit, Mich., for defendants.

TUTTLE, District Judge. This is a motion for a new trial on the ground that the verdict of the jury was so contrary to the evidence that it should be set aside and either a judgment non obstante veredicto entered or a new trial granted.

This was an action brought by the plaintiff, as trustee of the estate of the American Silica Company, a Michigan corporation, bankrupt, against the defendant partnership, J. W. Dykstra & Co., to recover from the latter an alleged preference given by said bankrupt to said defendant within four months prior to the filing of the petition in bankruptcy against said corporation; said alleged preference consisting of an assignment of certain book accounts as security for the payment of a pre-existing indebtedness due and owing by said corporation to said partnership. The court submitted to the jury as questions of fact for its determination the material questions in such a case, namely: First, whether at the time of the transfer alleged to constitute a preference said bankrupt was insolvent; second, whether such transfer operated as a preference; and, third, whether the defendant then had reasonable cause to believe that such transfer would effect a preference. It is not disputed that these were the material issues involved, as this action was based upon action 60b of the Bankruptcy Act (Act

July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1916, § 9644]), providing, among other things, as follows:

"If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy, * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it 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 and he may recover the property or its value from such person."

Counsel for plaintiff took no exceptions to the charge of the court submitting such issues to the jury, although given the opportunity so to do at the conclusion of the charge. He now, however, contends that the evidence on these material issues was insufficient to sustain the verdict for the defendant, which verdict for that reason should be set aside. The sole question raised or argued is whether there was sufficient conflict in the evidence to support the verdict of the jury rendered on such evidence.

As plaintiff did not request the court to instruct the jury to find in his favor on any of the issues submitted, and as he failed to take any exceptions to such charge, it would seem that he is not now in a position to make the contention thus urged. Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 127 C. C. A. 332.

[1, 2] Aside, however, from this consideration, I am satisfied, upon a careful examination and consideration of the record and briefs of counsel, that the charge was as favorable to plaintiff as the circumstances warranted, and that there was sufficient evidence to sustain the verdict. It is, of course, well settled that if there is any real conflict in the testimony, and there is any substantial evidence to support the verdict found, such verdict should not be set aside by the Court, even if the latter would have reached a different verdict from that of the jury on the same evidence. Mt. Adams & E. P. Inclined Railway Co. v. Lowery, 74 Fed. 463, 20 C. C. A. 596; Pringle v. Guild (C. C.) 119 Fed. 962; Pittsburgh Railways Co. v. Sullivan, 166 Fed. 749, 92 C. C. A. 429.

Without reviewing the evidence in detail, I deem it necessary only to say that I am satisfied that there was evidence from which the jury might properly have found, as it did, a verdict in favor of the defendants upon the material issues of fact submitted for its consideration. Particular stress is laid by plaintiff upon his contention that the verdict was contrary to the clear weight of the evidence on the question of reasonable cause to believe that the transfer in question would effect a preference. I am unable to agree with this contention, and think that the evidence on this question was sufficiently in conflict to warrant the verdict. In the language of the Supreme Court in the leading case of Grant v. First National Bank of Monmouth, 97 U. S. 80, 24 L. Ed. 971:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a

case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

"Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

Whether the facts or circumstances brought to the attention of the defendants were such as to cause a reasonably prudent person to believe that the effect of the assignment of these book accounts would effect a preference was, upon the evidence offered at the trial, a question of fact to be determined by the jury. Plaintiff produced only one witness on the material issues, and the testimony of such witness and that introduced on behalf of defendants was in important respects in direct conflict. Under these circumstances, I should not feel justified, even if I were so disposed, to reject the finding of the jury and substitute my own in the place thereof. To do so would, in my opinion, be a clear usurpation by the court of the functions of the jury acting within its proper province.

For the reasons stated, the motion will be denied, and a judgment entered in accordance with the verdict.

In re FAMOLARO.

(District Court, W. D. Pennsylvania. January 2, 1918.)

No. 20859.

ALIENS ⊂=68—NATURALIZATION—CANCELLATION OF CERTIFICATE—"BEFORE THE PASSAGE OF THE ACT."

Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596, after providing for the establishment of the Bureau of Immigration and Naturalization, in section 1 (Comp. St. 1916, § 963) and section 2, declares in section 4 (section 4352) that an alien must set forth in his declaration of intention his name, age, occupation, place of birth, date of arrival, etc., but that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen, shall be required to renew such declaration. A later paragraph of the same section provides that, not less than two years nor more than seven years after the alien has made a declaration of intention, he shall make and file a petition in writing, signed in his own handwriting and duly verified, setting forth his full name, place of residence, occupation, etc., but that, if he has filed his declaration "before the passage of the act," he shall not be required to sign the petition in his own handwriting. Section 28 (section 4383) and section 29 relate to the making of rules and regulations by the Secretary of Commerce and Labor, and appropriations for expenditures. Section 31 of the act declares that it shall take effect and be in force from and after 90 days from the date of its passage, provided that sections 1, 2, 28, and 29 shall go into effect from and after the passage of the act. *Held*, in view of section 8 (section 4364), declaring that no alien shall be naturalized who cannot speak the English language, provided that the requirements of the section shall not apply to any alien who has prior to the act declared his intention in conformity with the law in force at the date of making such declaration, that an alien who filed his declaration of intention after June 29th, the date of the enactment of the act of 1906, but before section 4 went into effect, falls within the proviso, and need not sign the petition for naturalization in his own handwriting; it being apparent that the expression "before the passage of the act" means before the act became effective.

In the matter of the petition for naturalization of Francesco Famolaro. On petition for rule to show cause why an order admitting applicant to citizenship should not be canceled. Petition denied.

Wm. M. Ragsdale, Chief Naturalization Examiner, of Pittsburgh, Pa.

THOMSON, District Judge. This is a petition for a rule to show cause why an order of this court, entered October 3, 1917, admitting Francesco Famolaro to citizenship, should not be canceled. There is perhaps no controversy as to the facts of the case, and we will assume them to be as alleged in the petition. The material facts are these: The applicant, an Italian subject, was born December 17, 1871, came to this country on April 17, 1901, and five days after the enactment of the Naturalization Act of June 29, 1906, to wit, on July 5, 1906, he declared his intention to become a citizen of the United States, in the court of common pleas of Allegheny county, Pa., being at that time unable to write his name, and signing his declaration by mark.

On June 26, 1917, he filed his petition for admission to citizenship, signing the same by mark, and on October 3, 1917, after the usual hearing, he was duly admitted as a citizen. The petition challenges the legality of the proceedings, on the ground that the petition for admission was invalid, not being signed by the applicant in his own handwriting, as required by the act of June 29, 1906.

The act of 1906 was passed to establish a Bureau of Emigration and Naturalization, and to provide a uniform rule for the naturalization of citizens throughout the United States. Section 4 (Comp. St. 1916, § 4352), in its various paragraphs, sets forth fully the manner in which the alien may become a citizen. The first paragraph enumerates what must appear in his declaration of intention: Name, age, occupation, place of birth, date of arrival, etc., concluding with this proviso:

"Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States, shall be required to renew such declaration."

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, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence, * * * occupation, etc. * * * Provided, that if he has filed his declaration before the passage of this act, he shall not be required to sign the petition in his own handwriting."

Section 27 (section 4382) sets forth the form of the declaration of intention, the petition for naturalization, the affidavit of witnesses, and the certificate of naturalization, which must be followed substantially. Section 31 provides:

"This act shall take effect and be in force from and after ninety days from the date of its passage: Provided, that sections 1, 2, 28 and 29 shall go into effect from and after the passage of this act."

Section 1 relates to the establishment of the Bureau of Emigration and Naturalization; section 2, to the providing of additional offices, clerks, etc., to the Bureau; section 28, to the making of rules and regulations by the Secretary of Commerce and Labor; and section 29, to the appropriation for expenditures. In other words, in these sections the Bureau was established, and the machinery necessary for its operation was set in motion on the date of the passage of the act; but the act itself, including all proceedings necessary for the naturalization of aliens, from the declaration of intention to the petition and final hearing, took effect and became in force on September 29, 1917.

How, then, does the case stand? This man, when he filed his declaration of intention on July 5, 1906, did not comply with the requirements of section 4 of the act of 1906, for the simple reason that that section was not then in force. His declaration of intention was in accordance with the law as it was prior to the passage of that act. But, being in conformity with the law then in force, under the first paragraph of section 4 of the act of 1906, he was not required to renew his declaration. By section 8 (section 4364) it is provided that no alien shall thereafter be naturalized who cannot speak the English language:

"Provided, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States, in conformity with the law in force at the date of making such declaration."

From this proviso I think it is clear that all cases would be included where the declaration was in conformity with the law in force at the date of making such declaration. In other words, that the words "passage of the act" refer to the date when the law went into effect, rather than the date of its actual enactment. If this were not so, then the legal status of an applicant declaring his intention immediately after the passage of the act would be different from that of one declaring his intention immediately before that date, although their declaration was made under and in compliance with the same act of Congress. This could hardly be, under an act whose purpose, as expressed by the title, is "to provide for a uniform rule for the naturalization of aliens throughout the United States." And so I would read the proviso to the second paragraph of section 4 (section 4352), in these words:

"Provided, that if he has filed his declaration before the passage of this act, he shall not be required to sign the petition in his own handwriting."

The declarant in this case complied with the law in all respects as it was when he filed his declaration of intention. While it had been enacted that the petition for admission to citizenship "must be signed by the applicant in his own handwriting," such enactment had not gone into effect, and as to him was the same as if it had never been passed. The whole act speaks, and of necessity must speak, as of the date when it became effective. Prior to that date, all the provisions of the act in relation to naturalization had no legal existence. In legal effect, they were as if the act had not been passed. It is entirely natural that that date should be regarded as the date of its passage. This interpretation, which makes all of its provisions harmonious, should be adopted unless there is a compelling reason to the contrary. In other words, I think the spirit of the act should prevail over its mere letter.

The petition is therefore refused.

HOLLOWAY et al. v. COLLEE et al.

(District Court, S. D. Florida. February 7, 1918.)

1. WILLS ⇐440—CONSTRUCTION—INTENTION OF TESTATOR.
   The intention of the testator, as gathered from the will itself, should govern.
2. WILLS ⇐487(2)—CONSTRUCTION—RELATION OF PARTIES.
   Evidence of the relations of the parties is admissible to aid in construing words of a doubtful meaning in a will.
3. WILLS ⇐497(2)—CONSTRUCTION—PERSONS ENTITLED TO TAKE.
   Testator devised and bequeathed the residue of his property to named children and to his wife, share and share alike, with the provision that the surviving consort and issue of any of his children dying before his death should take the share such child would have taken, if alive. A

later paragraph of the will declared that it was the testator's desire that all his children should share equally in his estate, and made provision for after-born children. Complainant, a granddaughter of the testator, who was the child of a daughter who had died many years before the testator and who was not named in the will, asserted her right to share under the will, on the theory that she was included under the alternative provisions for the benefit of the issue of any of testator's children dying during his life and the declaration that the testator desired all children should share equally in his estate. *Held* that, though that construction of a will which supports the inheritance by child or grandchild should be preferred, complainant is not entitled to take under the will; the gifts over to the issue of the deceased children obviously referring to the issue of the children named, and the declaration of the testator that his children should share alike referring to after-born children.

4. WILLS ⊂⇒479—INTERESTS—PAYMENTS.
One not entitled to take under the terms of a will acquires no rights by reason of payments to him by the executor.

In Equity. Bill by Beatrice H. Holloway and others against Louis A. Collee and others. Bill dismissed.

George C. Bedell, of Jacksonville, Fla., for plaintiffs.

W. A. MacWilliams, of St. Augustine, Fla., and John C. Cooper & Son, of Jacksonville, Fla., for defendants.

CALL, District Judge. The object of this suit is to construe the last will and testament of James L. Collee, so as to include the complainant granddaughter among the beneficiaries under said will, although she is not specifically named therein.

[1-3] The last will and testament of James L. Collee is set out in the bill in hæc verba, and after making certain bequests contains the following:

"Fifth. All the rest and residue of my estate, real, personal and mixed, in esse and in futuro, wherever the same may be at the time of my death, I devise and bequeath unto my children, Louis A. Collee, James R. Collee, Joseph B. Collee, George B. Collee, Raymond J. Collee, Arthur P. Collee, Otis M. Collee, Mamie J. Collee, Edna I. Collee, and my wife Georgia V. Collee, share and share alike, the surviving consort and issue of any of my children dying before my death taking share and share alike the share my child would have taken if alive."

The seventh paragraph reads as follows:

"It being my desire that all of my children shall share equally in my estate, should any child of mine be born after the execution of this will or after my death, I desire that it shall share equally with my other children and my wife above named, each devisee contributing ratably to make up the share of such child."

The complainant Beatrice H. Holloway is the granddaughter of the testator, being the child of Elizabeth Collee Solana, a daughter of the testator, who died many years prior to the death of James L. Collee, and prior to the making of the will in question, which was executed on December 26, 1903. The granddaughter had married, and had made her home in a place other than St. Augustine, some years before the making of the will.

As I understand the contention of the complainant, she claims to be entitled to participate in her grandfather's estate under the fifth paragraph of the will, as evidenced therein, and by the seventh paragraph, above quoted.

The intention of the testator is the determining factor in the construction to be given the instrument. That intention should be gathered from the instrument itself, and the construction of words of doubtful meaning can be helped by evidence of the relations of the parties, etc., and, in cases where the words are susceptible of two constructions, that construction will be given which supports the inheritance by a child or grandchild.

The fifth paragraph of the will names the recipients of the testator's bounty, and provides in the same sentence for the consorts and issue inheriting in case of death. It seems to me that a careful study of this paragraph should convince one that, although the word "any" is used before the word "children," in the latter part of the paragraph, the testator could have meant only those children specifically mentioned before. It is to me almost inconceivable that the testator should have been so particular to mention each child by name and vest in them the residue of his estate, and yet have meant by the subsequent portion of the sentence a child and consort of a long-dead daughter, and this although, as claimed by the complainant, the relations existing between the testator and his granddaughter were of the most affectionate character. Nor do I think the seventh clause of the will adds anything to the contention of the complainant.

That clause was clearly intended to provide for after-born children, if any there should be. That such after-born children "shall share equally with my other children and my wife above named" would seem to me to negative the construction contended for by complainants rather than support it. Reliance is placed on the words in the beginning of the paragraph, "It being my desire that all my children shall share equally in my estate;" but these words are followed by the words before quoted, in which he points out what children he meant should share in the estate.

[4] Nor do I think the payment to the complainant of money by the executor aids the complainant.

For these reasons I am of opinion that the equities are with the defendants, and a decree dismissing the bill will be entered.

Quite a lot of testimony was taken in support of the bill and the answers, and a number of objections were made at the taking of the same and insisted upon at the hearing, as well as a motion to exclude certain testimony on behalf of the defendants. I have not considered same, for the reason that in my judgment there are no such doubtful words in the will as to require testimony to aid in their construction.

BRONSON v. COOK.

(District Court, N. D. Georgia. December 12, 1917.)

1. CANCELLATION OF INSTRUMENTS ⟸13—JURISDICTION—ADEQUATE REMEDY AT LAW.
   Plaintiff, asserting that defendant, through fraud, induced her to execute a note payable to him, to pay at that time a sum of money in cash and to give defendant an agreement to purchase corporate stock, sought to enjoin suit on the note which it was alleged would be brought in New York, as well as suit on the agreement to buy the stock and to have the note and the agreement brought into court and canceled, and to recover the amount of payments. Under Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 73, if a right asserted is one which a court of law can grant as plain, adequate, and complete relief as the holder of the right is entitled to without aid of court of equity, the person asserting such right must proceed in a court of law. *Held*, that as, when action is brought on a note and contract to purchase stock, plaintiff can set up any fraud in defense of such actions, even though the action be one at law, equity is without jurisdiction to grant plaintiff relief.
2. EQUITY ⟸51(2)—INJUNCTION—RIGHT TO MAINTAIN.
   In such case, plaintiff is not entitled to relief on the ground of multiplicity of causes of action.
3. JURY ⟸12(1)—JURY TRIAL—RIGHT TO.
   In such case, in view of the issues of fact as to fraud, the parties are entitled to trial by jury.

In Equity. Suit by Mrs. Florence Cook Bronson against Edward Knox Cook. On application for an injunction. Application denied, and petition dismissed.

Edgar Watkins, of Atlanta, Ga., for plaintiff.
King & Spalding, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. The case made here is: That the plaintiff gave to the defendant, on the 29th day of January, 1917, a note for $21,000, paying, at the same time, $5,500 in cash, and gave him an agreement to purchase certain stock of the Knox Hat Company. That afterwards, on the 1st day of March, she paid him $6,000 on the $21,000 note. The plaintiff now claims that while she was sick in a hospital in New York, and in a serious condition physically, having undergone an operation, and in such mental condition, on account of her sickness and trouble, that she was not really responsible for her acts, she was overreached and unduly influenced by the defendant, her brother, into paying him the money and giving the note and agreement to purchase the stock.

The plaintiff and the defendant are brother and sister, and Edward M. Knox, the noted hatter, was their uncle, and the defendant Edward Knox Cook, was at one time made a legatee, and was to receive a share of Mr. Knox's estate at the death of the latter, but the will was subsequently changed, and the defendant Cook was cut out entirely in the changed will; the plaintiff, Mrs. Florence Cook Bronson, remaining and continuing to be recognized by the will for a considerable

distributive share of the estate, being, I believe, residuary legatee, at all events, being considerably interested in the estate.

[1] The contract alleged to have been made between them on January 29, 1917, was in settlement of a claim of the defendant, Edward Knox Cook, against the estate for, as well as I understand it, certain services he claimed to have rendered the estate, and probably for services he had rendered to Mr. Knox in the business and in the sale of the Knox Hat Company. There is considerable evidence by affidavit pro and con as to the fairness or unfairness of the agreement which resulted in the giving of the note, the payment of the money, and the agreement to purchase stock. It is not necessary, however, that the merits of the matter should be considered here, because I am perfectly satisfied that this is not a case of which a court of equity should take cognizance.

The effort here is to enjoin a suit on this note, which it is said will be brought in New York, and also a suit on the agreement to buy stock, and to have the note and the agreement to purchase stock brought into court and canceled and annulled, and that the plaintiff recover of the defendant the $5,500 which she paid him on the 29th of January, and the $6,000 subsequently paid on the note on March 1, 1917. I think, if the defendant brings a suit on the note and the agreement to purchase stock, everything set up here by Mrs. Bronson can be set up and pleaded as a defense to such suit in a court of law.

Under the Judiciary Act of 1789, if a right asserted is one in which a court of law can grant as "plain, adequate and complete relief as the holder of the right is entitled to, without the aid of a court of equity, the person asserting such right must proceed in a court of law." Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, and cases cited by Mr. Justice Gray, delivering the opinion. When suit is brought on the note and the contract to purchase the stock, in question here, certainly Mrs. Bronson can set up everything she has brought forward here, in defense to those suits. See, also, Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; and also, on this subject, see the very interesting case of Niagara Fire Ins. Co. v. Adams, 198 Fed. 822, 117 C. C. A. 464, and especially the discussion by Circuit Judge Putnam in delivering the opinion of the Circuit Court of Appeals for the First Circuit; also see Cable v. United States Life Ins. Co., 191 U. S. 288, and in the opinion by Mr. Justice Peckham, at page 309, 24 Sup. Ct. 74, 48 L. Ed. 188.

[2] Neither do I think there is danger of such a multiplicity of suits in connection with this matter as would justify the interference of a court of equity. Nor does it seem to me there is any difficulty about the right of Mrs. Bronson to assert all the matters she sets up here by way of defense to an action at law in this court; that is, in the United States District Court. It is a plain suit on a promissory note for a definite amount of money, against which she can plead as perfectly as she could in equity, and prove, that the note was obtained from her by fraud, and was wholly without consideration, and the other matters she sets up here. So, also, with the suit on the contract to purchase stock. To that she would have as complete a defense, it seems, as she would to the suit on the promissory note.

The right of the court to go on with this case on the equity side is definitely and fully raised in the pleadings, and my determination of the case is upon the ground that it does not present a case of which a court of equity should take cognizance. I think the remedy at law is ample and complete. While the plaintiff makes a strong case here, it is unnecessary to pass upon the merits of the matter. I simply decide it, as stated above, upon the ground that a case is not made for a court of equity.

[3] In addition to this, it seems to me to be conclusively a matter where the defendant, as well as the plaintiff, would be entitled to the benefit of a jury trial, and that they will obtain in a suit at law. The prayer for an injunction is denied, and the restraining order heretofore granted is vacated and set aside.

For the reason stated, that it is not a case in which a court of equity should take jurisdiction, a decree may be taken dismissing the petition.

GRASSELLI CHEMICAL CO. v. ÆTNA EXPLOSIVES CO., Inc.

(District Court, M. D. Pennsylvania. May Term, 1917.)

No. 247.

1. INJUNCTION ⟸118(4)—SUIT FOR INJUNCTION—PLEADING.
   A petition by receivers of a corporation for an injunction to restrain the payee of a note of the corporation, to which petitioners allege they have a complete set-off, and his agent, from transferring certain bonds held by them as collateral, *held* sufficiently specific as to the ownership of the note, the agency of the second defendant, and the alleged set-off.
2. EQUITY ⟸362—PLEADING—ALLEGATIONS BY WAY OF RECITAL.
   An allegation of an essential fact in a bill in equity by way of recital, but in such form that the existence of the fact appears by necessary implication, is good as against a motion to dismiss.

In Equity. Suit by the Grasselli Chemical Company against the Ætna Explosives Company, Incorporated. On motion to dismiss petition of George C. Halt and others, ancillary receivers of the Ætna Explosives Company, Incorporated, for injunction against Ferdinand L. Belin and the First National Bank of Scranton. Motion denied.

Winthrop & Stimson, of New York City, and J. Fred Schaffer, of Sunbury, Pa., for receivers.

John P. Kelly and Welles, Stocker & Torrey, all of Scranton, Pa., for respondents.

WITMER, District Judge. [1] On the petition of George C. Holt, Benjamin B. Odell, and Charles A. Snyder, ancillary receivers of the Ætna Explosives Company, Incorporated, a rule was granted on Ferdinand L. Belin and the First National Bank of Scranton, Pa., to show cause why an injunction should not issue restraining them from selling or otherwise disposing of $150,000 of bonds of the Ætna Explosives Company, Incorporated, held as collateral upon a note for $100,000

wherein the Ætna Company is the maker and Ferdinand L. Belin the payee. The rule was returnable December 10th; meantime a temporary injunction was allowed, which is now in force. The bank, having answered, made also a motion to dismiss the petition on the ground of insufficiency. Under well-settled rules of pleading, the effect of the motion to dismiss is an admission of the truth of all facts well pleaded in the petition.

It is the contention of the petitioners that Belin or the bank, as agent for him, has possession of the collateral, which is liable to be transferred to the loss of the company, which has a substantial and complete set-off to the note for which the collateral was pledged. This, respondent contends, does not sufficiently appear from the petition. The petition sets forth that:

"Your petitioners are informed and believe, and therefore allege, that the said Belin or his agents, among them the First National Bank of Scranton, Pa., still hold said note and said collateral. Said Belin has filed his claim on said note under order of the court made in this proceeding requiring claims against Ætna Explosives Company, Incorporated, to be so filed."

It was contended by counsel in supporting their motion that this allegation is not sufficiently specific; that it does not disclose in what special capacity as agent the bank held the note for Belin. How this can be important at this time does not make much of an impression, in the face of the averment that "Belin or his agents," specifying the bank as one of them, "still hold said note and said collateral." The charge here that Belin yet owns and holds the note and its collateral is clear, distinct, and unequivocal. This is followed and further on supported by the allegation that the "said Belin has filed his claim" therefor. No other reasonable inference can be drawn, from the language employed, than that the petition charges Belin with being the owner and in possession of the note, even if that did not appear clearly and unequivocally alleged.

[2] The petitioners are entitled to the benefit of all inference to be drawn from the language employed by them in stating their case. Though it might be said that the latter part of the allegation quoted is mere recital, nevertheless the petitioners are entitled to the benefit thereof. As was said in Investor Pub. Co. v. Dobinson (C. C.) 72 Fed. 603:

"An allegation of an essential fact in a bill in equity, by way of recital, but in such form that the existence of the fact appears by necessary implication, is good as against a general demurrer."

Being satisfied that it may be clearly and fairly gathered from paragraph 1 of the petition that Belin is as yet the owner of the note and the collateral the court is not disposed to dismiss the petition because it does not disclose the bank's special agency for him.

Objection is also made that there is a paucity of facts set forth in the second paragraph of the petition claiming a legitimate and substantial set-off against Belin's note. This court may at least take judicial notice of its own records, which discloses the magnitude of the receivership, its many plants, and exceptionally large operation. The assets mount into the millions. Having this also in mind the petitioners aver:

"In the investigation which your petitioners have made of the affairs of the Ætna Explosives Company, Incorporated, your petitioners have lately ascertained that the said Ferdinand L. Belin is, in the opinion of your petitioners, indebted to the Ætna Explosives Company, Incorporated, to an amount greater than the sum of one hundred thousand ($100,000.00) dollars, the face value of the said note held by the said Ferdinand L. Belin, and that the cause of action on said indebtedness is a cause of action in equity. Accordingly your petitioners are about to ask leave of this court to institute suit in equity against said Belin in this court for the collection of the said indebtedness due to said Ætna Explosives Company, Incorporated, from said Belin."

Using due diligence, as the magnitude of the business and assets of the Ætna Corporation demand, the receivers have lately ascertained as they allege—i. e., lately learned with certainty—that the said Belin, in their opinion, is indebted to the company in excess of $100,000, the principal sum of the note held by him. They then aver that the cause of action for the collection of the money is in equity. It is true that they do not here attempt to set forth the specific facts required in a bill in equity to warrant a recovery, but such is not here required. They are not attempting in this proceeding to set off this indebtedness against Belin's note. All that they are attempting here is to make such a showing as to justify the court's inquiry regarding the company's alleged set-off to Belin's note, though it rises out of equity. It is not doubted that if Belin held this note, without collateral, and he should press for judgment thereof by some appropriate action, the receivers of the Ætna Company in such action could set up their equitable counterclaim alleged against Belin to defeat his recovery. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 615, 14 Sup. Ct. 710, 38 L. Ed. 565. And if this be admitted it follows that reversing the parties will not defeat the same result in effect. The crucial point in the case is whether Belin is still the owner of the note? If he is, he should not be permitted to sell the collateral and waste the funds of the receivership, when at the same time it is charged that he is indebted to the receivers' company far in excess of the amount due him on the note. Of course, if it should appear upon hearing on the petition and answer that the note passed out of his possession for value before maturity, other questions would arise which require no attention here. After careful consideration the court has reached the conclusion that this case should come up on petition and answer.

The motion to dismiss is therefore denied.

PEERLESS LIGHT CO. v. LEVITON et al.

(District Court, S. D. New York. , December 23, 1916.)

COSTS ⇐173(2)—PRACTICE—DOCKET FEE—RIGHT TO.

Under Rev. St. § 824 (Comp. St. 1916, § 1378), allowing on final hearing in equity and admiralty a docket fee of $20, complainant, upon taking a decree pro confesso, is entitled to a docket fee; such decree being a final one.

In Equity. Suit by the Peerless Light Company against Evser Leviton and Isidor Leviton, copartners trading as the Leviton Gaslight Company. There was a decree for complainant pro confesso, and it moves for a docket fee. Fee allowed.

Hugo Mock, of New York City, for complainant.
Morris Berger, of New York City, for defendants.

AUGUSTUS N. HAND, District Judge. The question arises whether the complainant is entitled to a docket fee upon a decree taken pro confesso. Section 824 of the Revised Statutes (Comp. St. 1916, § 1378) allows, "on a final hearing in equity and admiralty, a docket fee of twenty ($20) dollars. * * *" In The Dwinsk (D. C.) 227 Fed. 958, I held that a docket fee could not be allowed in admiralty on the granting of a decree by consent of the parties.

That a docket fee is taxable where a decree is granted pro confesso is laid down in several cases, so that it can, I think, be regarded as the rule in this circuit. Judge Wallace decided that a docket fee could be taxed under precisely these conditions in the case of Andrews v. Cole (C. C.) 20 Fed. 410. Mr. Justice Blatchford, in the case of Wooster v. Handy (C. C.) 23 Fed. 49, said, at page 56:

"* * * To constitute 'a final hearing in equity or admiralty,' within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libelant has made out the case stated by him in his bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of pro confesso, or bill or libel and answer, or pleadings alone, or pleadings and proofs."

It might have been held that a "final hearing" meant such a situation as would entitle a litigant to a trial fee under the New York state practice; but such has not been the interpretation given to the federal statute, and the docket fee will ordinarily be allowed upon any determination of a suit which has not been discontinued, dismissed on complainant's own motion, or dismissed for lack of prosecution, or otherwise determined by consent. Ryan v. Gould (C. C.) 32 Fed. 754; Wigton v. Brainerd (C. C.) 28 Fed. 29.

In the case of a decree entered upon an order that the bill be taken pro confesso, Judge Wallace said in Andrews v. Cole, supra:

"The matter of the bill is still to be decreed by the court, and then only when it is proper to be decreed. The bill is to be examined to see if the facts alleged entitle the complainant to relief. According to the earlier practice of

the English chancery, a bill would not be taken pro confesso without putting the complainant to prove its material allegations. Johnson v. Desmineere, 1 Vern. 223. The later practice is to set down the bill for hearing, upon an order previously obtained that the bill be taken pro confesso, whereupon the record is produced, and the court hears the pleadings and pronounces the decree. The complainant is not permitted to take at his discretion such a decree as he may be willing to abide by. Geary v. Sheridan, 8 Ves. 192. This is the practice which obtains under the equity rules of this court. The consideration of the bill is a hearing, and is final when it results in the final disposition of the cause."

For the foregoing reasons, a docket fee should be allowed.

In re FALSONE.

(District Court, S. D. Florida. October 29, 1917.)

1. MORTGAGES ⟸559(9)—FORECLOSURE—DEFICIENCY JUDGMENT.
   Under Florida Rules of Practice, rule 89, which has the force of a statute, the courts of that state have power to enter deficiency decrees upon the foreclosure of mortgages and those decrees are personal judgments upon which execution may issue.
2. JUDGMENT ⟸828(3)—DECREE OF STATE COURT—ATTACK BY TRUSTEE.
   Where, on proceedings commenced after bankruptcy and to which the trustee was made the party, mortgages on the property of the bankrupt were foreclosed by the state court and deficiency decrees rendered, the trustee cannot attack the deficiency decrees on the ground that the property, which was bought in by the mortgagee, was sold for a mere nominal consideration; a judgment of a court of competent jurisdiction being subject to attack by a trustee in bankruptcy only for fraud or collusion, and the trustee, while charging inadequacy of consideration, making no charge of fraud or collusion.

In Bankruptcy. In the matter of the bankruptcy of J. A. Falsone. Petition by trustee to have the value of property sold and bought in by the Evansville Brewing Association, a mortgage creditor, applied to the amounts fixed in deficiency decrees. Proceeding to review the order of the referee granting the trustee's petition. Order reversed.

McKay, Withers & Phipps, of Tampa, Fla., for Evansville Brewing Ass'n.

George P. Raney, of Tampa, Fla., for trustee in bankruptcy.

CALL, District Judge. The Evansville Brewing Association is a creditor of the bankrupt, having held a mortgage to itself and two other mortgages acquired from others covering real estate of said bankrupt. These mortgages were foreclosed, and the property covered by them purchased by it, without competition, at the foreclosure sales, for some $2,000, which the trustee claims is merely nominal. After the master reported the sales to the state court, such sales were confirmed, and deficiency decrees amounting to over $38,000 entered against the bankrupt, after crediting the amounts bid on the decrees. The trustee seeks by his petition to the referee to have the value of the property sold under foreclosure proceedings and bought by the creditor at such

sale applied to the amounts decreed in these deficiency decrees, and a reduction pro tanto of such amounts. The referee, by his order of October 12, 1917, required the values of such property to be ascertained and so applied. It is this order which is brought before me for review.

The foreclosure proceedings were commenced after bankruptcy, and the trustee was duly made a party to such proceeding in the state court. The attorneys for the creditor claim that the order of the referee is erroneous, because the proof of claim submitted to the referee for allowance is a judgment of a court of competent jurisdiction and entitled to full faith and credit in the bankruptcy court, and therefore the referee erred in ordering the value of the property to be ascertained and amount of such value applied to the reduction of the deficiency decree.

[1] The state court, under rule 89 of Rules of Practice, prescribed by the Supreme Court of Florida, which rules have the force and effect of a statute, have the power to enter deficiency decrees upon the foreclosure of mortgages, and these decrees are personal judgments for the payment of money upon which execution may issue. Scott v. Russ, 21 Fla. 260.

[2] Mr. Collier, in his work on Bankruptcy, at page 861 (10th Edition), says that it seems that the law in the United States is that a judgment of a court of competent jurisdiction, regular in all respects, can be attacked by a trustee or creditor only for fraud or collusion. The cases of Winter's Appeal, 174 Fed. 556, 98 C. C. A. 338, and In re Dix (D. C.) 176 Fed. 582, were statutory foreclosures in which no deficiency decrees had been entered, and consequently no personal judgments against the bankrupt entered. The case of Hassall v. Wilcox, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001, is so different in its facts as to make the principle there decided inapplicable to the present case.

In the instant case the trustee was a party defendant, and no attack is made upon the regularity of the proceedings; but the consideration for which the mortgaged property was bid in by the creditor is claimed to have been grossly inadequate. No charge of fraud or collusion is made. Has the court of bankruptcy any power to go behind the face of the judgment, and reduce it by the true value of the mortgaged property obtained by the creditor at the public sale under the foreclosure proceedings? If the judgment is binding upon the parties and the creditors, and full faith and credit be accorded it, then the bankruptcy court is without this power.

For these reasons I am of opinion that the referee erred in his order providing for the ascertainment of the value of the mortgaged property and a reduction pro tanto of the creditors' claim.

The petition to revise will be granted.

MOORE v. AMERICAN FIDELITY CO. OF MONTPELIER, VT.

(District Court, W. D. Pennsylvania. October 4, 1917.)

No. 2.

APPEAL AND ERROR ⇐442—STAY OF PROCEEDINGS—RIGHT TO GRANT.

The replevin act of Pennsylvania of 1901 (P. L. 88) allows plaintiff, on entry of original judgment in his favor, to sue out a writ in the nature of a retorno habendo, or a writ of fieri facias for the value of the goods and damages, or to maintain an action on the replevin bond given. Plaintiff, in a replevin in the federal District Court for Pennsylvania, recovered a judgment against defendant, who sued out a writ of error to the Circuit Court of Appeals, which did not operate as a supersedeas; the writ being taken after the expiration of 60 days from the judgment, and no bail being given. Thereafter plaintiff began suit against the surety on the replevin bond. *Held* that, as the service of a writ of error or perfection of an appeal within 60 days is a condition to a supersedeas, and it is not within the power even of the appellate court to grant a stay of process if this has not been done, action on the replevin bond cannot be stayed until determination of the writ of error.

At Law. Action by James H. Moore, trustee in bankruptcy for Oswalt C. Gates, against the American Fidelity Company of Montpelier, Vt. Sur rule for stay of proceedings. Rule discharged.

E. O. Kooser, of Somerset, Pa., for plaintiff.

R. H. Hawkins, of Pittsburgh, Pa., for defendant.

THOMSON, District Judge. James H. Moore, trustee in bankruptcy for Oswalt C. Gates, brought an action of replevin against George H. Gates for certain horses and harness. The defendant, with the American Fidelity Company as surety, gave a counter bond for the retention of most of the property claimed. In that action the plaintiff obtained a verdict for $5,000, on which judgment was entered on February 19, 1917. Afterwards, on July 24, 1917, the plaintiff brought suit against above-named surety company on its bond, in which action the defendant, by affidavit of defense filed, admitted liability and tendered judgment for $5,350, with certain costs, denying liability for the balance of plaintiff's claim. The plaintiff thereupon took judgment for the amount admitted, taking a rule for judgment for the balance for want of insufficient affidavit of defense. On August 18, 1917, George H. Gates was granted a writ of error to the Circuit Court of Appeals from the judgment in the replevin suit, which did not operate as a supersedeas; the writ being taken after the expiration of 60 days from the date of judgment, and no bail for that purpose being given. On September 10th the surety company presented its petition, setting forth the taking of the appeal by Gates and praying for a stay of proceedings until the final disposition of said appeal. This application is opposed by the plaintiff.

Under these facts, should the prayer of the petition be granted? The answer to this question would seem to depend on the status of the replevin judgment upon the taking of the appeal. It was held in Line

v. State, 131 Ind. 468, 30 N. E. 703, that an appeal, where a supersedeas is obtained, stays proceedings on the judgment from which the appeal is prosecuted, but it does not preclude parties from suing on the judgment or prosecuting collateral or independent proceedings. In Nill v. Comparet, 16 Ind. 107, 79 Am. Dec. 411, it was said:

"The only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects, * * * until annulled or reversed, it stands binding upon the parties as to every question directly decided."

In Wood Mowing & Reaping Machine Co. v. Berry Harvester Co., 4 Pa. Dist. R. 141, suit was brought on a judgment recovered in New York. The affidavit of defense alleged an appeal from that judgment, the appeal operating as a supersedeas. On motion for judgment for want of sufficient affidavit of defense, it was held that the pendency of the appeal was no defense, the supersedeas going merely to the execution, not to the judgment. Judgment for plaintiff, with leave to produce proof of supersedeas in New York, which would stay execution in Pennsylvania.

In this case there is no supersedeas. The plaintiff has, therefore, an absolute right to proceed for the collection of his judgment as if the appeal had not been taken. This right cannot be interfered with. It was said by the Supreme Court in Kitchin v. Randolph, 93 U. S. 86, 23 L. Ed. 810:

"We are * * * of opinion that, under the law as it now stands, the service of a writ of error, or the perfection of an appeal within 60 days, Sundays exclusive, after the rendering of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a supersedeas, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done."

Having thus an absolute right to proceed upon his judgment for its enforcement, on what principle can it be said that he is deprived of the right to proceed against the surety, who became responsible for the payment of the judgment? Under the replevin act of Pennsylvania of 1901, on the entry of the original judgment the plaintiff had three remedies: First, a writ in the nature of a retorno habendo for the goods; second, a writ of fieri facias for the value of the goods and damages; third, an action, in the first instance, on the bond given. It would seem that these remedies could be superseded in one way only; that is, by appeal, with bond, and within the 60 days prescribed by the statute.

Under the facts of the case, to grant the prayer of the petition would appear to be depriving the plaintiff of a right given him by the statute. The rule to stay proceedings is therefore discharged.

Ex parte LYMAN.

(District Court, N. D. Georgia. November 19, 1917.)

CRIMINAL LAW ⊜1216(2)—SENTENCE TO IMPRISONMENT—COMMENCEMENT OF TERM.

Petitioner was convicted of a criminal offense and sentenced to imprisonment at San Quentin by a federal court in California. Pending error proceedings he gave a supersedeas bond and fled to Europe. He returned, and was again arrested and convicted of a separate offense in a federal court in New York, and sentenced to a term of imprisonment at Atlanta. During such term the judgment in California was affirmed, and he was again sentenced for the original term, to be confined at Atlanta. *Held*, that such term did not begin to run from the term of his second arrest, nor from the time of imprisonment under the New York sentence, but at the earliest from the time of his resentence, or from the time the warrant of commitment thereunder was received by the warden at Atlanta.

Petition by John Grant Lyman against Fred G. Zerbst, Warden of the United States Penitentiary at Atlanta, for a writ of habeas corpus. Writ denied.

See, also, 241 Fed. 945, 154 C. C. A. 581.

Arthur G. Powell and W. Carroll Latimer, both of Atlanta, Ga., for petitioner.

John W. Henley, Asst. U. S. Atty., of Atlanta, Ga., for respondent.

NEWMAN, District Judge. The petitioner, John Grant Lyman, says in the paper he has presented to the court that he is unlawfully detained in the United States penitentiary at Atlanta, Ga., and is being unlawfully restrained of his liberty by one Fred G. Zerbst, who is warden of said penitentiary. The petitioner, Lyman, prays for the issuance of an order as follows:

"Your petitioner prays for an order to show cause why a writ of habeas corpus should not issue to Fred G. Zerbst, ordering him to bring the body of your petitioner before this honorable court, that your petitioner may be discharged from said unlawful restraint and detention aforesaid."

On this petition an order was made in conformity with the prayer, directing that Fred G. Zerbst, warden, be served with a copy of the petition and this order, and that he show cause on the 12th day of November, 1917, at 10 o'clock a. m., why the prayer of the petition should not be granted and the order issued as prayed.

Fred G. Zerbst was duly served, and appeared and made answer to the petition. When the matter came before the court, the petitioner's wife stated to the court that she was unable, and the petitioner himself was unable, to employ counsel to represent him, whereupon the court appointed Arthur G. Powell, Esq., and W. Carroll Latimer, Esq., to represent the petitioner. They have done so, and the question is now before the court as to whether the writ of habeas corpus should issue.

An amendment was filed by the counsel representing Lyman, and I am considering this question on the original petition and the amendment alone, to ascertain, first, whether there is anything stated therein

which would entitle the petitioner to relief under the writ, if it were issued; and I am perfectly satisfied that the petition does not show such facts as would justify the court, in any view of it, in granting the petitioner relief under a writ of habeas corpus, if the same were allowed.

It appears that the petitioner was convicted in the United States District Court for the Southern District of California of the crime of using the mails in the execution of a scheme to defraud, in violation of section 215 of the United States Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]), and that he was sentenced, on January 9, 1914, to the state penitentiary at San Quentin, Cal., for a term of 1 year and 3 months. The case was taken, by writ of error, to the Circuit Court of Appeals for the Ninth Circuit, and was affirmed by that court on May 14, 1917. 241 Fed. 945, —— C. C. A. ——.

From the petition it appears that when the petitioner here took his case to the Circuit Court of Appeals, as stated, he gave bond in the sum of $20,000, conditioned for his appearance if the judgment of the District Court for the Southern District of California should be affirmed; that immediately upon his release on bail he fled to Europe, and that thereafter, in February, 1916, he was arrested in St. Petersburg, Fla., taken before a United States commissioner, and thereupon removed to the Southern District of New York; that he was thereafter convicted in the District Court for the said Southern District of New York of using the mails to effect a scheme to defraud, and on the 9th day of June, 1916, he was sentenced to a term of 18 months in the United States penitentiary at Atlanta, Ga., and delivered to the warden to begin the service of said sentence, which said sentence would expire October 22, 1917.

On receipt of the mandate of the affirmance of the judgment of the District Court for the Southern District of California, said mandate was duly entered on the records of that court, and on July 2, 1917, that court sentenced Lyman to 1 year and 3 months in the United States penitentiary at Atlanta, Ga.; the designation of the Atlanta penitentiary being made in pursuance of a letter from the Attorney General of the United States designating the United States penitentiary located at Atlanta, Ga., as the place of confinement of John Grant Lyman in lieu of San Quentin, Cal.

Petitioner's claim has been ably presented by his counsel, and the contention is that his original sentence in California, as I understand it, began to run when he was arrested by the officers of the United States in Florida, and, if not then, at the time of his arrival at the United States penitentiary in pursuance of the New York sentence; that is, the contention is that, notwithstanding the fact that he had taken the California case, by writ of error, to the Circuit Court of Appeals for the Ninth Circuit, and his sentence had been superseded by his giving bond in the sum required by the court, and that no order had been made by either the Circuit Court of Appeals for the Ninth Circuit or the District Court for the Southern District of California, the sentence began to run from the time he was arrested for another offense by

the United States, or at least, as petitioner alleges, from the time he was received at the penitentiary under his New York sentence.

I am wholly unable to see how this contention can be sustained. It is alleged in the petition that the appeal of Lyman to the Circuit Court of Appeals in California was stricken from the docket, and that his bondsmen secured a warrant for his arrest as a fugitive from justice. Lyman claims that when he was taken to New York from Florida he protested against such action, and asked to be taken to California to serve his sentence at San Quentin, and that upon being brought before the United States commissioner at Tampa, Fla., he formally surrendered himself and asked to be removed to California, and asked to be allowed to serve his sentence there; that he also telegraphed the court in California, asking that his stay of execution be canceled, his appeal withdrawn, and that he be permitted to serve his sentence; that he wrote to Judge Wellborn, judge of the Southern District of California, twice, once from Lucerne, Switzerland, stating that he would return when wanted, and again from Boston, Mass., on his return to this country; that he was hiding from his bondsmen, who were blackmailing him, and constantly calling for money, and threatening to give him up if he did not pay; that he paid one of his bondsmen $2,500, two weeks before his arrest, to avoid such contingency.

There is nothing shown from the California court, except the commitment first to San Quentin, and then, after the determination of the case by the Circuit Court of Appeals, his sentence to the penitentiary at Atlanta. No record is presented showing the striking of the case from the docket, or any record showing the bond, although this latter is assumed here to be true. If the case was stricken from the docket in California, it was for some reason not developed here, and must be presumed to have been for a satisfactory reason, for the court subsequently decided the case and returned its mandate to the District Court.

I do not think there is anything in any of these matters which are contended for here which would justify this court in saying more than that the sentence may have commenced to run concurrently with the New York sentence, either at the time it was last imposed, July 2, 1917, and to the penitentiary at Atlanta, or upon his being received in the penitentiary at Atlanta under the California sentence, which appears to have been on July 9, 1917; and, considering either of these dates to be the time when his sentence from the California court commenced to run, it does not expire for nearly a year yet, so that there is no illegal confinement of Lyman by the warden in the penitentiary at Atlanta.

On the ground, therefore, that no relief could be granted him on the facts stated, even if the writ of habeas corpus should issue, the issuance of the writ will be denied.

In re EAST STROUDSBURG GLASS CO.

(District Court, M. D. Pennsylvania. December 22, 1917.)

No. 3528.

1. CHATTEL MORTGAGES ⟸116—CONSTRUCTION—FIXTURES.
A bankrupt corporation, which was engaged in the business of manufacturing glass bottles, mortgaged all its buildings, machinery, plant, tools, equipment, and franchises necessary for the operation of its business. The plant, aside from buildings, consisted of a tank where the material for the making of glass was melted. The tank was located in the center of the main building and had a number of openings through which the glass material is removed by the workmen and molded into bottles, some of the work being done by hand and some by machinery. The machines for molding bottles were attached to the furnace, as were the molds used in connection with such machines. *Held*, that the hand molds, as well as the machine molds, passed under the mortgage, whether such molds were fast or loose, being a part of the freehold necessary to the carrying on of the manufacturing operations.

2. CHATTEL MORTGAGES ⟸124—CONSTRUCTION—AFTER-ACQUIRED PROPERTY.
In such case, machines and molds added since the plant was mortgaged became an integral part of the factory or plant, and passed equally under the mortgage with the portion originally aliened.

In Bankruptcy. In the matter of the East Stroudsburg Glass Company. The trustee petitioned the court to restrain the sale of certain of the bankrupt's property by the Security Trust Company, as trustee for bondholders secured by a mortgage, on the ground that it was not bound by the lien of the mortgage. The court permitted a sale of all the property, directing that the proceeds should be kept separate. On rule to show cause why restraining order should not be made permanent. Rule dismissed, and proceeds awarded to the lien creditor.

Eilenberger & Huffman, of Stroudsburg, Pa., for trustee for bondholders.

A. Mitchell Palmer and C. R. Bensinger, both of Stroudsburg, Pa., for trustee.

WITMER, District Judge. [1] The Security Trust Company, of Stroudsburg, Pa., as trustee for the bondholders of a certain mortgage aggregating $50,000, upon their judgment, through scire facias sur mortgage, obtained from the court of common pleas of Monroe county a writ of levari facias, upon which the sheriff levied and advertised for sale, in the language of the conditions of the mortgage:

"All buildings, machinery, plant, tools, equipment, and franchises which are necessary, useful, or convenient for use, maintenance, or operation of its business, and also all renewals, replacements, additions, betterments, improvements, enlargements, and extensions thereof and thereto, now or hereafter belonging to said company," including the following: 380 hand molds, assorted sizes and kinds; 202 machine molds, assorted sizes and kinds; 129 set bottle finishing tools; 2 O'Niel narrow-mouthed blowing machines.

The trustee for the bankrupt's creditors petitioned the court to restrain the sale of this property on the ground that the same was not

bound by the lien of the mortgage, and that it formed part of the general unpledged assets of the estate. The court, after hearing, being satisfied that it would be to the best interest of the party ultimately succeeding in establishing title to the property in dispute that the same should be sold by the sheriff, when the plant or real estate of the bankrupt company was offered for sale, ordered and directed that the restraining order be released, and permitted the sheriff to sell such property, at the time stated, offering each parcel or item of property by itself, and then and there retain separately and apart the proceeds or moneys realized for each item until and for the further order of the court.

The question remaining to be disposed of, in determining the ownership of the proceeds derived from such sale, has to do with the title to the property in dispute, whether belonging to the execution plaintiffs, bound by the lien of their mortgage, or whether free from such, having passed to the trustee for the bankrupt's unsecured creditors. Answer to these questions depends much, if not altogether, upon the use of these articles in connection with the bankrupt's business, that of manufacturing glass bottles.

The machines, molds, and tools were found in the bankrupt's plant, where they were in use for some years. It may be that some of the molds were old and beyond usefulness, as is ordinarily to be supposed; but the testimony is not clear upon this point, and, failing to distinguish, the inference remains that all were useful in connection with the business. The plant, in the main, aside from the buildings, consists of a furnace or tank, where the material that goes into the making of glass is heated and transformed into a molten semiliquid mass. The tank is located in the center of the main building and has a number of openings in it, known as "rings." Through these rings the glass material in its heated condition is removed from the furnace by the workmen or blowers, and molded or shaped into glass bottles. This may be done by hand or machinery. Formerly all glass blowing and shaping was by hand, which has now by modern improvement and invention given way to machinery. It is admitted that the latter method, that by machinery, is the more successful, being both economic and productive of uniformity in the required product.

In the bankrupt's plant, bottles were made by hand and by machine. The finishing tools in dispute are the instruments used by the hand blowers and the machines when the operation is by machinery. The molds in each case are the necessary and essential part to give the product its required shape. The machines were placed in position for operation by cutting sections of the foot bench along the furnace, on which the hand operators worked. They were placed in these sections close to and against the furnace and attached to the air system when in operation. The molds used in connection with the machines were also attached to it; however, it matters little, if any, whether any of these machines, tools, and molds were in any manner actually and physically attached to or affixed to any portion of the real estate. They were apparently so absolutely essential as instruments to the successful operation of the bankrupt's plant that they must be regarded as

part of it. Without these instruments, or others of like kind, the business for which the plant was erected could not have been carried on, and so the case is brought within the rule laid down by Judge Gibson, in Voorhis v. Freeman, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490, where he said:

"Whether fast or loose, thereof, all of the machinery of a manufactory, which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold."

That this rule has been uniformly followed in similar cases since then will appear from the following, which may be consulted, if further authorities are of importance: Pyle v. Pennock, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517; Edge v. Kille, 84 Pa. 333; Morris' Appeal, 88 Pa. 383; Sampson v. Graham, 96 Pa. 405.

[2] Nor does it matter that the machines and some of the molds were added since the plant was mortgaged. As they were introduced, they became an integral part of the factory or plant, and so became equally bound under the mortgage with the portion originally aliened. Roberts v. Bank, 19 Pa. 71; Muehling v. Muehling, 181 Pa. 483, 37 Atl. 527, 59 Am. St. Rep. 674.

The rule to show cause is dismissed, and the proceeds of the sale of the items herein mentioned are awarded to the lien creditor.

Ex parte GERLACH.

(District Court, S. D. New York. December 10, 1917.)

1. ARMY AND NAVY ⇐44(2)—ARTICLES OF WAR—SCOPE—"PERSON ACCOMPANYING THE ARMIES OF THE UNITED STATES"—"SERVING WITH THE ARMIES OF THE UNITED STATES"—"IN THE FIELD."

Petitioner went to Europe as mate on a vessel apparently in use as a military transport. He was there discharged and sent back on an army transport. He volunteered to stand watch, and for several days did so, but finally refused to continue. For such disobedience to a military order of an army officer, he was tried by court-martial and sentenced to imprisonment. The second Article of War (Rev. St. § 1342, as amended by Act Aug. 29, 1916, c. 418, 39 Stat. 651 [Comp. St. 1916, § 2308a]), declaring that all retainers to the camp and all persons accompanying or serving with the armies of the United States, without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, are subject to the Articles of War. *Held*, that petitioner was a "person accompanying the armies of the United States" and was voluntarily "serving with the armies of the United States" at the time he disobeyed the order, and furthermore was in the field and without the territorial jurisdiction of the United States, within the meaning of the article, the words "in the field" not referring to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications where military operations are being conducted; and hence, under Articles of War, the court-martial had exclusive jurisdiction to try petitioner for his refusal to stand watch as directed.

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2. ARMY AND NAVY ⟸5—ARTICLES OF WAR—AUTHORITY OF CONGRESS.
Under Const. U. S. art. 1, § 8, authorizing Congress to raise and support armies, make rules for the government of land and naval forces, and make all laws which shall be necessary to carry into execution the following powers, Congress is authorized to enact articles of war, and it is within the power of Congress, in aid of the general war power, to make all retainers to the camp and all persons accompanying or serving with the armies of the United States, or in the field, subject to Articles of War, though not a part of the military personnel.

Application of Charles E. Gerlach for a writ of habeas corpus to obtain his release from imprisonment under a sentence of court-martial. Writ dismissed, and petitioner remanded to the custody of military authorities.

Silas B. Axtell, of New York City, for petitioner.

Francis G. Caffey, U. S. Atty., and Ben A. Matthews, Asst. U. S. Atty., both of New York City, for respondent.

AUGUSTUS N. HAND, District Judge. Charles E. Gerlach, an employé of the United States Shipping Board, went to Europe as mate on the steamship McClellan, a vessel apparently in use as a military transport, though this fact was not definitely proved. He was there discharged, and sent back on the El Occidente, an army transport, to New York. He volunteered to stand watch, and for several days did this, but finally refused to continue. For this disobedience to the order of an army officer, who was in command of the transport, he was tried by a court-martial and sentenced to five years' imprisonment.

The second Article of War (R. S. § 1342, as amended by Act Aug. 29, 1916, c. 418, 39 Stat. 651 [Comp. St. 1916, § 2308a]) reads as follows:

"The following persons are subject to the Articles of War: * * *

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to" the Articles of War.

[1] I think Gerlach was a person accompanying the army of the United States, and also voluntarily serving with the armies of the United States at the time he disobeyed the order. I further hold that he was "in the field" and without the territorial jurisdiction of the United States within the meaning of the article. The words "in the field" do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted. In this case he was on an army transport, and peril from submarines existed when he refused to stand watch. The captain in charge of the vessel had, in my opinion, the right to call upon all persons on board to protect the transport in any way that seemed best in view of the danger. The section

of the Articles of War subjecting persons accompanying armies to military authority not only enables military officers to preserve order on the part of such persons, but also in the cases that it covers to call on them for assistance and direct their action while they are properly in the field of military operations. The court-martial, therefore, had exclusive jurisdiction by the terms of the Articles of War over this man, who not only accompanied the army, but volunteered to serve, unless the act of Congress, which adopted the Articles of War, is unconstitutional.

[2] Section 8 of article 1 of the Constitution is the source of authority for the Articles of War. Congress is thereby given power to raise and support armies, to make rules for the government of land and naval forces, and to make all laws which shall be necessary for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States. The Articles were enacted in pursuance of the general war power, and ought to be given a broad scope in order to afford the fullest protection to the nation. The act is, in my opinion, constitutional. That an officer should be able to call upon a person accompanying the military forces to protect a transport and its occupants in time of danger, particularly where he had volunteered and indeed asked to stand watch as Gerlach had, is certainly within the fair object of the Articles of War, and is a reasonable exercise of authority.

The writ was properly dismissed, and the prisoner remanded to the custody of the military authorities.

ATLANTIC TURPENTINE & PINE TAR CO. v. ROSIN & TURPENTINE EXPORT CO.

(District Court, S. D. Georgia, E. D. February 5, 1918.)

No. 57.

1. PRINCIPAL AND AGENT ⇐69(4)—SALES AGENT—RIGHT OF AGENT TO PURCHASE.

Under Civ. Code Ga. 1910, § 3582, declaring that without the express consent of the principal, after a full knowledge of all the facts, an agent employed to sell cannot be himself the purchaser, an agent to sell is not, without the consent of his principal, authorized to make sales in foreign markets under an arrangement whereby the agent should assume all risks and contingencies of loss and take all the profits, as this would amount to a sale by the agent to himself, and one cannot lawfully do by indirection what he is positively forbidden to do.

2. PRINCIPAL AND AGENT ⇐84—SALES AGENTS—COMMISSIONS.

Where a sales agent, without the consent of his principal, sold goods in a foreign market under an arrangement whereby he was to assume any loss incurred and to take the profits, such agent, having violated his agreement, is not, under Civ. Code Ga. 1910, § 3586, entitled to any commissions, but the principal is entitled to all profits, subject to no deduction for commissions.

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

In Equity. Bill for accounting by the Atlantic Turpentine & Pine Tar Company against the Rosin & Turpentine Export Company. Decree for complainant.

O'Byrne, Hartridge & Wright, of Savannah, Ga., for plaintiff.
Osborne, Lawrence & Abrahams, of Savannah, Ga., for defendant.

EVANS, District Judge. This is a bill by a principal against his sales agent for an accounting for profits alleged to have been received by the sales agent from the sale of consignments to himself without the principal's knowledge or consent. The contract is contained in a letter from the agent to his principal, proposing to sell the latter's manufactured products, and to receive for such services a commission of 5 per cent. The written contract did not authorize the agent to buy from his principal, but the agent pleaded that, shortly after the contract was made, his principal, by parol agreement, altered it to the effect that on all foreign business the principal was to quote the agent a price f. o. b. car or ship side Savannah, in which price was to be included a 5 per cent. commission to the agent, who was authorized to sell the principal's goods for delivery foreignwise; the agent taking all risk incident to fluctuations in freights, exchange, insurance, inability to procure bottoms, etc., and such profits as might accrue from the foreign business was to belong to the agent. The agent further pleaded that immediately after the foreign business was begun a course of dealing was pursued by the parties which was a departure from the written contract, in that the agent sold certain products of his principal quoted by the principal to him, and thereafter the agent assumed all the hazard of selling and transporting same to foreign markets. This departure was acquiesced in and adopted by both parties to the contract. I do not think, under the preponderance of the evidence, that any parol modification of the written contract was made by the parties.

[1] On the feature of the case that the parties had departed from the contract by a course of dealing implicative of a mutual understanding that consignments sold by the agent in foreign markets was to be accounted for at prices quoted to the agent by the principal, less 5 per cent. commission, I find that the evidence is too inconclusive to authorize this deduction. The Code of Georgia (section 3582) declares that "without the express consent of the principal after a full knowledge of all the facts, an agent employed to sell cannot be himself the purchaser." One cannot lawfully do by indirection what he is positively forbidden to do. The practical effect of a sale by the agent in foreign markets, where the agent was to assume all risks and contingencies of loss, and take all the profits, would seem to be nothing more than a sale to himself. Such a sale is forbidden, unless by the express consent of the principal, which I find was not given.

But, even if the doctrine of mutual departure from a written contract by a course of dealings be applicable to a contract between a principal and an agent to sell, I do not think the evidence sufficiently strong to infer that the principal had notice that the agent was pursuing a course of conduct variant with the written contract, and acquiesced in

the agent's contention that the latter was entitled to receive all profits of goods sold in foreign markets above the quotations in the principal's invoice of consignment.

[2] The agent did not account for foreign sales. There were no losses, and he claimed the profits adversely to his principal. What effect did his conduct in this respect have on his contractual stipulation for commissions? This query is answered by section 3586 of the Code of Georgia, which declares that an agent who violates his engagement is entitled to no commission.

It was stipulated on the trial that the agent's books correctly show the profits he made on foreign sales. Under my view of the case, the principal is entitled to recover this amount, without deduction for commissions, with 7 per cent. interest thereon from the time the profits which came into the agent's hands should have been remitted to the principal, agreeably to the written contract.

Leave is given to the complainant to enter up judgment accordingly.

INGERSOLL et al. v. DOYLE et al.

(District Court, D. Massachusetts. December 21, 1917.)

No. 827.

1. TRADE-MARKS AND TRADE-NAMES ⇐61—INFRINGEMENT—ALTERATION OF TRADE-MARK ARTICLE.

The alteration by another of an article which is sold by the maker under a trade-mark and with his warranty makes it a new construction, the sale of which, with the trade-mark and warranty of the original maker still thereon, is an infringement of the trade-mark, even though it is marked to indicate the alterations, and by whom made.

2. COURTS ⇐263—JURISDICTION OF FEDERAL COURTS—SUIT FOR INFRINGEMENT OF TRADE-MARK.

In a suit in a federal court for infringement of trade-mark, where there is diversity of citizenship between the parties to give jurisdiction, the court may grant relief against the violation of common-law trade-mark rights, which do not depend on transactions in interstate or foreign commerce.

In Equity. Suit by Robert H. Ingersoll and others against Edward L. Doyle and others. On complainants' motion for preliminary injunction and defendants' motion to dismiss. Motion to dismiss denied. Motion for injunction granted.

Nathan Matthews and William G. Thompson, both of Boston, Mass., for plaintiffs.

Walter Pyne, of Lynn, Mass., for defendants.

DODGE, Circuit Judge. The defendants dispute neither the facts alleged in the bill nor those set forth in the plaintiffs' affidavits. All

said facts are admitted for the purposes of this hearing. Nor have the defendants contended that their dealings, as thus admitted, with watches of the plaintiffs' manufacture bearing the marks, containing the guaranty, and marketed in the boxes which the bill describes, do not violate the plaintiffs' exclusive rights in the registered mark "Ingersoll," as designating watches of their manufacture, and in the words "Midget" and "Radiolite," used in connection therewith as designating various grades of Ingersoll watches respectively.

[1] I consider it clear that no attempt to justify the defendants' doings above referred to could succeed. In effect, they are sales of watches under representations that the watches sold are made and guaranteed by the plaintiffs. But such representations are untrue. An Ingersoll watch of either grade referred to, or of any grade, after the defendants' additions thereto or alterations therein have been made, is no longer what its makers offer to the public as a guaranteed Ingersoll watch; it has become a new construction. General Electric, etc., Co. v. Re-New Lamp Co. (C. C.) 121 Fed. 164; Id. (C. C.) 128 Fed. 154; Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 131 C. C. A. 626; Coca-Cola Co. v. Bennett, 238 Fed. 513, 151 C. C. A. 449.

Jurisdiction in this court appears, not only from the allegations that the plaintiffs own the above registered trade-mark, but also from the allegations showing diverse citizenship of the parties.

The defendants' motion to dismiss must be denied. The plaintiffs' right to an injunction is regarded as established.

The defendants have requested modifications in the decree submitted by the plaintiffs, according to which the defendants are enjoined—

"from selling or offering for sale or delivering to others for sale any watch as an Ingersoll watch, which, though originating in the complainants' factory, has been altered or added to so that it no longer is in its entirety the product of" the plaintiffs.

The defendants ask either the elimination of the above, or that, if retained, it be qualified by adding:

"Unless the defendants impress upon the dial of any such watch words plainly legible and plainly indicating that said watch has been altered and the particulars in which it has been altered by the defendants."

They also ask the insertion, after "from selling or offering for sale or delivering to others for sale," of the words "in interstate or foreign commerce."

As to the first request, if, as I think, the defendants violate the plaintiffs' exclusive rights when they market their altered watches as Ingersoll watches without indicating the fact of alteration thereon, they would still be violating the plaintiffs' exclusive rights if they marketed such watches as Ingersoll watches with the proposed indication thereon. They would still be marketing, as Ingersoll watches, watches not such in their entirety, but new constructions. The defendants do not stand as if they had rights of their own to market other watches as Ingersoll watches, and were bound only to distinguish their product from the plaintiffs'.

[2] As to the second request, the defendants violate, not only rights in a registered trade-mark, but also rights in common-law trade-marks, and are therefore trading unfairly as regards the plaintiff. Against such violations of their rights the plaintiffs, in a bill based on diverse citizenship, are entitled to relief.

The decree submitted by the plaintiffs may be entered, and an injunction may issue accordingly.

CRAVEN v. CLARK.

(District Court, D. Massachusetts. October 27, 1917.)

No. 120.

DISMISSAL AND NONSUIT ⊂⇒81(8)—RESTORATION AFTER DISMISSAL—EXCUSABLE NEGLECT.

Some time after the filing of the auditor's report, which was adverse to plaintiff, his counsel died. Plaintiff did not understand that the case was likely to be dismissed or dropped by the court, and delayed for some time in securing other counsel. After the case had been closed by the entry "Neither party," counsel consulted by plaintiff moved to docket the case; but such counsel filed no appearance. *Held*, in view of the fact that plaintiff endeavored to have the case put on the trial calendar, his negligent delay in securing other counsel should not preclude restoration of the case to the docket on his giving security for payment of costs accrued.

At Law. Action by Michael Craven against Embury P. Clark. The case was closed by the entry of "Neither party." On motion by plaintiff to restore the case to docket. Motion granted, on condition.

Samuel W. Emery and Hoar & Dewey, all of Boston, Mass., for plaintiff.

Christopher T. Callahan, of Holyoke, Mass., and Hurlburt, Jones & Cabot, of Boston, Mass., for defendant.

MORTON, District Judge. On May 3, 1915, this case was closed by an entry of "Neither party," entered by the clerk under the general order of March 16, 1915, for the disposition of cases in which no action had been taken for more than two years preceding April 1, 1915. The plaintiff now moves that the entry be vacated and the case be restored to the docket.

The action was begun on June 29, 1910, by a writ in this court. It was referred to an auditor and was fully heard by him, and his report was filed on October 18, 1911. In November, 1912, Mr. Emery, counsel for the plaintiff, died, and no other counsel appeared for the plaintiff until in connection with this motion. Notice that the action was subject to dismissal under the general order was mailed by the clerk to Mr. Emery. What became of it does not appear. The plaintiff

knew about Mr. Emery's death shortly after it occurred, and made various efforts to get other counsel. His wife died during this period, but, so far as appears, he himself was able to attend to his business affairs. He did not, however, know that the case was likely to be dismissed or dropped by the court. Counsel consulted by him made an oral request of the clerk to put the case upon the trial list in the spring of 1915, but did not at that time enter any appearance. The request was not complied with, because it came too late, the list having been already made up; and nothing further was done about the case until this motion.

It thus appears that for about 3½ years after the filing of the auditor's report, which was against the plaintiff, no action was taken by the plaintiff in further prosecution of his case. During that time his counsel died, but he knew of the death, and knew that it was necessary for him either to get other counsel or to attend to the case himself. There does not seem to have been an intentional abandonment of it. His action in endeavoring to have it put on the trial list last spring disproves that. If the facts had been called to the attention of the court before the order of dismissal was entered, it would not have been dismissed. The plaintiff was plainly at fault for not following up his case himself, or seeing that he had counsel to do so, after Mr. Emery's death. I think, however, that to adhere to the entry of "Neither party" is to penalize such negligence too highly.

If, within 60 days from the entry of this order, the plaintiff shall give to the defendant satisfactory security for the payment by the plaintiff of the defendant's taxable costs to date, in case the defendant shall finally prevail, the entry "Neither party" is to be struck off, and the case is to be restored to the docket; otherwise, the entry is to stand.

In re SUGAR PRODUCTS CO. et al.

(District Court, S. D. New York. December 1, 1917.)

COURTS ⇐508(2)—INJUNCTION BY UNITED STATES COURT TO RESTRAIN PROCEEDING IN STATE COURT.

A charterer of a vessel which was lost has no claim against the vessel for the recovery of prepaid charter hire, which can be asserted in proceedings by the owner for limitation of liability; but such cause of action is personal, and an action thereon in a state court cannot properly be enjoined by the admiralty court in the limitation proceedings.

In Admiralty. Proceeding by the Sugar Products Company and the Sugar Products Shipping Company, Incorporated, owners of the steam tug C. W. Morse, for limitation of liability. On motion by petitioners for injunction. Denied.

J. Dexter Crowell, of New York City (I. R. Oeland, of New York City, of counsel), for petitioners.

Bullowa & Bullowa, of New York City (Emilie M. Bullowa, of New York City, of counsel), for respondent Universal Transp. Co.

AUGUSTUS N. HAND, District Judge. The above petitioners instituted a proceeding for limitation of their liability. The owners deposited in court as pending freight $10,000, which was paid by the Universal Transportation Company as charter hire prior to the date of the alleged loss of the vessel. The charter party contained the provision:

"That should the tug be lost, all moneys paid to the owner by the charterers shall be retained by the owner, but hire shall cease from the date of loss."

The charterers seek to have the $10,000 prorated, and to recover a balance in an action which they have brought in the Supreme Court of New York. The petitioners move in this court to restrain the prosecution of the action in the state court.

Judge Choate held in the case of In re Liverpool & Great Western Steam Co. (D. C.) 3 Fed. 168, that a claim for prepaid freight was not a claim based upon the loss or destruction of the goods, and that it could not be proved in a limitation proceeding. The same line of reasoning was adopted in The Leonard Richards (D. C.) 41 Fed. 818. The contract here is, I think, a personal contract. The petitioners contend that the charterer is seeking to reach a fund in the custody of this court by proceeding in the state court. I cannot see that this is so. The charterer is suing at law to recover an overpayment under what it deems to be a proper construction of the charter party. Its right of action does not arise out of the loss of the ship or from anything the ship has done, but because a contingency which the charterer says was provided for in its contract has happened. How the charterer can recover —how, indeed, it is not expressly precluded from recovering by the language of the charter party—in any tribunal I cannot discover; but I think it clear that the cause of action is personal, and not one which can be asserted in the limitation proceeding. There is no doubt that this court can determine the amount of pending freight as between the owner and claimants to the fund in the limitation proceeding as was done in La Bourgogne, 139 Fed. 433, 71 C. C. A. 489, affirmed 210 U. S. 95, 52 L. Ed. 973, but not as between the owner and persons who are not proper claimants in that proceeding. If too much is deposited, a creditor is not prevented from recovering upon a personal contract that gave rise to no lien against the ship.

Motion denied.

FIRESTONE TIRE & RUBBER CO. v. RIVERSIDE BRIDGE CO.

(Circuit Court of Appeals, Sixth Circuit. January 17, 1918.)

No. 3029.

1. APPEAL AND ERROR ⟸1022(1)—REVIEW—FINDINGS.
The concurrent findings of a master and the trial judge will not be disturbed on appeal, upon any less than a demonstration of plain mistake; this being especially true where the trial court's opinion showed that the master was well fitted to discharge his duties, and that the judge most painstakingly scrutinized the report and exceptions.

2. CONTRACTS ⟸350(1)—CONSTRUCTION—EVIDENCE.
On a bill to foreclose a mechanic's lien, a finding by the master, concurred in by the lower court, that the contractor was equitably entitled to a month's extra time for completing the work by reason of defendant's delays and other unavoidable delays, *held* not contrary to the evidence.

3. CONTRACTS ⟸284(4)—BUILDING CONTRACTS—ARBITRATION.
Where a building contract provided for submission of claim for extension of time of construction to the owner's engineers, and for arbitration in case of dissent from their decisions, a presentation of claim for extension, and its rejection by the engineers or arbitrators, would bar it.

4. CONTRACTS ⟸284(4)—BUILDING CONTRACTS—EXTENSIONS—ARBITRATION.
In such case the rejection of the claim by the engineers or arbitrators is final, though the engineers pass on the question whether their own default caused delay which, under the contract, entitled the contractor to an extension.

5. DAMAGES ⟸122—BUILDING CONTRACTS—EXTENSION OF TIME.
A building contract, which made the contractor's obligation to complete erection of the steel work by dates named conditional upon the absence of delays, due to rolling mill, transportation, or other circumstances beyond the contractor's reasonable control, further declared that, if the contractor should be delayed by any act, neglect, or default of the owner, or delay due to rolling mills, the time for completion should be extended for a period equivalent to the time lost, and that such period should be determined and fixed by the owner's engineers, but no allowance should be made unless a claim therefor should be presented in writing to the engineers within 48 hours of the occurrence of the delay. There was a further provision for arbitration in case of dissatisfaction with the engineers' award. Due to numerous short delays, occurring in a brief space of time, the contractor was delayed for at least a month. The contractor continued work, and the engineers gave an estimate which the defendant owner refused to pay; its previous notice of a willingness to arbitrate not having been acted upon. After completion of the building, the contractor sued for the balance of the contract price and for extras, and defendant demanded a foreclosure of its lien, which, as the action was in the federal court, necessitated the filing of a bill on the equity side of the court. Defendant answered, setting up its damages by reason of the contractor's delay, and by a cross-bill prayed a decree for the amount of its damages, less the amount of the contract price, unpaid. *Held*, that where, in such suit, there was little doubt that an extension for at least a month would have been given, had the contractor so asked, and as it continued work long after the lapse of the contract period, and defendant accepted the work, defendant, which in reality was claiming damages in a court of equity, falls within the rule that he who seeks equity must do equity, and the contractor is entitled, on the computation of damages for its delay, to have the case treated as if the period for completion had been extended for at least one month.

6. CONTRACTS ⟸322(4)—ACTIONS—EVIDENCE.
In a suit by a contractor to foreclose his lien for payment due, *held*, that a finding by the master, concurred in by the trial judge, that the contractor's steel erection was on a certain date so far completed as not to substantially interfere with follow-up trades, should not, under the evidence, be rejected as erroneous.

7. DAMAGES ⟸163(2)—MINIMIZING DAMAGES—BURDEN OF PROOF.
While it is the duty of a party not in default to minimize the damages arising from the opposite party's default, the burden of proving that the damages could have been mitigated is upon the party asserting it.

8. EVIDENCE ⟸595—BURDEN OF PROOF—CONSIDERATION OF EVIDENCE.
Though the burden of proving an issue be on a particular party, inferences may be drawn from testimony, regardless of its source.

9. DAMAGES ⟸189—BUILDING CONTRACTS—EVIDENCE.
A finding by the master, concurred in by the trial judge, to the effect that the defendant owner did not use reasonable efforts to minimize its damages, resulting from the contractor's breach, *held* not so contrary to the evidence that it could be disturbed on appeal.

10. DAMAGES ⟸140—ADEQUACY—BUILDING CONTRACTS.
In a suit by a contractor to foreclose its lien, the award of damages on account of the contractor's delay in completion of the building *held*, under the evidence, adequate.

11. DAMAGES ⟸122—BUILDING CONTRACTS—DELAY IN COMPLETION.
Where a delay in completion of a building was due, partly to the default of the contractor (in a certain time proportion only) and partly to the default of the owner, the contractor is not liable in damages for the owner's loss of rentals by reason of the delay.

12. COSTS ⟸158—ALLOWANCE—OVERRULING OF OBJECTIONS TO MASTER'S REPORT.
Where, because the master's original report was not sufficiently full to permit a disposition of the exceptions thereto without an original examination by the court of all testimony presented, the court re-referred the cause, no allowance of costs under general equity rule 67 (198 Fed. xxxvii, 115 C. C. A. xxxvii), should be made on account of objections and exceptions to the master's first report overruled, which were practically duplicated in the exceptions and objections to the second report.

Appeal from the District Court of the United States for the Northern District of Ohio; John H. Clarke and John M. Killits, Judges.

Bill by the Riverside Bridge Company against the Firestone Tire & Rubber Company. From a decree for complainant, defendant appeals. Modified, and, as modified, affirmed.

Amos C. Miller and Miller, Gorham & Wales, all of Chicago, Ill., and Hills & Van Derveer, of Cleveland, Ohio, for appellant.

Arthur A. Stearns and Stearns, Chamberlain & Royon, all of Cleveland, Ohio, for appellee.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. By written contract dated May 25, 1910, and completely signed three days later, appellee, whom we shall call plaintiff, agreed to provide materials for and perform the work connected with the fabricating and erecting of the structural steel and iron work, including stairwork, for a reinforced steel factory building of appellant, hereinafter called defendant. At defendant's instance, the structural steel was to be purchased by plaintiff from the Carnegie

Company, with whom defendant had friendly business and personal relations. Defendant was to complete the foundations for the structure on or before July 14. This being done (as well as other things required of defendant, not necessary to enumerate), plaintiff was to begin the erection on July 14, and to complete the steel framework by September 2, and the stairwork by September 12 following, provided there were no delays due to rolling mills or other circumstances beyond plaintiff's reasonable control. The concreting and brickwork were to be done by defendant through a contractor working on a cost plus percentage basis, and plaintiff's contract provided for agreement between plaintiff, defendant's engineers and the concrete contractor upon a method by which plaintiff's work should be so begun and prosecuted as to permit the concrete contractor to begin work as soon as practicable after plaintiff's erection of the structural steel should be begun. Plaintiff's work was not fully completed until about December 1 to 7, 1910. Defendant, however, accepted the work as it progressed and finally, and made during the progress of the work four payments (aggregating 70 per cent. of the contract price, based on estimates provided for by the contract), the first on July 15 and the last on October 25, 1910; the concreting and brickwork, as well as the work of the other "follow-up" trades being carried on in conjunction with and following plaintiff's steel erection.

The bill in this cause is filed to enforce a mechanic's lien for the full amount of the contract price, together with the value of certain extra work done and payments made by plaintiff for defendant's benefit. No question is made of the regularity and effectiveness of the lien proceedings, nor of plaintiff's right to recover its full claim, except as affected by defendant's asserted claim for damages due to plaintiff's delay in performing its work—consisting of increased cost of concreting and bricking in cold weather, plus rental of the building during the period of delay. The special master to whom the issues were referred found that plaintiff's erection of the superstructure was actually begun August 9; that the steel was not shipped by the Carnegie Company until 30 to 50 days after the order date (in fact, there was an average interval of 38 days); that the defendant's engineers held 60 out of 116 of plaintiff's drawings from 12 to 31 days after their receipt, and in several instances from 1 to 19 days even after their approval by the engineers; that the necessary time for approving these drawings was from 2 to 4 days; that it was impossible to determine the extent to which the delays of the engineers and of the Carnegie Company postponed fabrication, but that by reason of these delays plaintiff was entitled to have the date for completion extended a month or more, had it so asked; that the erection proper was practically finished November 9—that is to say, leaving only the "plumbing-up"—and that the plumbing-up was done as fast as needed; that the erection proper was thus practically finished about a month later than it should have been, after allowing plaintiff a month's extra time; and accordingly deducted upwards of $11,000 from the amount to which plaintiff would otherwise be entitled, and rendered decree in plaintiff's favor for the balance. The District Judge (the present Mr. Justice Clarke pre-

siding) overruled the exceptions to the master's report, thereby concurring in the master's findings, and entered decree on the basis found by the master for upwards of $28,000, with interest from the date of the master's report. The defendant alone appeals.

[1] It is the well-settled rule, applicable to cases such as this, that the concurrent findings of master and judge upon questions of fact will not be disturbed upon anything less than a demonstration of plain mistake. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Crawford v. Neal, 144 U. S. 585, 586, 12 Sup. Ct. 759, 36 L. Ed. 552; Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649. In Judge Clarke's opinion confirming the master's report that officer is referred to as "an experienced lawyer and long-time common pleas judge of Cuyahoga county, Ohio," and presumably the appointment was made by reason of the special fitness of the appointee. The evidence was voluminous and intricate, involving the testimony of a large number of witnesses and many exhibits. The record indicates that the master performed his duties with painstaking care and fidelity; the judge stating in his opinion that the master "spent more than 30 days listening to the testimony introduced, heard elaborate oral arguments, and considered written arguments, which, although called 'briefs,' are several hundred pages in extent." Numerous exceptions were taken to the master's report, and the judge re-referred the case to that officer for fuller and more detailed report of his findings of fact and conclusions of law, "with reference to the pages of the testimony upon which the findings of such fuller report shall be based." While the exceptions were overruled, as not presented in the required form, yet the court examined their merits "as fully as if they had been properly presented" for consideration. Judge Clarke expressly says that he has "gone very carefully through this voluminous record, and is satisfied that the special master was amply justified, considering the conflict of testimony before him, in reaching the conclusion which he reports," and without regard to the rule of presumption in its favor. These facts emphasize the force otherwise given to the findings below. Wabash Ry. Co. v. Compton (C. C. A. 6) 172 Fed. 17, 21, 96 C. C. A. 603.

Turning to the fundamental and meritorious questions on which the decision below was made to rest:

[2] 1. We cannot declare unjustified a conclusion that plaintiff was equitably entitled to a month's extension of time for completing its contract, on account of delays occasioned by circumstances not reasonably within its control. The delays at the rolling mills and in the engineer's office have already been referred to. True, there was criticism of plaintiff's method of "picking-off" from the drawings and ordering from the mills as creating unnecessary delay; but there was competent testimony that such practice was proper and expeditious. It does not necessarily follow that plaintiff was at fault in not more closely following the rolling mills' schedules, nor is absence of fault on the part of the rolling mills necessarily conclusive that the delay was within plaintiff's reasonable control. There was also criticism of plaintiff's practice in fabricating at its shop at one time, as far as possible, all

of certain like members throughout the building, instead of first fabricating materials for each wing, in the order of erection; but the master found this method of fabricating proper, and we see no reason to reject his conclusion. There was also criticism that some of the delay was caused by imperfect fabricating and by an asserted improper and inconvenient piling of materials at the building site; but there was testimony that some of the steel shipped from the rolling mills was so bad that it had to be knocked to pieces, and that representatives of defendant's engineers actually inspected at plaintiff's factory all the various fabrications alleged to have been defective, and while such inspection and approval did not necessarily forbid rejection of the defective work before its erection in the building, it had a tendency to mitigate delay on plaintiff's part occasioned thereby. The asserted improper method of piling does not seem to have been of controlling importance.

[3-5] Article 7 of the contract, however, provides that, if plaintiff should "be delayed in the prosecution or completion of the work, delay due to rolling mills, by the act, neglect or default of the owner, upon the work, or by any damage caused by fire * * * or other casualty for which the contractor is not responsible, or by strikes or lockouts caused by acts of employés, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid." The language above quoted is followed by this clause, "which extended period shall be determined and fixed by the engineers; but no such allowance shall be made unless a claim therefor is presented in writing to the engineers within forty-eight hours of the occurrence of such delay;" and article 12 provides that in case either party to the contract dissents in writing within 10 days from the decision of the engineers referred to in article 7, the matter shall be referred to a board of arbitration, to be made up as provided therein. This provision was not complied with; and defendant urges that plaintiff is, for the purposes of this suit, thereby wholly barred from equitable consideration by reason of delays suffered, and (inferentially), even though not responsible for them.

Assuming that the provisions cited control the controversy in the instant case, a presentation of claim for extension and its rejection by the engineers or arbitrators would bar it (United States v. Gleason, 175 U. S. 588, 605, 20 Sup. Ct. 228, 44 L. Ed. 284); and the fact that the engineers were required to pass upon the effect of their own default would not alter the rule (Memphis Trust Co. v. Iron Works [C. C. A. 6] 166 Fed. 398, 405, 93 C. C. A. 162). But plaintiff presented no claim for extension, and the contract does not in terms make application to the engineers a condition precedent to further indulgence.[1] Apart from the fact that the provisions of articles 7 and 12 do not seem readily workable as applied to a series of numerous short delays

[1] Defendant, at the time, treated the November estimate as an extension of time, and gave notice of willingness to arbitrate. But nothing seems to have been done under the notice, and neither party in this court treats the estimate as an extension, as we think it plainly was not.

occurring in a brief space of time, no one of which could perhaps be made the basis of formal application for a specific extension of time, and assuming these articles otherwise applicable, we think they do not exclusively control the question as here presented, for article 6 expressly makes plaintiff's obligation to complete erection by the dates named absolutely conditioned upon the absence of delays "due to the rolling mills, transportation, * * * or other circumstances beyond the contractor's reasonable control"; and we think the history of this case, and defendant's attitude thereto, preclude it from here asserting the bar now urged. Plaintiff first began suit, on the law side of the court below, to collect the balance of the contract price and for extras. Defendant, under the Ohio statute, demanded foreclosure of the lien which, in the federal court, could be had only in equity. The bill in this case was accordingly filed. Defendant answered, setting up its damages by reason of plaintiff's delay, and by cross-bill asked decree against plaintiff for the amount of defendant's damages "less that part of the contract price for the erection of the said structural steel and iron work still unpaid," and for an injunction (which was granted) restraining the prosecution of the suit at law on the ground that the issues involved therein, and in the equitable suit, "are too complicated and involved to be intelligently passed upon" in a court at law. Defendant is, in this suit, practically a plaintiff suing for damages. There is little, if any, room for doubt that an extension of at least a month would have been given, had plaintiff so asked. Plaintiff continued its work long after the lapse of the contract period, the defendant accepted it, and, as already stated, its engineers gave plaintiff an estimate of such work, and although defendant protested, and refused to pay the estimate, by its answer and cross-bill it pretty nearly concedes that plaintiff is entitled to some consideration in respect of time, by asserting a necessity that plaintiff should complete its work under the contract "within the time therein provided or within a reasonable time thereafter, to wit, 30 days." In our opinion, the case is one for the application of the rule that "he who seeks equity must do equity." Without reference to the fact that the contract did not stipulate the measure of damages for delay, we agree with the conclusion of Judge Clarke that:

"The court, with the full concurrence of the defendant, has before it for determination the amount due to the plaintiff or to the defendant."

[6] 2. Was plaintiff's steel erection so far completed by November 9 as not thereafter to interfere substantially with the follow-up trades?

Above the first story the building was divided by courts into eight so-called wings. It was arranged that wings 4 and 5 should be first erected, and wings 1 and 8 last; the idea being that the concreting should follow the steel work as rapidly as practicable, the brickwork to follow the concreting. This arrangement aided defendant in hastening final completion; except for it, defendant would have been in default, for its preliminary work (except as needed to meet steel erection in the given wings) was not all finished by the time required by the written contract. The actual erection of the steel work was followed by its bolting and plumbing. The steel work in wings 4 and 5

was so far completed that the placing of forms for concreting on the lower floor was begun September 1, although the pouring was delayed until September 21. There was evidence that on November 9 the forms on the first floor of wing 8 were ready for concrete, although there was still some bolting and plumbing to be done and roof bars to be supplied; also that on November 12 the steel work in wings 1 and 8 was practically all erected, although "very little plumbed." The most substantial controversy in this respect arises over defendant's contention that the bolting and plumbing did not progress rapidly enough to permit the concreting and bricking to follow without substantial interruption. Among the more prominent reasons for this asserted impracticability are that concreters and bricklayers were unwilling to and could not effectively work while steel erection or bolting was being done upon the upper floors. There was testimony, however, tending to sustain conclusions that bolting can be done before complete plumbing; that concrete could be poured whenever two floors were properly bolted and plumbed; that concrete was actually and customarily poured in the lower parts of a building while steel work was still being done on the upper floors; and that such practice was feasible and proper. The questions involved were purely of fact. In view of the record, and of the care with which both the master and the judge have considered the maze of testimony, we cannot say that the conclusions reached were wrong.

[7-9] 3. Did defendant use all reasonable efforts to minimize its damages?

Its duty so to do is properly conceded. Warren v. Stoddart, 105 U. S. 225, 26 L. Ed. 1117; Lawrence v. Porter (C. C. A. 6) 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167. The burden of proving that the damages could have been mitigated is on plaintiff. Campfield v. Sauer (C. C. A. 6) 189 Fed. 576, 580, 111 C. C. A. 14, 38 L. R. A. (N. S.) 837. But inferences may be drawn from testimony, regardless of its source.

In reaching the conclusion that defendant did not use due diligence, the master found that defendant might have finished the concreting by December 15 (6 weeks before it was actually completed); that the forms could have been taken down in 5 or 6 days after pouring the concrete; that the brickwork might have been started September 11 (it seems to have been actually started October 26); that each wing could have been bricked in 21 days, and the last wing thus finished on January 12; and that while the concrete "was in" on wing 1–8 (the last wing—perhaps meaning a certain floor) on December 3, brickwork was not started "on that floor" until about February 11. If these conclusions are justifiable, the ultimate finding that due diligence was not used should not be disturbed; for there is no claim that defendant needed the building before March 1, and on the basis of the master's conclusions it does not necessarily appear that it should not have been available for use by that date.

Defendant forcibly challenges each of these subsidiary conclusions, as well as the ultimate conclusion of the master. But we should not be justified in overturning them, unless the intervention of cold weather

was clearly so controlling as plainly to show that the master was in error. There is no doubt that extremely cold weather makes concrete work more expensive; it delays the setting, requires heating of materials and packing of the new work, calls for a mixture richer in cement, and decreases efficiency of labor. The master found, however, that defendant was at fault in connection with the heating and packing after cold weather came on; that weather conditions were not extreme up to December 31; that canvas was not used, so as to enable the building to be heated, until December 27; that packing material as a substitute for heating was first used December 31; and that, if artificial heating means had been used, the work could have progressed as rapidly in cold weather as in moderate weather. These conclusions present no little difficulty. For instance, the conclusion that concrete forms could be taken down in 5 or 6 days after pouring does not rightfully apply to floors; but there was testimony tending to show that the outside of columns (and possibly the inside) could be bricked before floors were ready for stripping. And while there was testimony by defendant that concreting could progress as rapidly in cold weather as in temperate weather, if provisions are made to offset the temperature, there was evidence from the same source that other operations in connection with concreting (such as handling and fastening rods and making forms) go more slowly in cold weather. But there was testimony that the forms were usually constructed before putting in place, and we cannot say with confidence that a holding, in spite of such testimony, that with sufficient additional labor and sufficient heating accommodations the concreting could have progressed approximately as rapidly in cold as in moderate weather would be clearly wrong; and plaintiff was charged with a substantial sum for extra cost of concreting. And while not affirmatively finding, upon our own judgment, that the conclusions referred to are right, we cannot say that, so far as necessary to the ultimate conclusion, they are substantially and clearly wrong.

[10, 11] 4. Damages. The master found that the first half of the concreting was finished by November 22, and the last half about the last of January; that all the increased cost in cement due to cold weather, and most of the lumber, came after December 18; that all the cost of heating and canvas was after December 27. He found all that part of the extra cost of construction arising after December 15 to be wholly defendant's fault, by reason of its failure to minimize its loss, and all that part of the extra cost of construction prior to December 15 to be the fault of both parties. He further found that it was impossible to work out in detail the various items of extra expense due to delay, and that an approximation was thus necessary; that the additional cost of the last half of the concreting (November 22 to January 31) was $25,596.61; and that much of the extra cost came after December 15.[2] He concluded that plaintiff should be charged with one month's delay

[2] No claim is made for additional cost of the first half of the concreting, finished November 22. Defendant practically concedes that, if it could have completed the "follow-up" work by January 1, there would have been no additional cost of construction.

and one month's extra cost due to winter work. The master's computation of defendant's damages, as announced in his first report, viz. 40 per cent. of the then unpaid balance of the original contract price, does not impress us as resting upon a rational basis. But, if he rightly concluded that plaintiff was responsible for the delay only in the time proportion stated, the amount awarded (upwards of $11,000) is not clearly shown to be inadequate. In such cases there would be no liability for lost rentals. The master's second report and findings did not state the basis of the assessment of damages. We do not feel justified in disturbing the award.

[12] 5. Defendant filed 50 so-called "objections" and 59 exceptions to the master's first report, and 91 objections to that officer's supplemental report. The District Court, properly treating the objections to the second report as exceptions, awarded plaintiff, as part of its costs, under general equity rule No. 67 (198 Fed. xxxvii, 115 C. C. A. xxxvii), $705, viz. $5 for each of 141 objections overruled.

We are disposed to agree with defendant that the exceptions to the master's first report should not have been considered in computing costs, for the reason that they were practically duplicated in the exceptions to the second report; and the order re-referring the cause to the master was made after it came on for hearing upon the exceptions to the first report, and because the court was of opinion that that report was not sufficiently full and detailed to permit a disposition of the exceptions thereto without an original examination by the court of all testimony presented, although the final order shows that the hearing was had upon exceptions to both reports. It may also be that the findings challenged by exceptions 20 and 21 to the supplemental report are of such breadth as to entitle defendant to costs, and, if so, the same considerations would apply to exception 30, although we are not satisfied that any of the findings or failures to find in the supplemental report which are excepted to are of such controlling character as necessarily to make the master's ultimate conclusions wrong. We are thus inclined to think a reduction from $705 to $425 on account of exceptions overruled would be equitable, and such modification will be made.

6. Plaintiff has presented, as against defendant's right to damages, several objections of a more or less technical nature, which, in view of the conclusions otherwise reached, we find it unnecessary to pass upon.

The decree of the District Court, as modified in paragraph 5 hereof, is affirmed. By reason of such modification, and the fact that appellant has already paid the greater part of the costs of this court, no costs in this court will be awarded to either party.

SHULER et al. v. RATON WATERWORKS CO.

(Circuit Court of Appeals, Eighth Circuit. December 24, 1917.)

Nos. 4634, 4850.

1. CONTEMPT ⊂=66(3½)—TIME FOR APPEAL.
Where judgments in contempt proceedings were entered August 30, 1915, an appeal taken October 16, 1916, comes too late, and must be dismissed, under Act March 3, 1891, c. 517, § 11, 26 Stat. 829 (Comp. St. 1916, § 1647), allowing six months in which to take appeals.

2. CONTEMPT ⊂=66(1)—REVIEW—WRIT OF ERROR—EQUITY CASE.
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, but when such mistake or error occurs it shall disregard the same, and take the action which would be appropriate if the proper appellate procedure had been followed, a writ of error sued out to review a judgment in contempt proceedings entered in 1915, cannot be dismissed on the ground that the judgment was entered in an equity suit and reviewable only by appeal; this being so despite the provisions of section 7 of the act that it should not apply or affect any writ of error, appeal, or certiorari already applied for, and that the right of review under existing laws should remain unaffected for six months.

3. APPEAL AND ERROR ⊂=77(1)—REVIEW—FINAL JUDGMENTS.
In a suit by a waterworks company against a city to enjoin it from furnishing water to any of its citizens from a waterworks system which it had constructed, persons not parties to the action were adjudged guilty of contempt in disobeying a temporary injunction and fined. *Held* that, as they were not parties and could not appeal from the final decree in the main case, those so adjudged in contempt are entitled to appeal from, or sue out a writ of error to review, such judgment in contempt; it being final as to them.

4. INJUNCTION ⊂=218—VIOLATION OF INJUNCTION.
While the dismissal of a bill and temporary injunction will not relieve those who violated the temporary injunction from the effects of their disobedience, or purge their contempt, it may be considered in determining the equities in the proceeding for contempt.

5. INJUNCTION ⊂=223(1)—VIOLATION OF INJUNCTION—SCOPE OF ORDER.
A waterworks company, claiming an exclusive franchise, sued in the federal District Court to enjoin a city from furnishing water to any of its citizens from a water system which the city had constructed. On order to show cause, a temporary restraining order was issued; thereupon the city's legislative officers enacted an ordinance repealing the franchise of the waterworks company and directing it to remove its pipes and equipment from the highways, grounds, and public places of the city. The ordinance directed the mayor, clerk, and city attorney to take such steps as might be necessary to effectuate its provisions. Thereupon a bill in equity was filed in the state court, praying an injunction restraining the waterworks company from collecting or attempting to collect water rentals or rates. *Held* that, in view of the fact that the waterworks company took no step to assert its exclusive franchise until the city had practically completed its own plant, and that the temporary injunction was subsequently dismissed and the bill denied, the city officials and attorneys, who asserted that they were acting in good faith in passing the ordinance and instituting the litigation, should not be adjudged guilty of contempt on the theory that they had violated the spirit of the restrain-

ing order, for such order is not one which should be extended by construction; this being true, even though the city sought relief in the state court, while a suit involving the matters in controversy was pending in the federal court, for the pendency of such suit did not deprive the city of the right to sue in the state court, and the waterworks company had the right to apply in the federal court for an order staying proceedings in the state court.

In Error to and Appeal from the District Court of the United States for the District of New Mexico; William H. Pope, Judge.

Suit by the Raton Waterworks Company against the City of Raton. J. J. Shuler and others were adjudged guilty of contempt for violating an injunction order, and they appeal and bring error. Appeal dismissed, and judgment reversed on writ of error.

Pershing, Titsworth & Fry and R. G. Bosworth, all of Denver, Colo., for plaintiffs in error and appellants.

L. Laflin Kellogg, of New York City, Jesse G. Northcutt, of Trinidad, Colo., E. B. Upton, of Cripple Creek, Colo., and Henry W. Coil, of Trinidad, Colo., for defendant in error and appellee.

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

CARLAND, Circuit Judge. [1] This case is here by writ of error (4634) and appeal (4850). The appeal was taken October 16, 1916, from a judgment in contempt proceedings entered August 30, 1915. It thus appears that the appeal was not taken within the time allowed by law (Act March 3, 1891, § 11, 26 Stat. 829 [Comp. St. 1916, § 1647]) and must be dismissed.

There is a motion to dismiss the writ of error for the following reasons: (1) The judgment in contempt was an interlocutory order, and part of the record in the main case, and not reviewable prior to the final decree therein. (2) This court has no jurisdiction to review the judgment in contempt by writ of error, for the reason that said judgment was entered in an equity suit and is only reviewable by appeal.

[2] The second point made has no merit, as section 4 of the act of September 6, 1916 (section 1649a, Comp. St. 1916, 39 Stat. 727), prohibits the dismissal of the writ for the reason urged. Section 7 of the act referred to provides that the same shall not apply to any writ of error theretofore duly applied for; but it is manifest that said section 7 is a saving clause against other provisions of the act and has no effect upon section 4.

In considering point 1 it will be necessary to describe to some extent the action in which the judgment in contempt was entered.

[3] The Raton Waterworks Company commenced an action in equity in the court below to enjoin the city of Raton, N. M., from furnishing water to any of its citizens from a waterworks system which the city had constructed. The city of Raton in its corporate name was the only party sued. The plaintiffs in error, viz. J. J. Shuler, mayor; Floyd Hayner, clerk; William T. Huffine, A. V. Lucero, Henry Boan, Edwin B. Humphrey, Henry C. Jones, and Abe Garcia, aldermen; and Howard L. Bickley, James H. Pershing, and John R. Fry, attor-

neys—were not parties to the action, and the judgment in contempt imposed fines ranging from $50 to $100 each upon them for disobeying a temporary injunction issued in said action; the plaintiffs in error to stand committed in default of payment thereof. The judgment further provided that the fines should be paid to the Waterworks Company, as damages. Not being parties to the suit, plaintiffs in error could not have appealed from the final decree in the main case. The judgment in contempt affected them personally and was final. Bessette v. W. B. Conkey, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; Alexandria v. United States, 201 U. S. 117, 26 Sup. Ct. 356, 50 L. Ed. 686; Nelson v. United States, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673. The motion to dismiss the writ of error must therefore be denied. The remaining question to be considered is: Were the plaintiffs in error guilty of contempt?

[4, 5] As before stated the prayer of the complaint asked for a temporary injunction, to be made permanent on final decree, restraining the defendant, its officers, agents, employés, and attorneys from permitting or authorizing any of the inhabitants or citizens of the city of Raton to connect their water pipes with the mains of said city, or from supplying any of said citizens or inhabitants with water from the said water mains, either under contract to pay therefor, or gratuitously or otherwise, until the further order of the court in the premises, or from using water from the city waterworks system for fire or hydrant purposes, or any other municipal purpose, and from operating or using said waterworks system in any manner until the further order of the court in the premises. This was all the relief asked for, except that there was a prayer for general relief, but such prayer has no importance in the matter now under discussion. The complaint was filed July 2, 1915. On the same day an order was issued requiring the plaintiffs in error to show cause why a preliminary injunction should not issue restraining them during the pendency of the action as prayed in the complaint. A temporary restraining order was made a part of the order to show cause. It reads as follows:

"And until the hearing and final determination of this motion, and the further order of the court in the premises, the said defendant, the city of Raton, its officers, agents, servants, and attorneys, are hereby restrained and enjoined from supplying any of the citizens or inhabitants of the said city of Raton with water from the water mains of the defendant, either under contract to pay therefor, or gratuitously or otherwise, and from using water from its waterworks system for fire hydrant purposes or any other municipal purposes, and from permitting or authorizing any of the inhabitants or citizens of the said city of Raton to connect their water pipes with mains of the defendant in the city of Raton, and from operating or using its waterworks system in any manner whatsoever; this temporary restraining order not to become effective until plaintiff shall have filed a good and sufficient injunction bond to be approved by the clerk in the sum of $5,000 protecting defendant against damages pending the hearing."

On July 31, 1915, after the order to show cause had been heard, the court made the following order:

"This cause having been heretofore submitted upon plaintiff's motion for a temporary injunction, it is ordered that the said motion be granted and that said temporary injunction be granted as prayed, upon an injunction bond in

the sum of $15,000 to be filed with the clerk within five days and to be approved by him, the temporary restraining order heretofore granted to continue meanwhile in force; to which ruling the respective parties duly excepted."

On August 25, 1915, defendant in error filed a petition for an order requiring the plaintiffs in error to show cause why they should not be punished for contempt for disobeying the injunction. No temporary injunction was ever in fact issued, except the restraining order made a part of the order to show cause. On the hearing of the order to show cause a temporary injunction was granted as prayed, the temporary restraining order to continue in force in the meantime. The order granting the temporary injunction contemplated that the writ should issue within five days, as the injunction bond was to be filed within that time, so it is doubtful whether the restraining order was in force after the period of five days, that being the meantime above mentioned. But, be that as it may, the injunction granted, if any, was in accordance with the prayer of the complaint, the language of which the temporary restraining order literally followed. Assuming, therefore, that there was actually or constructively some kind of an injunction in force, we proceed to ascertain what plaintiffs in error did for which they were punished.

On August 30, 1915, the court found plaintiffs in error guilty of contempt on the allegations in defendant in error's petition, which the court found were admitted by plaintiffs in error in their answer to the same. The petition covers 46 pages of the printed record and only its substance can be stated. It set forth the official relations of plaintiffs in error to the city of Raton, the proceedings in the suit resulting in what was claimed to be the injunction granted, the knowledge of plaintiffs in error thereof, and then proceeded to charge that said plaintiffs in error had conspired and confederated together in enacting into law an ordinance of the city of Raton, known as No. 197. This ordinance, after numerous preliminary statements, ordained:

"Section 1. That the ordinance entitled 'Ordinance No. 10, granting franchise to the Raton Waterworks Company, to erect and maintain waterworks,' passed July 20, 1891, and published July 24, 1891, as amended by Ordinance No. 104, and all ordinances amendatory thereof, be and hereby are repealed, and the franchises therein granted be and the same are hereby revoked, and all rights and privileges therein granted, or thereby permitted, are null.

"Section 2. That said Raton Waterworks Company be and it is hereby directed and required immediately to remove from the streets, alleys, lanes, roads and other highways and grounds and public places within the city of Raton its pipes, conduits, structures and works of every kind and character, used or capable of being used in connection with its waterworks system in said city of Raton.

"Section 3. The mayor, clerk and city attorney of said city be and they are hereby authorized and directed to take all such steps as may be necessary on behalf of the city of Raton to effectuate the provisions of this ordinance.

"Section 4. All ordinances and parts of ordinances, in conflict with this ordinance are hereby repealed.

"Section 5. This ordinance shall take effect and be in full force five days after its passage and publication.

"Adopted and approved this 6th day of August, A. D. 1915.

"J. J. Shuler, Mayor."

That plaintiffs in error, in further carrying out their said conspiracy, had filed a bill in equity in the district court in and for the county of

Colfax, New Mexico, in a suit entitled City of Raton v. Raton Waterworks Company, wherein it was prayed that an injunction issue in said suit restraining defendant in error from collecting or attempting to collect any water rentals or rates which might accrue to it, and which injunction had been issued. The situation between the parties at the time the acts complained of were committed was this: The Waterworks Company, claiming that it had an exclusive franchise to furnish the city of Raton and its inhabitants with water by virtue of an ordinance of the city, had commenced a suit to enjoin the city from supplying itself and its inhabitants with water by means of a waterworks system of its own, and a temporary injunction had been issued in said action. The city, after the injunction had issued, passed the ordinance above set out, repealing the ordinance and amendment thereto, which granted a franchise to the Waterworks Company. It also commenced a suit in the state court for an injunction as heretofore stated. The passing of the ordinance and the commencement of the suit in the state court were not acts prohibited by the literal terms of the injunction, and under the circumstances which surround the case we are of the opinion that the injunction order ought not to be extended beyond its terms. The Waterworks Company had waited until the city had issued bonds to the amount of $400,000 and constructed a waterworks system of its own, which, when the bill in the present case was filed, was practically completed, and so alleged in the bill. The ordinance under which defendant in error claimed its franchise contained a provision that the city might revoke it in the event that defendant in error continued after complaint to furnish unwholesome water.

The record before us shows that on final hearing the bill in the present action was dismissed, and also the temporary injunction. While the dismissal of the bill and the injunction would not relieve plaintiffs in error from the effects of their disobedience of the temporary injunction, the dismissal may be taken into consideration in determining the equities in the proceedings for contempt. The plaintiffs in error denied under oath that they intended to violate the injunction and allege that they acted in good faith in the matter. The legislative power of the city of Raton to terminate the franchise of the defendant in error, under section 12 of the ordinance granting the same, was not destroyed by the filing of the bill in the federal court. So it seems to us that the passage of the ordinance complained of cannot be said to have been a violation of the temporary injunction. The city, it is true, might by cross-bill, or by answer in the nature of a cross-bill, have obtained all the relief which it sought in the state court; but it does not seem that the city was obliged to seek relief in that way, although, while the case was pending in the federal court, it could not do anything that would embarrass the federal court from giving the full relief to which the plaintiff was entitled under the bill. In any event the defendant in error could have obtained an injunction against the prosecution of the suit in the state court, and such relief was given at the time the judgment in contempt was entered. It was not necessary to have proceeded by way of contempt. If the defendants were to be found guilty of contempt, such finding should, under the circumstances of this case,

have been based upon a violation of the literal terms of the injunction. In other words, it is not a case where the spirit of the injunction order ought to be strongly emphasized.

The judgment against plaintiffs in error should be reversed; and it is so ordered.

PATERLINI et ux. v. MEMORIAL HOSPITAL ASS'N OF MONONGAHELA CITY, PA., et al.

(Circuit Court of Appeals, Third Circuit. January 21, 1918.)

No. 2293.

1. COURTS ⟸367—FEDERAL COURTS—RULES OF DECISION.
Where, on the ground of diversity of citizenship, an action is begun in the federal court against a hospital, chartered under the state laws as a charitable corporation, to recover on account of the death of a patient, the federal court should, on ground of comity, if for no other reason, follow the state rules as to liability of such hospitals, although federal courts, where their jurisdiction depends on diversity of citizenship, should follow those state rules of decision which have become rules of property.

2. CHARITIES ⟸45(2)—PUBLIC CHARITIES—LIABILITIES.
A Pennsylvania hospital association, which was a charitable corporation, is not, where there was no negligence on the part of its executive officers, liable for the death of a patient resulting from negligent and unauthorized act of a nurse who, contrary to the rules, went into the operating room to procure a cathartic, but instead procured a poison, which she administered to the patient with fatal results; the inapplicability of the doctrine of respondeat superior to charitable corporations having crystallized in Pennsylvania into a rule of property.

3. COURTS ⟸307(1)—FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.
The jurisdiction given to federal courts on account of diversity of citizenship of the parties is intended merely to secure to a nonresident, as against citizens of the state, an impartial trial, and does not create in favor of such nonresident any rights of action which citizens of the state under like situation would not have.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by John Paterlini and Mary Paterlini, citizens and subjects of the kingdom of Italy, against the Memorial Hospital Association of Monogahela City, Pa., a corporation, and Joseph A. Herron and others, citizens of Pennsylvania. There was a judgment for defendants (241 Fed. 429), and plaintiffs bring error. Affirmed.

Arthur O. Fording, of Pittsburgh, Pa., for plaintiffs in error.

Charles G. McIlvain and McIlvain, Murphy, Day & Witherspoon, all of Pittsburgh, Pa., Carl E. Gibson, of Monongahela, Pa., and Andrew M. Linn, of Washington, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This suit was brought against an incorporated hospital and against its directors individually, by the parents of a boy who died while a patient in such hospital, to recover

damages for negligence alleged to have caused his death. The jurisdiction of the court is based on diversity of citizenship, the plaintiffs being citizens of Italy, and the defendants citizens of Pennsylvania. The court below sustained a demurrer and dismissed the suit. On writ of error this court (see 232 Fed. 359, 146 C. C. A. 407) reversed the case; the court saying:

"In view of the allegations of the pleadings and of the fact that the questions involved in this case so closely concern the administration of charitable foundations in Pennsylvania, we are unwilling to pass upon the liability of such institutions and their trustees for negligence, until by the proofs, rather than from the uncertain averments of pleadings, we are precisely informed of the facts upon which our judgment should rest. Without, therefore, expressing in any way any view upon these questions, we deem it the exercise of wise discretion to overrule the demurrer and allow the proofs to be placed on record before the case is reviewed by this court. Accordingly we will reverse the judgment below, and remand the cause, with directions to overrule the demurrer, without prejudice to later raising the questions raised by it, and that the cause proceed in due course."

Subsequently the case was tried, proofs on both sides taken, and the court directed a verdict for the defendants. Thereupon the plaintiffs sued out this writ. Consequently we now have the full proofs, and are thereby enabled to dispose of the important questions here involved to much better advantage than when the case was here before. As presented by pleadings and proofs, the right of the plaintiffs to recover takes three aspects: First, the personal liability of the directors arising from any negligence on their part; second, the liability of the corporate defendant, the Hospital, arising from the negligence of its officers; and, third, the liability of the Hospital for the negligence of a nurse.

Without reciting all the proofs, we may say they tend to show the defendant hospital was chartered by the state of Pennsylvania, and was located in a bituminous coal district, where mining accidents were of frequent occurrence and required prompt attention. In the operating room there were constantly kept two one-gallon bottles—one containing bichloride, the other mag. salts—which were necessary and much-used antiseptics in surgical work. Each of these bottles was plainly labeled; the bichloride being also marked "Bichloride, Poison." The surgical room was entirely separate from the ward section, was at some distance, and nurses in the ward section were forbidden to enter it.

Such being the situation, the proofs show that about 6:30 on the morning of the accident a ward student nurse had occasion to administer a cathartic of epsom salts to the plaintiffs' son, a patient in her ward. Going to the cupboard where the cathartics were kept, she got castor oil, but, finding no salts in the customary place, she, in violation of the rules, went across two corridors to the dressing room, which connected with the surgical room. Her description of what followed, after there finding the bottles of antiseptics referred to above, was:

"Q. Those bottles you say were large gallon bottles? A. I think they were gallon bottles. Q. Were they labeled so that you could read them? A. Yes, sir. * * * Q. In making your observations in this room that morning, did you read on this bottle the label, 'Bichloride'? A. Yes, sir; I read the bottles. Q. You saw on another bottle 'Solution of Salts'—epsom salts? A.

Yes. Q. You say, when you found a bottle of epsom salts in the operating room, you put your tray on a table; and what was the position of the table which you placed your tray on with reference to the location of the bottles? A. It was about like that (indicating) to the left, and I just turned that way. Q. You turned about half way around? A. Yes, sir. Q. And in reaching down in that manner, half turned, your hand fell upon the bottle containing bichloride, instead of the solution of epsom salts? A. That is the only way I can remember making the mistake. I had read it first, and then it seems, when I went to get my glass, I reached at the same time for the bottle, and picked up the wrong bottle. * * * Q. Was there anything about that bottle beside the label—I am referring now to the bottle of bichloride—was there anything about that bottle, beside the label, to indicate that it contained poison? A. They were labeled poison. Q. It was labeled poison? A. That is as well as I can remember what it was labeled."

Bearing on what this student nurse should have done when she found there were no salts in the ward cupboard, the uncontradicted proof was:

"Q. What was the duty of the nurses when they discovered that 'mag.' salts was not in the cupboard where they went to obtain it? A. She should have referred to the graduate nurse. Q. Have you ever before, in your experience, had a nurse go into another department of a hospital to hunt medicine? Was there any such authority on the part of a nurse to do so? A. No; she should not go to another department without permission. Q. Is it not against the well-known rules and regulations of your hospital for her to have done so? A. Yes, sir."

The proofs further showed the executive work of the hospital was in charge of experienced and capable people, and there is an entire absence of any proof showing an act of commission or omission on the part of the directors, or on the part of any executive officer of the hospital.

In the absence of such proof, it is clear that the court was justified, and indeed it was its duty, to charge the jury that there was no proof that justified a verdict against the directors personally or against the hospital for negligence on the part of its executive officers. It follows, therefore, that the only ground on which the hospital could be held was for the negligence of the student nurse, and under the proofs that phase of the case resolves itself into the question whether the hospital is responsible for the negligent act of a nurse done without the knowledge of the hospital, outside the scope of her duty, and in violation of the rules of the hospital.

This hospital was chartered by the state of Pennsylvania under that section of its general incorporation act of April 29, 1874 (P. L. 73), which provides for corporations not for profit and for "the support of any benevolent, charitable * * * undertaking."

[1-3] The corporation being created by the state of Pennsylvania, being supported by charitable contributions of its citizens and by appropriations by that state, and the charitable uses and trusts which such a corporation administers being subjects over which the courts of that state are given statutory jurisdiction, the case would seem especially one where a federal court would from comity, if for no other reason, incline to follow the settled law of Pennsylvania if such law is found to exist. In the able opinion of Judge Gray, in Snare & Triest Co. v. Friedman, reported at 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A.

(N. S.) 367, this court, while noting its wide range of independent judgment, recognizes that in cases based on diversity of citizenship, a federal court exercises a jurisdiction concurrent with the local state courts, and lays down this salutary policy and principle:

"It is to be remembered, however, that this diversity of opinion will not be indulged in by the courts of the United States, where, as we have just said, in the ordinary administration of the law by the state courts, and by the settled course of their decisions, certain rules are established which have become rules of property and conduct in the state, and have all the effect of law, which it would be wrong to disturb."

Taking this as its chart, the duty of the court below was clear. This hospital was of the general type described by the Supreme Court of Pennsylvania in Gable v. Sisters of St. Francis, 227 Pa. 256, 75 Atl. 1088, 136 Am. St. Rep. 879, as—

"maintained by donations, appropriations made by the state, and pay received from such patients as demand and are accommodated with rooms separate from the general wards. * * * Admission to the hospital is denied [to] no one on grounds of religious faith or because of inability to pay. * * * It has no corporate stock; it can declare no dividends, and its entire income is employed to maintain and enlarge, as it is able, its capacity for gratuitous, beneficent service to the public."

That such organizations are trustees for the public benefit is a recognized principle in that state. In Humane Fire Co.'s Appeal, 88 Pa. 391, the Supreme Court referring to a fire engine company, says:

"This is not a trading corporation designed to make money for its shareholders, whose money has purchased its property and in which property every such shareholder has a right, proportionate to the amount of his contribution, but it is a charity, incorporated as a public benefaction, and it consequently holds its property, which has been contributed by the public, in trust for that public. There are no shareholders in companies of this kind, and if any contributions have been made to this company by the members thereof, they were made as gifts and donations for the public good, and these members themselves are but trustees and agents to carry into effect this charitable organization. That a voluntary association of individuals, who have contributed funds for a purely public purpose, will be regarded as a charity was ruled in Thomas v. Ellmaker, 1 Pars. Eq. Cas. [Pa.] 98; and that such association has been incorporated alters neither its design nor nature, but only gives it a legal status which it would not otherwise possess. * * * It is but a trustee for the public and to give its assets to its members would be a perversion of such trust."

In Fire Insurance Patrol v. Boyd, 120 Pa. 646, 15 Atl. 556, 1 L. R. A. 417, 6 Am. St. Rep. 745, where the object of the corporation was "to protect and save life and property in or contiguous to burning buildings, and to remove and take charge of such property, or any part thereof, when necessary," the court held that:

"The Fire Insurance Patrol of Philadelphia is a public charitable institution;" that is, "in the performance of its duties it is acting in aid and in case of the municipal government in the preservation of life and property at fires."

In Ford v. School District, 121 Pa. 549, 15 Atl. 812, 1 L. R. A. 607, it was held that in Pennsylvania a school district is but an agent of the commonwealth, and as such a quasi corporation for the sole purpose of administering the commonwealth's system of public education; it is therefore not liable for the negligence of school directors or of their employés.

This latter question of the liability of such corporations for the negligence of its employés, after being simply referred to in Boyd v. Insurance Patrol, 113 Pa. 269, 6 Atl. 536, finally came before the Supreme Court of Pennsylvania in 1888, in Fire Insurance Patrol v. Boyd, 120 Pa. 646, 15 Atl. 558, 1 L. R. A. 417, 6 Am. St. Rep. 745, and it was there held the rule of respondeat superior did not apply to a public charity like the Insurance Patrol, and it was not liable for the negligence of an employé. In that case the court said:

"No state in this country, or in the world, has upheld the sacredness of trusts with a firmer hand than the state of Pennsylvania. Not only is a trustee for a public or private use not permitted to misapply the trust funds committed to his care, but if he convert them to his own use the law punishes him as a thief. How much better than a thief would be the law itself, were it to apply the trust's funds contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustee? * * * If the principle contended for here were to receive any countenance at the hands of this court, it would be the most damaging blow at the integrity of trusts which has been delivered in Pennsylvania; we are not prepared to take this step."

This decision, made in 1888, remained the unquestioned law of the state until 1910, when it was again sought to be raised in Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879; a case against a hospital and in all pertinent facts like the present. But the Supreme Court adhered to its former decision, saying:

"It is a doctrine too well established to be shaken, and as unequivocally declared in our own state as in any other, that a public charity cannot be made liable for the torts of its servants. * * * In 120 Pa. 624 [15 Atl. 533, 1 L. R. A. 417, 6 Am. St. Rep. 745], the question received an emphatic and unequivocal answer, and the rule as stated there is the settled law of Pennsylvania."

During the 30 years that have elapsed since the earlier decision, many public charities have been founded, enlarged, or endowed by gifts, bequests, or state appropriations. The founders and donors have had the solemn sanction of the state's most authoritative court that on such public charities should not be imposed legal liability for the negligence of those employed to administer them. Freedom from such liability wronged no one, because no one was bound to accept of their helpful service, and it was no injustice to couple with the voluntary enjoyment of such service, judicially decreed freedom of the charity from liability for negligence. Such being the settled law of Pennsylvania, a plaintiff in a case like this would have no ground on which to support a case in a state court of Pennsylvania. Why should the fact that he is a nonresident of that state, and therefore with less claim on its public charities than its own citizens, enable him, by going into a federal court, to obtain a judgment which would be denied to a citizen of Pennsylvania. The jurisdiction of the federal court given to nonresidents against citizens of the local state, is to insure an impartial trial, not to create rights of action which citizens of the state, in like condition, do not have.

Notwithstanding such is the case, it is contended that we should not follow the Pennsylvania cases, because, as is alleged, they are not based on sound principles. We have examined the whole range of

learned and lengthy opinions cited on this general subject, but we refrain from entering the tempting field of joining in such discussion. Whatever may be the grounds for their conclusions, the Pennsylvania decisions and those in accord therewith, have adjudged two things, namely, that hospitals and the like are public charities; and, secondly, that the law does not impose liability on such charities for negligence of an agent in administering such charity to beneficiaries. Some decisions are based on restricting trust funds to fulfill trust purposes; some on the public character of the trust, and some treat the exemption as an exception from a general liability. We see nothing to be gained by an abstract discussion of these theories. The simple fact is that if liability by a hospital, to a patient, for the negligence of a nurse exists, it is one imposed by law and is not created by contract. The imposition of that liability, in other words, invoking the legal principle of respondeat superior, was, when the question originally arose in Pennsylvania, largely a question of judicial discretion, and the due exercise of that discretion involved, on the one hand, the broad field of invoking, encouraging, safeguarding, and perpetuating charitable gifts and trusts, and, on the other, a due regard for the welfare and protection of those who availed themselves of the ministrations of these charities. With this in view, the Pennsylvania courts charged with the responsibility of imposing or not imposing liability, and having the wide field of encouraging, as well as of beneficially administering, charitable trusts, held they would not impose liability on the part of the trust to a beneficiary for the negligent act of an employé or agent in administering its benefits. Whatever the reasoning process by which it is reached, the conclusion commends itself to us.

The many accidents resulting from the industrial pre-eminence of Pennsylvania, have called into being hospitals in every section of the state. Those hospitals have in turn inspired large private and state benefactions, and have called to their directorship the most efficient, careful, and thoughtful men and women. The outcome has been that for one patient injured by a nurse's negligence, thousands have had a degree of solicitous care far in excess of a legal standard of mere duty. The unselfish aims of charities, the high grade of thoughtfully careful people whom the very nature of such charities enlist in their service, the voluntary act of recipients in seeking their aid, the comparatively few cases in which nurses have proved negligent, all unite to vindicate the far-seeing wisdom of the earlier decisions of Pennsylvania which refuse to impose liability on a hospital for the negligence of a nurse, and we see no reason why this court should depart from, and every reason why it should abide by, this ruling of the Pennsylvania courts.

The judgment below is affirmed.

BALL v. IMPROVED PROPERTY HOLDING CO. OF NEW YORK. EMPIRE TRUST CO. v. IMPROVED PROPERTY HOLDING CO. OF NEW YORK et al. Ex parte PARSONS et al.

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

No. 54.

1. RECEIVERS ⟸128—RECEIVERS' CERTIFICATES—PRIORITIES.
Where the order providing for the issuance of certificates by the receiver of an insolvent corporation which included as part of its assets a term for years, in valuable real property, made no provision for priority to the holders of the certificates, which were issued to secure funds to pay taxes, rent and other charges the nonpayment of which entitled the lessors to retake the property, the holders of such certificates are not entitled to priority over the subsequently accruing claims of the lessors for rent, for there is no difference in equity between the claims for rent due before the insolvency, which were secured by the right of re-entry, and which the certificates paid, and that due afterwards which was equally secured and which the lessors forebore to assert by re-entry.

2. RECEIVERS ⟸128—RECEIVERS' CERTIFICATES—PRIORITIES.
As every one who deals with a receiver knows that he has power to charge the estate only as the court may authorize him, and as the court having the funds in its custody may establish such priority as it sees fit, at least against those creditors who take the credit of the receiver after the order authorizing the earlier debt has once been passed, the rights of those taking receivers' certificates depend on the priorities given in the order providing for issuance of the certificates.

3. RECEIVERS ⟸152—PRIORITIES—ADJUSTMENT.
The court is not absolutely bound to recognize the priorities in a receivership case fixed by its order, and that matter is open to equitable readjustment, however conclusive a protection the order may be to the receiver as to payments made under its terms.

4. RECEIVERS ⟸128—PRIORITIES—ORDER.
Where to enable a receiver of an insolvent corporation to make payments to protect the corporation's leasehold, from which property the receiver was about to be dispossessed by the lessors on account of nonpayment of rent and other charges, the court authorized the receiver to issue certificates under an order declaring they should constitute a lien upon all the property of every nature of the corporation and upon its net earnings, and that such lien should be prior to a specified mortgage, and to the general claim of unsecured creditors, the holders of the certificates were given no priority over the lessors for subsequently accruing claims for unpaid rents; both being creditors of the receiver.

5. RECEIVERS ⟸152—ASSETS—MARSHALING.
Where the holders of receivers' certificates had no priority over the claims of lessors for rents becoming due after receivership on property in which the insolvent corporation had a leasehold interest, the several claims and the funds for which the receiver was to account should be brought into hotchpot and the funds distributed pro rata.

6. RECEIVERS ⟸128—RECEIVERS' CERTIFICATES—PRIORITIES.
An order continuing a receivership declared that 10 per cent. of the gross rents and incomes of the property should be set aside in a separate fund held for or applied to the expenses, charges, or obligations of the receivership, and further provided that after making certain deductions the receiver should pay and apply the balance of the rents and income from such property to the payment of taxes and other governmental charges thereon and the rentals due the owners. To prevent the lessors

of property in which the corporation had a leasehold interest from dispossessing him on account of nonpayment of rents and taxes, the receiver under authority of the court issued certificates to obtain funds for the payment of those charges. *Held*, that such certificates could not be construed as obligations for which a percentage of the profits was reserved, but that term should be understood as referring merely to the ordinary expenses of the receivership; nor could the order be construed as giving a priority to rent charges subsequently accruing over the certificates.

7. RECEIVERS ⟸128—RECEIVERS' CERTIFICATES—PRIORITIES.
Expenses of receivership, including allowances to receivers' solicitors, are taxable as costs and entitled to priority over the receivers' certificates; but allowances to a mortgage trustee and its solicitors are not entitled to such priority.

8. RECEIVERS ⟸128—RECEIVERS' CERTIFICATES—PRIORITIES.
Where receivers' certificates were issued subject to costs, counsel fees, and disbursements, but the claims of lessors for rents on property held by the receiver and which accrued during the receivership stood on the same footing as ordinary receivership certificates being debts of the receiver, funds remaining in the hands of the receiver after deducting the allowances to his attorney and the incidental charges should be ratably divided between the lessors and certificate holders; the allowance to the mortgage trustees and their solicitors being a charge against the sum apportioned to the certificate holders but not the lessors.

9. APPEAL AND ERROR ⟸900—REVIEW—PRESUMPTIONS.
Where no appeal was taken from an order denying the holders of receivers' certificates certain priorities, it must be assumed that they did not assert priority over those charges.

10. RECEIVERS ⟸99(1)—DEBTS—RENT.
Where the receiver of an insolvent corporation who took possession of property in which the corporation had a leasehold interest, and, to prevent the lessors from dispossessing him on account of the nonpayment of charges and rent, secured an order providing for the issuance of certificates to obtain funds to pay such charges, the lessors' claim for rent subsequently accruing and which was secured by the right of re-entry is a proper debt against the receiver, regardless of whether his possession in the first instance was neutral, and may be asserted as such in a proceeding to settle the receiver's accounts.

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

Creditors' bill by Alwin Ball, Jr., against the Improved Property Holding Company of New York, together with ancillary dependent bills by the Empire Trust Company, as trustee, against the Improved Property Holding Company of New York and others. A receiver was appointed, and Eliza L. Parsons and others, trustees under the last will and testament of William Barclay Parsons, deceased, and others, and Eliza L. Parsons and others individually, filed objections to the account of the receiver. From an order sustaining the report of the master, and overruling their objections, Eliza L. Parsons and others appeal. Reversed and remanded.

This is an appeal from an order disposing of the balance of a certain sum of money in the hands of the receiver of the defendant herein upon confirmation of a master's report filed June 13, 1916. The order was made in the administration of the property of the defendant, which came first into this court by a creditor's bill to sequester all the assets of the corporation and to prevent its dissipation by attachments, executions, and

other legal process issued by its creditors. In May, 1912, the bill was filed and a decree entered on May 21, 1914, appointed temporary receivers for the corporation, followed on May 31, 1914, by an order making permanent such receivers and directing them to conserve the assets of the company for its creditors. The assets of the corporation consisted for the most part of terms for years in real estate in the city of New York, among which was a lease to the corporation from certain individuals who were trustees under the will of William Barclay Parsons, deceased. The lease was made on January 21, 1908, and was at the yearly rent of $33,500 a year. It had the usual covenants to pay the taxes levied upon the property, rights of re-entry for defaults, and other clauses common in such cases. On June 3, 1912, the Parsons trustees applied to the District Court for leave to dispossess the receiver, who was in actual possession under the orders of May, 1912, and to take over the lease in accordance with the rights of re-entry therein provided, and this leave was given on July 16, 1912, and remained available to the lessors from that time on. At the time when the receiver was appointed the taxes were largely in arrears and the lessor had the right therefore to re-enter under its lease in accordance with the Code of Civil Procedure of the State of New York.

On July 3, 1912, the Equitable Trust Company, as trustee for bondholders under a mortgage executed on June 1, 1906, by ancillary dependent bill began to foreclose that mortgage. The Empire Trust Company was a party defendant to this suit, as trustee under a junior mortgage of May 24, 1909, known as B-mortgage, which covered part of the assets of the defendant. On July 12, 1912, the receivership was divided, and one set of receivers from that time forth took possession of and received the income from the property covered by the Equitable Trust Company mortgage which did not include the premises leased by the Parsons trustees. The third receiver, Joseph J. O'Donohue, continued as receiver of the rest of the property of the defendant, including the premises now in question. Finally, on November 20, 1912, the Empire Trust Company of New York, as trustee under the mortgage of May 24, 1909, already mentioned, by ancillary dependent bill started to foreclose its mortgage (the B-mortgage), and the receivership was extended to that property for the benefit of the Empire Trust Company as such trustee, and an order was signed on November 25, 1912, directing the disposition of the income from the properties to be made by the receiver. The relevant parts of that order are as follows:

"Ordered that Joseph J. O'Donohue, Jr., as receiver of the property of Improved Property Holding Company of New York, covered by its said mortgage dated May 24, 1909, pay and apply and disburse the rents and income from each of the properties in his possession as and when received by him as follows:

"(a) Ten per cent. (10%) of the gross rents and income of each of the said properties shall be set aside in a separate fund and held for or applied to the payment of the expenses, charges and obligations of the receivership, including a fair proportion of the expenses of the maintenance of the general offices of Joseph J. O'Donohue, Jr., as receiver in any of his aforesaid capacities at No. 505 Fifth avenue, borough of Manhattan, city of New York, and the wages of the employés and assistants connected therewith.

"(b) After the deduction of said ten per cent. all rents and income from the said property shall be applied to the payment of operating or maintenance charges or expenses of the said property, exclusive of taxes, ground rents and mortgage interest.

"(c) After making the deductions and payments provided for above in paragraphs (a) and (b) the said receiver shall pay and apply the balance of the rents and income from each such property to the payment of the taxes and other governmental charges thereon, and the rentals due the owners thereof, the interest on mortgages thereon, and other sums payable on account of obligations in respect of each such property, by the Improved Property Holding Company of New York and properly payable by the receiver hereby appointed, it being the intent of this order that the rents and income from each property applied under this provision shall be applied to such property only.

"(d) After making the deductions and payments provided for above in

paragraphs (a), (b), (c), the receiver shall hold the balance of the rents and income from each such property, subject to the further order of this court."

Meanwhile, the bondholders under the mortgage of May 24, 1909, known as B-mortgage, desiring to maintain the lease of 505 Fifth avenue, entered into negotiations with the Parsons trustees looking toward the payment of back taxes and made a provisional agreement with the Parsons trustees that upon the payment of such back taxes they should keep the leasehold for two years from January 1, 1913. In order to obtain the necessary money, which amounted to more than $30,000, on November 27, 1912, they petitioned the court for leave to issue receivers' certificates, the proceeds of which should go to pay these taxes, and relieve the term from the threat of re-entry, as well as to pay the interest due upon a mortgage of the term to the lessors. On the same day the court passed an order granting the prayer of this petition and authorizing the receiver to issue $30,000 of receivers' certificates. The material part of this order is as follows:

"Ordered that the prayer of said petition be and it hereby is granted so far as is hereinafter set forth, and the said Joseph J. O'Donohue, Jr., as receiver of the property of Improved Property Holding Company of New York, covered by its mortgage dated May 24, 1909, be and he hereby is authorized to issue his certificates of indebtedness to an amount not exceeding $30,000, upon the terms and conditions hereinafter set forth.

"Said certificates, to the amount of the principal and interest thereof, shall constitute a lien upon all the property of every nature and description of Improved Property Holding Company of New York, subject to its mortgage dated May 24, 1909, made to Empire Trust Company, as trustee, and upon all the net earnings and income of the said property after deduction of 10 per cent. of the income from the said property, as provided in the order filed in the above entitled causes on the 25th day of November, 1912, except so much of said property and earnings as may be necessary to defray costs, counsel fees and disbursements as finally allowed by the court. Said lien shall be prior, as respects said property, to the mortgage of Improved Property Holding Company of New York dated May 24, 1909, to the lien of the mortgage of Improved Property Holding Company of New York, dated October 1, 1911, made to New York Trust Company, as trustee, and to the claims of the general unsecured creditors of Improved Property Holding Company of New York. * * *

"The proceeds of the said certificates shall be applied to the following purposes and no other:

"(1) The payment of the arrears of taxes, water rents and other charges, together with interest thereon to the date of payment, assessed against the premises in the borough of Manhattan, in the city of New York, known as No. 505 Fifth avenue, which premises were leased by indenture dated January 24, 1909, between Eliza L. Parsons, Schuyler Parsons and William Barclay Parsons, as trustees, parties of the first part, and Improved Property Holding Company of New York, party of the second part.

"(2) To the payment of the arrears of interest upon the mortgage upon said leasehold, dated January 21, 1908, made by Improved Property Holding Company of New York to Eliza L. Parsons, and others, as trustees.

"(3) To the payment of interest at the rate of 6 per cent. per annum upon any deferred payments heretofore, since May 21, 1912, made to the lessors under said lease, from the date when such deferred payments became due to the date of the payment thereof.

"(4) To the payment of a counsel fee not exceeding $1,000 to counsel for the said lessors for legal services made necessary by the receivership of Improved Property Holding Company of New York."

Later it became necessary to obtain seven thousand dollars more upon similar receivers' certificates for the same purposes, and on the 17th day of November, 1913, the District Court passed an order in the same terms authorizing the issuance of such added certificates.

On June 1, 1915, the Parsons trustees obtained the leave of this court to begin the foreclosure of their mortgage upon the term for years because of the defaults in the payment of the installments of interest due upon the same,

and foreclosure was begun, a receiver appointed in the state courts, and the property taken out of the hands of the District Court.

The receiver having disposed of all the property in one way or another filed his accounts and prayed leave for a discharge on June 19, 1915. The accounts were later continued down to April 1, 1916, and showed a balance on hand derived altogether from the net income out of the property while it had been managed by him, and those funds which had been turned over to him on his separate appointment in June, 1912. On July second, 1915, the Parsons trustees filed certain objections to the account of the receiver as so filed, which matter stood over until April 13, 1916. Meanwhile, and on November 11, 1915, the Parsons trustees filed supplemental objections to the accounts, these latter seeking to raise the question whether the receivers' certificates had priority over their claims for rents which had arisen during the occupation of the receiver. The District Court on April 1, 1916, denied leave to the Parsons trustees to file the supplemental objections heretofore noticed, but referred the whole accounts as brought down by the revised summary of April 1, 1916, to a special master to take and state the same and to report on the proper allowances, claims and general distribution of the balance found due. This report the special master filed on June 13, 1916. He disregarded the claims of the Parsons trustees under the ruling of the District Court, passed the accounts, and made certain allowances to the receiver's attorneys. To this report the Parsons trustees excepted, but the report was confirmed with certain modifications in the allowances.

The substantial questions involved are those sought to be raised by the supplemental objections of the Parsons trustees, i. e., whether upon the net balance of the income derived from the management of all the properties covered by the B-mortgage the receivers' certificates are a lien ahead of the rent arising under the Parsons lease, and, if not, where in marshaling the income they should stand and where should stand the allowances to the trustee and its solicitors.

Spotswood D. Bowers, of Bridgeport, Conn., for Parsons trustees.

Reese D. Alsop, of New York City, for Empire Trust Co.

Edward F. Clark and Rogers Hinds, both of New York City, for holders of receivers' certificates.

Guy Van Amringe, of New York City, for receiver.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

LEARNED HAND, District Judge (after stating the facts as above). [1] Among the creditors of a receiver we see no reason why either the lessors or the certificate holders should enjoy a priority unless some such was established by the court. We are not dealing with a public service corporation (Texas Co. v. Int. & G. North Co., 237 Fed. 921, 150 C. C. A. 571), and unless it appears that the court meant to postpone the certificate holders to the lessors, or vice versa, we can see no reason upon the bare origin of their claims why either should step ahead of the other. We recognize no difference in equity between the rent due before the insolvency which was secured by the right of re-entry and which the certificates paid, and that due afterwards which was equally secured, and which the lessors forebore to assert by re-entry. It is true that under Durand & Co. v. Howard & Co., 216 Fed. 585, 132 C. C. A. 589, L. R. A. 1915B, 998, the claim for rent due before the insolvency was held not to be preferred in distribution, but that case rested upon the waiver of the existing forfeiture involved in asking the court to compel the receiver to exercise his option to affirm or reject. The lessors did

not do so here, and theirs was a claim upon which they could have reentered. The supposition, therefore, that the certificates should be postponed, because their proceeds only went to pay an existing debt of the corporation, is not true in fact assuming it would in any case be a good distinction, which we do not decide. The consideration advanced by each class of creditors, the lessors and the certificate holders, was for the essential preservation of the estate, since without it the best asset would have been lost. Each was a debt strictly within the powers of a court of equity which may pledge a part of the assets for the preservation of the rest; each was as much an operating expense as the other.

[2] As in all such cases, the order authorizing the debt is the most conclusive evidence of the rank which the creditors should hold among other claims on the fund. This has been repeatedly used as the test in cases of receivers' certificates. Anderson v. Condict, 93 Fed. 349, 35 C. C. A. 335; In re John W. Farley Co., 227 Fed. 378, 142 C. C. A. 74; St. Louis Union Trust Co. v. Texas So. Ry. Co., 59 Tex. Civ. App. 157, 126 S. W. 297; Lewis v. Linden Steel Co., 183 Pa. 248, 38 Atl. 606; In re J. B. & J. M. Cornell (D. C.) 201 Fed. 381. The court having the fund in its custody may establish such priorities as it sees fit, at least as against such creditors, as take the credit of the receiver after the order authorizing the earlier debt had once been passed. Every one who deals with a receiver knows that he has the power to charge his estate only as the court may authorize him, and, if a prospective creditor fails to inquire how far the assets may be already incumbered, he takes the risk.

[3] We do not forget that the court is not absolutely bound to recognize the priorities fixed by the order, and that the matter is open to equitable readjustment, however conclusive a protection it may be to the receiver as to payments made under its terms. Louisville Ry. Co. v. Wilson, 138 U. S. 501, 506, 11 Sup. Ct. 405, 34 L. Ed. 1023. But, as we shall show, the orders in this case established no priorities as between the classes, and we are therefore relieved of the necessity of determining in what circumstances we should disregard them. All we need assert is that, disregarding the orders, there is no inherent ground for priority between him who lends money to pay accrued rent which is secured and him who allows the use of his property upon the agreement that the accruing rent shall be paid. Just why it should be taken against the lessor that he thought it profitable to leave the property at the existing rent, or against the bondholders that they should have thought it profitable to assume the lease, does not appear obvious to us. We therefore proceed to consider the effect of the orders.

[4, 5] The order of November 27, 1912, did not profess to give the certificates any priority except as against the mortgagees and the unsecured creditors. We pass the question whether those words were necessary in any event to give that priority if the order was granted after the mortgagees had become parties to the suit by asking to foreclose. Whether necessary or not, they meant to go no further in establishing priority than to put the certificates ahead of creditors,

secured and unsecured, of the corporation. As between themselves and other creditors of the receiver the certificate holders stood, so far as we can see, on a parity for the reasons given above. Hence it follows that the rule should apply of Lewis v. Linden Steel Co., 183 Pa. 248, 38 Atl. 606, and In re J. B. & J. M. Cornell (D. C.) 201 Fed. 381, that the creditors of a receiver in the absence of some original marshaling to the contrary, or of some fundamental equity, shall share ratably. Therefore the fund should be brought in hotchpot with all the claims of receiver, and each should share pro rata. In so far as Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337, gives the lessors greater rights merely as lessors, with deference, we do not follow it. It is to be noted in that case that the lessors had a lien upon all the improvements erected on the locus in quo, which were the source of the fund. The contest seems therefore to have been between a prior lien of the lessor not a party and the lien of the certificates. We need not differ from the decision rendered upon that question.

[6] Nor under the order of November 25, 1912, should the certificate holders be preferred as falling within the class secured by the ten per cent. reserve fund. Verbally taken, the word "obligations" would, of course, cover them; but we read the phrase rather in its context, and, so read, we believe that it was meant to cover the ordinary expenses which the receiver might have to pay currently as he went and such as he might not have paid when he accounted. Paragraph (c) of the order, on the other hand, does not affirmatively give a priority to rent over such charges as the certificates, because the latter by virtue of their payment of past rent, secured, as we have said, by the right of re-entry, partake enough of those claims to fall within these words of the order, which was passed before the back rent had been paid.

[7-9] The only question remaining is of the allowances to the mortgage trustee and its solicitors. As between them and creditors of the receiver, they have no priority. The court must first pay its debts, the solicitors must look to their client, and the trustee to its beneficiaries. Petersburg Savings & Insurance Co. v. Dellatorre, 70 Fed. 643, 7 C. C. A. 310. Such services, when performed for the general preservation of the fund, as, for instance, the allowances to the receiver's attorneys, stand on a different basis; but, when the solicitor of a party brings a fund into court for administration, he must look to the ultimate share of his client for payment for services rendered to that client, or to his retainer. This would, of course, free the share of the certificates as well, except for the language of the order of November 27, 1912, that the lien of the certificates shall be subject to "costs, counsel fees and disbursements." It is permissible to argue that this affects the lien only qua lien, but we think not. The purpose is pretty clear to give counsel fees priority as against the certificates, and among counsel fees we are disposed to include the allowances to the trustee's solicitors. The precise point was not argued, and we assume that the certificate holders in any case do not assert a priority over those charges, since they were allowed against them in the court below and no appeal was taken.

The net balance in the hands of the receiver will therefore be divided as follows: First, deduct the allowances to the receiver's attorney and the incidental charges of the receivership; next, divide the balance ratably between the lessors and the certificate holders; last, charge against the dividend of the certificate holders, the allowance to the solicitors of the trustee and to the trustee itself.

[10] We have, of course, assumed throughout that the claim for rent against the receiver was a proper debt of the receiver. This is not contrary to the doctrine of Stokes v. Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870. The very distinguished and learned judge who wrote the prevailing opinion in the case distinctly said that the rule did not apply to a claim by the lessor in the proceedings in which the receiver was appointed, and he specifically reserved such a right from the effect of the decree. In the case at bar it is evident from the petition of the receiver of November 27, 1912, that his purpose was to preserve the lease for the purpose of assigning it to a corporation which the bondholders at that time expected to organize. This certainly could not have been supposed to be possible unless the fund was charged with the intervening rents. We need not therefore decide what was the effect of the neutral occupation of the receiver after July 16, 1912, when the lessors were free to re-enter. Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632; U. S. Trust Co. v. Wabash Ry. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085. There can be no doubt that the receiver by his petition and the order upon it and the payment of the back rents meant to abandon his earlier neutral position, and that he became liable during his subsequent occupation, for all ensuing charges. This is equally true whether or not he had finally elected to assume the lease for all purposes. Any other interpretation of the proceedings resulting in the issuance of the certificates would make them a fraud upon the lessors, who continued to allow the receiver to remain in possession.

The order is reversed, and the cause remanded for further proceedings consistent with the foregoing.

McFARLAND v. SAVANNAH RIVER SALES CO.

(Circuit Court of Appeals, Third Circuit. January 8, 1918.)

No. 2275.

SALES ⊂=109—CONTRACT FOR SALE AND PURCHASE OF LUMBER—CONSTRUCTION —BREACH.

Plaintiff contracted to sell and defendant to buy 2,000,000 feet of lumber, to be delivered at plaintiff's mill on barges or vessels furnished by defendant. It was to be paid for "cash less 2 per cent. 30 days from date of shipment." Delivery "to begin prompt and be completed within 75 to 90 days." Shipment "will be made as above, or as nearly as possible, delays by fires, strikes, shipwreck, or other unforeseen contingencies excepted." *Held:* (1) That shipment was required to be made the same as delivery within 90 days; (2) that payment was to be made within 30 days after shipment; (3) that notices by plaintiff in reply to requests for ex-

tension of time that it would expect shipments to be made as per contract, and did not intend to furnish lumber thereon after expiration of the 90 days, did not constitute an anticipatory breach; (4) that defendant was not relieved from the requirement to make shipment within the 90 days under the provision against "unforeseen contingencies," because certain barges which he chartered were unable because of weather conditions to perform their charters, it not appearing that others could not have been obtained; (5) that his failure to make payments and to ship all the lumber within the prescribed time were breaches of the contract which entitled plaintiff to recover for the part performed and to rescind as to the remainder.

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

Action at law by the Savannah River Sales Company against James B. McFarland, Jr., trading as the McFarland Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 242 Fed. 587.

Ralph B. Evans, Frank P. Prichard, and J. Quincy Hunsicker, Jr., all of Philadelphia, Pa., for plaintiff in error.

Owen J. Roberts, C. Allison Scully, and Joseph S. Clark, all of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action in assumpsit, brought by the Savannah River Sales Company against James B. McFarland, Jr., trading as McFarland Lumber Company, to recover the price for a portion of the contract quantity of lumber delivered by the plaintiff to the defendant.

The defendant is a wholesale lumber dealer in Philadelphia. The plaintiff is a lumber manufacturer with a mill at Wiggins, South Carolina. In October and November, 1915, the parties entered into a contract by correspondence and the exchange of orders and acceptances, whereby the plaintiff agreed to sell and the defendant to purchase 2,000,000 feet of lumber under terms and conditions of which the following only are pertinent to this controversy:

"Terms: Cash less 2 per cent. 30 days from date of shipment.
"Price: F. A. S. barge or vessel Wiggins Mill.
"Delivery: To begin prompt, and be completed within 75 to 90 days.
"Shipment: Shipment will be made as above or as nearly as possible, delays by fires, strikes, shipwreck or other unforeseen contingencies excepted."

As the contract orders bear different dates, it was agreed at the trial that the time for delivery under all orders expired on February 3, 1916.

After the contract was made, the defendant chartered from the Southern Transportation Company, a shipping concern engaged in coastwise trade, four barges to report at Wiggins before February 1, 1916, and load the lumber for transportation to Philadelphia.

The first shipment was made on November 30, and was invoiced to the defendant at the sum of $4525.84. On December 30, the defendant paid $4000.00 on account of the invoice, and held back $525.84

pending the unloading and "counting of the lumber thereon." To this the plaintiff made no protest. On counting the lumber, the defendant found a shortage, which, in money, amounted to $8.23. But he did not then or later remit the plaintiff the difference between this small shortage and the substantial amount retained to cover it. This is one item sued for in this action.

As the barges were slow in arriving at Wiggins, and as the defendant understood that he "must move all stock purchased from (the plaintiff) by February 3d," he endeavored, by letter of December 22, to effect new arrangements with the plaintiff whereby he could secure barges and make shipments after the expiration of the time prescribed by the contract. In this he was not successful, for the plaintiff replied by letter of December 27, as follows:

"I am in receipt of your letter of the 22d, beg to advise you that *we will expect you to move your order as per contract.*"

Continuing, the plaintiff proposed a modification of the contract, which, had it been accepted, would have relieved the defendant of some of his difficulties. It is as follows:

"If, *at the expiration of the contract*, there is *not over one barge*, say 400 to 500 M ft. to be shipped, we will allow you the privilege of either cancelling this balance or advancing 90 per cent. against the same."

The defendant made no reply to this offer until January 31.

During this correspondence the second barge arrived. It was loaded and the lumber invoiced under date of January 1, 1916. Payment was due, it is claimed, 30 days thereafter.

No other barge reported at Wiggins for several weeks. On January 25, the plaintiff wrote the defendant:

"We wish to call your attention to the fact that the time for moving your orders will expire on the 3d of February."

On January 29, the plaintiff replied to a letter of the Transportation Company (not in evidence, but written evidently with reference to delays or difficulties in getting barges to Wiggins), as follows:

"I have yours of the 27th inst. and note carefully all you say.

"This is a matter that we are unable to discuss with you. We made a contract with the McFarland Lumber Co. with the understanding that the lumber would be moved within 60 to 90 days. The 90 days will expire on Feb. 3d, after which date it is not our intention to furnish them any more lumber on this contract."

The Transportation Company sent this letter to the defendant, whereupon, the defendant wrote the plaintiff on January 31, stating, that he would expect the plaintiff to make deliveries after February 3, inasmuch as delays in shipment were due to weather conditions and not to any fault of his or of the Transportation Company, promising to mail on the next day (February 1) a check for 90 per cent. of the invoice of January 1 (without referring to the balance due upon invoice of November 30), and promising also to mail a check for approximately 90 per cent. on the *fifth* barge "as per special arrangements of your letter of December 27th." The letter referred to is the one in which the plaintiff said, that "if there is not over one barge"

of lumber remaining to be shipped "at the expiration of the contract," it would give the defendant the privilege of cancelling the balance or advancing 90 per cent. against it.

At the time of this correspondence, but two barges had been loaded; the third had just arrived; the fourth was nowhere reported; and there was substantially "over one barge" of lumber remaining to be shipped. The plaintiff began loading the third barge. The defendant, evidently fearing or expecting that the plaintiff would refuse deliveries after the expiration of the contract period, did not remit the amount due on the second invoice, as he had promised, but, instead, sent a check for $4000.00 as a 90 per cent. advance against the "fifth" cargo. Not having received the remittance promised, and recognizing the legal purport and effect of accepting an advance on a cargo it was not obliged by the contract to deliver, the plaintiff returned the check, stopped loading, recovered the lumber that had been loaded, and notified the defendant that it rescinded the contract. After correspondence between the parties, which in no way altered their relations or affected their rights, the plaintiff brought this action to recover the balance due upon the first invoice and the whole amount due upon the second.

The court directed a verdict for the plaintiff on the ground that the failure of the defendant to make payments as required by the contract constituted breaches on his part, which gave the plaintiff the right to recover upon the contract in so far as it had been performed and to rescind the contract as to the remainder. The defendant sued out this writ of error.

The assignments of error resolve themselves into the question: Was the defendant obliged to move all the lumber by February 3, 1916, and pay for each shipment within 30 days? Upon this question the defendant submitted several propositions, which we shall consider separately.

First: The contract did not require the defendant to move all lumber by February 3.

In discussing this proposition we shall view the contract as it was originally made. We are of opinion that the defendant's tardy attempt by his letter of January 31 to accept the plaintiff's offer of December 22 to make one deferred delivery, implying and imposing conditions not embraced in the plaintiff's offer, did not constitute an agreement varying the terms of the contract.

In construing the contract, the defendant makes a distinction between the delivery of lumber and the shipment of lumber, maintaining that the duty to deliver devolved upon the plaintiff, while the duty to ship devolved upon the defendant; that the contract specified the time within which the plaintiff was required to make deliveries, but that it did not specify the time within which the defendant was required to make shipments. The defendant maintains, therefore, that to perform its undertaking to make deliveries (which according to the contract were to be F. A. S. defendant's barges and vessels) the plaintiff was bound to pile all the lumber on its wharf by February 3; but, in performing his undertaking to ship, the defendant was not required to take and ship it at any prescribed time theretofore or thereafter. As

we read the contract, we see no distinction between deliveries and shipments, for the contract provided that delivery shall begin and "be completed" within 90 days and shipments shall be made "as above," that is, according as deliveries are begun and completed. It is clear that the parties did not expect deliveries to be made before the defendant had brought his barges to the place of delivery and shipment, for the contract specifically provided for delivery F. A. S. barge or vessel, and the payment of certain charges to the plaintiff's stevedores for loading the same. It is equally clear that the plaintiff could not make a delivery F. A. S. barge or vessel if there was no barge or vessel alongside. It is very certain that the parties did not intend that the plaintiff should pile 2,000,000 feet of lumber on its wharf, there to remain until taken away at the convenience of the defendant. We are of opinion that the contract required the defendant to remove all lumber within the limit of 90 days, or by the agreed date of February 3, unless relieved by another paragraph of the contract presently to be considered.

Second: The contract did not specify a time of payment.

In support of the proposition that the contract did not specify a time of payment, and therefore the defendant committed no breach by nonpayment before the plaintiff rescinded the contract, the defendant questions the meaning of the contract terms of payment. These are—"Cash less 2 per cent. 30 days from date of shipment." This, he maintains, is not a requirement upon the defendant to pay cash within 30 days from date of shipment, but is in effect an inducement extended to him whereby he would get 2 per cent. discount if he paid within 30 days and would not get it if he did not pay within that time. He further maintains that as the contract is silent as to date of payment, the date is what the law makes it, namely, a reasonable time after shipment.

We think the terms of payment are in no degree ambiguous. They mean what they say—cash in 30 days with 2 per cent. discount. Failure to pay within 30 days was a breach. Time ordinarily being of the essence of merchants' contracts, there was here a breach justifying rescission. Lawder v. Mackie & Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795; Moss v. Katz, 69 Tex. 411, 6 S. W. 764; Reybold v. Voorhees, 30 Pa. 116; Rugg v. Moore, 110 Pa. 236, 1 Atl. 320. Without relying very insistently upon this contention, the defendant maintains for excuse of its failure to make payments within the time prescribed by the contract, that,

Third: The plaintiff committed an anticipatory breach of the contract.

This proposition is based upon the plaintiff's letter of January 29, notifying the Transportation Company that it would not furnish the defendant any more lumber after the expiration of the contract on February 3. But the plaintiff gave the defendant a similar notice by its letter of December 27, and again by its letter of January 25. These three notices, instead of constituting an anticipatory breach of the contract, show very clearly that the plaintiff proposed to perform its part of the contract and proposed also to make the defendant perform its part or suffer the consequences. These notices were nothing more than

assertions by the plaintiff of its contract right, the first of which, it may be assumed in the absence of an intimation to the contrary, was given in ample time for the defendant to arrange for the arrival and loading of barges within the period prescribed by the contract.

The defendant maintains as a concluding proposition (if the contract be construed as creating reciprocal obligations on the plaintiff and defendant, the one to deliver and the other to ship the lumber within the contract time), that,

Fourth: The defendant was entitled to an extension of time for removing the lumber, if he can show that his failure to move it was due to causes over which he had no control.

By this proposition the defendant seeks to bring himself within the following clause of the contract:

"Shipment will be made as above or as nearly as possible, delays by fires, strikes, shipwreck or other unforeseen contingencies excepted."

This and like expressions in contracts have been the subject of judicial consideration, arising generally under the concluding words of such clauses, which in varying phrases are,—"other unforeseen contingencies," "unforeseen casualties," "other causes," etc. Pacific Metal Works v. Californian Canneries Co., 164 Fed. 980, 91 C. C. A. 108; Hickman v. Cabot, 183 Fed. 747, 106 C. C. A. 183; Connell Bros. v. Diederichsen & Co., 213 Fed. 737, 130 C. C. A. 251; Fish v. Hamilton, 112 Fed. 742, 50 C. C. A. 509; Jackson Phosphate Co. v. Caraleigh, 213 Fed. 743, 130 C. C. A. 257. They have been given judicial interpretation with reference to the peculiar facts of the cases, a full discussion of which appears in the briefs. But we feel that we are not called upon to construe the clause in this contract and determine whether the words "or other unforeseen contingencies," are, or are not ejusdem generis of the preceding particular words, "fires, strikes, shipwreck," and, whether, accordingly, they limit or enlarge the class of casualties specifically mentioned, because, what the defendant offered to prove in order to bring himself within the clause, would not, if admitted, make the clause available to him under either construction. The unforeseen contingency which the defendant sought to introduce in evidence to bring him within this clause (and which the court excluded against his exception, now being reviewed), was weather conditions which prevented two chartered barges, the Raritan and the Tampa, reporting at the plaintiff's mill within the prescribed period.

Assuming it to be true that the defendant had chartered these two barges to move the contract lumber, and that, owing to circumstances beyond his control, they had failed to report within the proper time, that did not excuse him for not performing his contract undertaking. By that undertaking the defendant bound himself to make shipments within a specified time. He was bound, therefore, to supply barges and vessels within that time, barring contingencies that made it impossible. He did not offer to prove that the Raritan and the Tampa were the only barges that could be gotten to perform that service. He was not restricted by the contract, nor was he permitted by the contract to limit his selection of barges to the Raritan and the Tampa. Failing to get the barges he had chartered, he was bound to go elsewhere and obtain

other barges, if available, with which to carry out his part of the contract. That others were available, is not questioned. He had been told as early as December 27, 1915, that he must make his shipments by February 3, 1916, and by his own letter of December 22, he showed that that was his understanding of his obligation. Weather conditions, which prevented two particular barges reaching the plaintiff's mill is not such an unforeseen contingency, within the meaning of the saving clause of the contract, as will excuse him for not getting other barges to the mill within the contract time. Pacific Sheet Metal Works v. Californian Canneries Co., 164 Fed. 980, 91 C. C. A. 108; Connell Bros. v. Deiderichsen & Co., 213 Fed. 737, 130 C. C. A. 251.

We are of opinion that the District Court committed no error in refusing to admit evidence, which, if admitted, would not have brought the defendant within the exception of the contract.

We find with the District Court, that the defendant was bound to ship all lumber by February 3; that the plaintiff committed no anticipatory breach of the contract; that the defendant committed two breaches of the contract by failing to make payments within the time stipulated, and, that, therefore, the plaintiff was entitled to recover on the contract in so far as it had been performed and to rescind the contract as to the remainder.

The judgment below is

Affirmed.

PENINSULAR CHEMICAL CO. v. LEVINSON et al.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1917.)

No. 3043.

1. TRADE-MARKS AND TRADE-NAMES ⇐61—REGISTRATION—SCOPE OF TRADE-MARK.

   Where the certificate of registration of a trade-mark recited that it was used for chemicals, medicines, and pharmaceutical preparations, the trade-mark did not include cigars, for they cannot be said to be of the same descriptive properties as the specified articles, even though they are usually sold at drug stores.

2. TRADE-MARKS AND TRADE-NAMES ⇐97—UNFAIR COMPETITION—WHAT CONSTITUTES.

   Plaintiff, which sold and distributed drugs and other druggist supplies, adopted as its trade-name and trade-mark the arbitrary word "Penslar." The drug stores which purchased such articles were known as "Penslar Drug Stores," and plaintiff intended ultimately to sell cigars. Defendants sold cigars marked "Penslar" to the Penslar drug stores, patronizing plaintiff. Defendants' general representations were that plaintiff had determined to put out cigars, and that defendants were engaged on behalf of plaintiff in introducing them to the Penslar Drug Stores, and that if the dealer would not buy them it would be necessary to offer them to some competitor who did not have Penslar goods. *Held*, there being a presumption that the cigars were inferior or they would not be sold by misrepresentations, and that presumption being upheld by evidence, defendants should be enjoined from using the name "Penslar" in connection with their cigars; their purpose being a fraud, and it working injury to the good will of plaintiff's business and the reputation of its output,

by inducing customers to think the cigars, which were inferior, were offered by plaintiff.

3. TRADE-MARKS AND TRADE-NAMES ⟸93(1)—UNFAIR COMPETITION—LIABILITY FOR MISREPRESENTATIONS.
In such case, where the manufacturer of the cigars contended that he did not authorize his codefendant, the salesman, to make misrepresentations as to their origin, it must be inferred that he authorized such misrepresentations, as he copied the name used by plaintiff in disposing of its product, and also dressed his cigars in such a way as to lead purchasers to believe they were manufactured by plaintiff.

4. TRADE-MARKS AND TRADE-NAMES ⟸85(1)—RELIEF—CLEAN HANDS.
Where plaintiff, a corporation engaged in the distribution of drugs and pharmaceutical supplies, purchased them from a Detroit company, but maintained in Canada its own place of manufacture for goods sold there, and plaintiff's label, between their corporate name and American address, contained the word "Distributors," but elsewhere stated that plaintiff's Canadian laboratory was in Walkerville, Ontario, plaintiff cannot be denied protection of a court of equity against one seeking to dispose of his goods as those of plaintiff, on the ground that, because of misrepresentations on the label, plaintiff did not come into court with clean hands; the label merely being equivalent to a statement that some of the goods sold in Canada were made there.

5. TRADE-MARKS AND TRADE-NAMES ⟸97—RIGHT TO INJUNCTION—ISSUANCE.
Where the actual damages suffered by reason of unfair competition are difficult to establish with precision, or perhaps impossible of ascertainment, and the prevention of threatened future injury is the substantial thing, an injunction will be awarded, even though there is no sufficient basis for an accounting.

6. EQUITY ⟸65(1)—CLEAN HANDS.
A defendant, whose business enterprise is based upon express and deliberate fraud, will not find a court of equity as strenuous to preserve all the rights which he might have had, if his conduct and motives had been honest.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Bill by the Peninsular Chemical Company against Samuel Levinson and another. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded.

The Nelson-Baker Company is engaged, at Detroit, in the business of manufacturing drugs and medicines. Observing that other manufacturers of similar goods were putting out a "line" of drug store supplies and sundries and supplying many or most of the needs of a chain of drug stores throughout the country, which stores were designated by the trade-name adopted for such line of supplies, the Nelson-Baker Company determined to adopt that method of business. Accordingly, it organized a corporation under the laws of Michigan, with stockholders and officers mainly identical with those of the Nelson-Baker Company. This corporation was named "Peninsular Chemical Company," and is the plaintiff herein. Its goods, sold in this country, it bought mainly, or took over from the Nelson-Baker Company but bought some articles from other manufacturers. It adopted, as its general trade-name and trademark, for the goods which it handled, "Penslar," and this arbitrary name was commonly used in a peculiar script form with certain underscoring and other selected and decorative features.

At the time the present controversy arose the situation is thus accurately and briefly stated by Judge Hollister: "To such an extent had complainant introduced its goods at the time this suit was brought (December 2, 1915) that it had more than 3,500 agencies in the United States and Canada, and its

sales had risen to more than $300,000 annually. These drug stores display the name 'Penslar' on the front glass of the show window, or on the door of the store, and the dealer agencies are known as 'Penslar Drug Stores.' The complainant does not own the drug stores, nor has it any interest in them, so far as appears. The mark is distinctive, attracts attention, and is composed of a coined word written with peculiar characteristics. It has no meaning except as a name for complainant's goods, but it denotes origin, not only from that fact, but also because it is an abbreviation of the adjective 'Peninsular' in complainant's corporate name. The name has become identified with complainant's goods, which enjoy a high reputation for quality and reliability."

It should be added that, at this time, the plaintiff's "line" had been extended until it included more than 175 articles, each of which was called "Penslar," and was sold at the "Penslar" drug stores. It had never sold cigars.

The defendants had been engaged at Cincinnati, in a small way, making and selling cigars. They were brothers, and one had charge of producing and one of selling. The latter made his sales mostly by traveling about and by personal solicitation. Shortly before suit was brought, the defendants began to offer for sale, to the Penslar drug stores, cigars which were marked "Penslar" and "Made by the Penslar Co.," and which they offered as being made by plaintiff or in its interest. Their general representation was that plaintiff had determined to add cigars to its line, and had put out these cigars, or caused them to be put out; that defendants were engaged on behalf of plaintiff in introducing the cigars to the Penslar drug stores; and that, if the dealer would not buy them and add them to his line, it would be necessary to offer them to some competitor who did not have Penslar goods. The invoices and bills, which accompanied defendants' shipments when they made a sale, purported to be from the Penslar Company, at Cincinnati, and specially directed that all remittances and correspondence should be addressed to Cincinnati; but in spite of this plaintiff, at Detroit, received remittances and correspondence regarding the cigars.

Thereupon, plaintiff filed this bill in the court below, alleging infringement of a common-law trade-mark, infringement of a registered trade-mark, and unfair competition and asking an injunction. There was the necessary diverse citizenship to give jurisdiction on that ground. The District Court, while finding the facts as claimed by plaintiff, and while accepting, in the main, plaintiff's theories of its rights, felt constrained to dismiss the bill practically on the theory of damnum absque injuria; and plaintiff appeals.

Wm. Lucking, of Detroit, Mich. (F. T. Nelson, of Detroit, Mich., of counsel), for appellant.

Littleford, James, Ballard & Frost, of Cincinnati, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. So far as concerns the registered trade-mark and the jurisdiction and rights which rest solely thereon, plaintiff can have no relief. The certificate of registration was issued April 8, 1911, No. 52,253, and specifies that the trade-mark was used for the specified line of articles, all of which were included in "class No. 6, chemicals, medicines, and pharmaceutical preparations." Cigars are not included in this list, nor can they be said to be of the same descriptive properties as the specified articles.

2. Based upon its common-law trade-mark rights, plaintiff argues that it has adopted the name "Penslar" for articles commonly sold in drug stores; that cigars are so sold; that, although it has not yet sold cigars, it plans to do so, and that this would be a natural and ordinary

development of its business; and that it has, therefore, a right to exclude from the use of the name one who adopts it for the sole purpose of forestalling plaintiff's impending adoption. This argument presents the very interesting question as to how far, if at all, a trademark may be pre-empted or reserved in advance of actual use—a question one aspect of which was somewhat considered by this court in Rectanus v. United Drug Co., 226 Fed. 545, 549, 553, 141 C. C. A. 301 (now pending in the Supreme Court). Its special color in the present case arises from the commercial practice, not yet, as far as we know, considered in any decided case, where a manufacturer or jobber is in the course of establishing and expanding throughout the country a chain of stores which use a trade-name and handle a constantly increasing line of articles sold under that same trade-name.

We have concluded that this question, as well as the somewhat correlative argument by defendants that the terms of plaintiff's charter do not permit it to sell cigars, do not require any decision in this case. We also pass without consideration the argument that since plaintiff is not selling cigars, there is no competition at all between the parties, and so there can be no unfair competition.

[2] 3. It is not denied that the good will of a business and the good reputation of an output, when considered in connection with the business itself, are a species of property which may not be destroyed with impunity; and we know of no principle which will forbid malicious destruction of this kind to a competitor and permit it to a stranger. Indeed, it was assumed by all parties in the court below, and in this court —and we do not doubt—that malicious damage by defendants to the good will of plaintiff's business and to the good reputation of plaintiff's line of goods would be redressed by the law, and would call for an injunction where the remedy at law was not adequate. The District Court felt that the existence of such damages was not sufficiently proved and—more specifically—that the cigars were not shown to be of distinctly poorer quality than the public would expect for the price charged. It is conceivable that an article, sold under the pretenses here employed, might be of such a high quality that no damage could come to the company falsely charged with its origin; but all presumptions are the other way. There is usually no sufficient motive to sell under false cover an article of high inherent merit. When it appeared that defendants untruthfully represented that the article they were selling was, in effect, the plaintiff's article, and that they were selling for or in the interest of plaintiff, that regular customers of plaintiff bought goods in the belief that they were of high quality or else plaintiff would not have put them out, and that certain customers found the goods unsatisfactory and unsalable, except at a sacrifice, we think there arose a sufficient presumption of threatened pecuniary injury to plaintiff to call for the injunction. Not only was there reasonable ground for apprehending injury to the high reputation of plaintiff's goods among its dealers and among consumers, but also the causing of a large number of dealers in different parts of the country to suppose that they had entered into contracts with plaintiff, when, in fact, they had not, was reasonably sure to produce trade disputes and complications lead-

ing to expenditure of valuable time and efforts to remove the false impression, even if it did not lead to the costs and expenses of actual litigation. That this is a kind of injury of which the law must take notice seems to us the necessary result of the fundamental principles involved; but if somewhat specific support in precedent is desired, it may be found in Eastman Co. v. Cycle Corp., 15 Patent Cas. 105, and Walter v. Ashton, [1902] 2 Chancery, 282. In the former of these cases, it was held that a defendant should not be allowed to sell "Kodak Bicycles," because of the injuries naturally resulting to the established trade in "Bicycle Kodaks"; and, in the latter, the defendant was not allowed to call its bicycle a "Times" bicycle, and represent that it was made by or for the newspaper of that name.

[3] 4. We have said that defendants held themselves out as selling for plaintiff. This is proved as against S. W. Levinson, the traveling salesman; Samuel Levinson, the manufacturer, denies that he authorized any such claims. If it were to be believed that he gave no express authority, that would make no difference, because his equivalent action must be inferred. It is true that the mere adoption of a trade word, which carries some color of description or of quality (as "Aluminum," in American Co. v. Saginaw Co. [C. C. A. 6] 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609), or the mere adoption of a not uncommon proper name, to which defendant, as against plaintiff, has no good-faith right (as "Borden" in Borden Co. v. Borden Co. [C. C. A. 7] 201 Fed. 510, 121 C. C. A. 200), may not alone be enough to prove that a defendant claims to be handling a plaintiff's output; but when, in this case, we find a word of arbitrary form, which also is a plain imitation of plaintiff's name, and find it used with the peculiar script and decorations of plaintiff, and find it so marked on goods offered for sale by defendants to plaintiff's dealers under such a system as existed here, there is no escape from the inference that both defendants indirectly made the same representations which S. W. Levinson made in express words. It must be remembered also that plaintiff's system of expanding business, and the systems followed by similar houses and well known to the dealers, made it a naturally to be expected thing that plaintiff should add cigars to its line, and the normal implications from the complete adoption of plaintiff's dress are affected by this well understood situation.

[4] 5. Defendants rely upon the equitable defense of "unclean hands," supplemented by the supposed effect of the Pure Food Law in absolutely prohibiting misbranding. As has been stated, the plaintiff is, in effect, a distributor in the United States, of pharmaceutical supplies made by the Nelson-Baker Company, at Detroit, and of other supplies which it buys from others. It also maintains, in Canada, its own place of manufacture for pharmaceutical goods to be there sold. This is in accordance with the familiar practice, induced by the Canadian customs law. Plaintiff's articles, which are in bottles, carry, at the bottom of the label, in large and prominent characters, the following:

"PENINSULAR CHEMICAL COMPANY,
"(*Incorporated*)
"DETROIT
Distributors,
MICHIGAN."

Some of them also carry, in another part of the label, and less prominently displayed, the words, "Canadian Laboratory, Peninsular Chemical Co., Ltd., Walkerville, Ont." If this were to receive defendant's coloring, we doubt whether there would be any material misrepresentation which would affect the relief to which plaintiff was otherwise entitled (Jacobs v. Beecham, 221 U. S. 263, 31 Sup. Ct. 555, 55 L. Ed. 729); but we fail to find any falsity whatever. Reasonably interpreted, this label is the statement of the Peninsular Chemical Company, of Detroit, that certain goods sold in Canada are made in Canada; and this is true. The defense of "unclean hands" is without substance.

[5] 6. Where the actual damages suffered are difficult to establish with precision or perhaps impossible of ascertainment, and where the prevention of threatened future injury is the substantial thing, an injunction will be awarded even though there is no sufficient basis for the accounting. Ludington Co. v. Leonard (C. C. A. 2) 127 Fed. 155, 62 C. C. A. 269; Gaines v. Rock Spring Co. (C. C. A. 6) 226 Fed. 531, 543, 141 C. C. A. 287. This seems to be such a case, though this conclusion is without prejudice to plaintiff's right to an accounting below, if it can make a prima facie showing of computable damages.

[6] 7. A defendant whose business enterprise is based upon express and deliberate fraud will not find a court of equity strenuous to preserve all rights he might have had if his conduct and motives had been honest. Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 723, 724, 119 C. C. A. 164. A leading firm of manufacturing pharmacists, in Detroit, sold a line of remedies and drug store sundries under the name "Nyall," through "Nyall Stores"; defendants, who had officially registered their Cincinnati cigar business under the name "Wyandotte Cigar Company," put out a line of "Nyall" cigars, over the name of "Nyall Cigar Co.," and tried to place them in the "Nyall Stores." The plaintiff, with its "Penslar" goods, found the defendants doing a similar thing; defendants had even announced their intention of selling "Rexall" cigars for distribution to the Rexall drug stores. If the defendants have used, or have any intention of using, the word "Penslar" in some manner which would not be within the condemnation we have expressed, such use or intention has not been disclosed. Until it is, it will be premature to speculate how far that can be done. The injunction will prohibit defendants from representing that cigars offered for sale by them are made by the plaintiff, or sold by its permission, or in its interest, or that plaintiff has any interest, direct or indirect, in such manufacture or sale, and from using, in connection with such cigars, the word "Penslar" in the same or in substantially the manner and form in which the word has been used by them.

The decree below is reversed, and the case remanded for a new decree in accordance with this opinion.

HERO v. HANKINS.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1917. Rehearing Denied February 18, 1918.)

No. 3075.

1. LANDLORD AND TENANT ⟸167(1)—DEFECTS IN PREMISES—LIABILITY OF LANDLORD.

Civ. Code La., art. 670, declares that every one is bound to keep his buildings in repair so that neither all nor any part of the material composing them may injure the neighbors or passengers, under penalty of all losses and damages which may result from the neglect of the owner, while article 2322 declares that the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it or when it is caused by a vice in original construction. *Held*, that the articles impose a duty on the owner of a building to keep it in a safe condition and make him answerable for damages occasioned by its ruin, fall, or collapse, whether such is due to structural vice or neglect to repair, and the owner cannot acquit himself of liability as to third persons lawfully on the premises by contracting with his tenant that the latter shall make repairs demanded of the owner by statute; but such freedom from liability extends only to those in privity with the tenant.

2. LANDLORD AND TENANT ⟸164(5)—DEFECTS IN PREMISES—LIABILITY OF LANDLORD—PRIVITY OF LESSEE.

The wife of one who rented two rooms, together with an appurtenant gallery, from the tenant of the premises who contracted to maintain them in repair, is not in such privity with the tenant that her recovery pursuant to Civ. Code La., art. 2322, for injuries resulting from the collapse of the gallery railing, can be defeated even though the lease required the tenant to keep the premises in repair and freed the landlord from liability as to the tenant for damages caused by vice or defects in the property except for neglect to make repairs after reasonable written notice.

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

Action by Mrs. Rosa Hankins against Mrs. George A. Hero. From a judgment for plaintiff, defendant appeals. Affirmed.

James Wilkinson and Wm. S. Hero, both of New Orleans, La., for appellant.

T. Semmes Walmsley and Michel Provosty, both of New Orleans, La., for appellee.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The controlling question is the liability of the owner of a building to the wife of a roomer, who had engaged two rooms of the tenement with an appurtenant gallery from the owner's tenant, for injuries sustained in consequence of the collapse of a defective railing of the gallery. Mrs. George A. Hero is the owner of a two-story dwelling house at 1426 Carondelet street, in the city of New Orleans, La. She leased the dwelling and premises to August Muller, who was acting for and in behalf of Mrs. Maria Martin. The lease,

which was for a year and in writing, obligated the lessee to keep the premises in good order, and contained a stipulation that the owner will not be responsible for damages caused by any vices or defects in the property, except for neglect to make repairs after reasonable written notice. Mrs. Martin rented by the month two upstairs rooms, with an appurtenant gallery, to the husband of the plaintiff. During the plaintiff's occupancy she washed a pair of hose, and hung them on the railing of the gallery that they might dry. Shortly afterwards she discovered that one of them had been blown off. She placed her hand on the rail to look into the yard below, and as she leaned forward the railing gave way, and she was thrown on the brick pavement below, sustaining serious injuries. She brought suit against the owner of the building and recovered a judgment, and the owner sued out a writ of error.

[1] In determining the liability of the owner of a demised tenement with respect to persons injured either by its defective condition or its defective construction, we look to the following provisions of the Civil Code of Louisiana:

"Art. 670. Every one is bound to keep his buildings in repair, so that neither their fall, nor * * * any part of the materials composing them, may injure the neighbors or passengers, under the penalty of all losses and damages, which may result from the neglect of the owner in that respect."

"Art. 2322. The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

In McConnell v. Lemley, 48 La. Ann. 1433, 20 South. 887, 34 L. R. A. 609, 55 Am. St. Rep. 319, the Supreme Court of Louisiana construed these articles as being in pari materia, and exclusively related to injuries which may be occasioned by falling walls, or materials composing them, upon neighbors or passers-by, and not to those resulting to occupants of the building or guests therein assembled, and denied a recovery to a guest who was injured by the fall of a gallery.

In Brodtman v. Finerty, 116 La. 1103, 41 South. 329, and Bianchi v. Del Valle, 117 La. 590, 42 South. 148, it was said that the claim of a wife of a tenant to any recovery from the owner of the building was through her husband, and her rights were measured by his.

In a later case (Cristadoro v. Von Behren's Heirs, 119 La. 1025, 44 South. 852, 17 L. R. A. [N. S.] 1161), the Supreme Court criticized the ruling in McConnell v. Lemley, supra, and in the syllabus it was said that the holding to the effect that the responsibility provided for by article 2322, Civil Code, is restricted to neighbors and passengers, was overruled.

All of the foregoing cases were examined by Judge Saunders, of the United States District Court of the Eastern Division of Louisiana, in Frank v. Suthon (C. C.) 159 Fed. 174, and held not to preclude a holding:

"That the landlord and owner of the building is liable in damages to all persons who are lawfully in his building for injuries sustained by them as the result of the dilapidated condition of the building; unless such persons

are debarred from recovery by reason of special contractual relations between themselves and the owner, or by reason of contributory negligence on the part of the persons injured, or other lawful defenses."

Very recently the Supreme Court of Louisiana was called upon to decide the right of the wife of a tenant to recover of the owner of a building damages for injuries sustained, as being measured by the rights and restrictions of the tenant. Ciaccio v. Carbajal, 76 South. 583. The court reviewed the former cases, and overruled them in so far as they identified the wife of a tenant with him as affecting her right to recover of the owner for personal injuries sustained because of the defective condition of the demised premises. That decision goes to the point that article 2322 of the Civil Code of Louisiana raises a duty on the part of the owner of a building to keep it in a safe condition, so that it may not injure by its ruin any one lawfully therein, and this duty, owing to a person lawfully therein, is not absolved by the tenant's failure to make the necessary repairs; that the wife of a tenant is lawfully on the premises, but is not in such privity of contract with the owner as to deny a recovery against him on the ground that the tenant did not perform his contract. The Louisiana statute, as thus construed (article 2322), imposes a duty on the owner of a building to keep it in a safe condition, and makes him answerable for the damage occasioned by its ruin—i. e., fall or collapse—whether such is due to structural vice or neglect to repair. The owner cannot wholly acquit himself of liability by contracting with his tenant that the latter shall make the repairs demanded of the former by the statute. The tenant will be bound by his contract; but one lawfully on the premises, who is not a privy with him, will not be bound.

[2] It may be said that the wife, or servant, or guest, is in privity with the tenant, and that their rights are no greater than his. But, as has been pointed out, the Supreme Court of Louisiana in its latest exposition of the law on the subject expressly refused to limit the scope of the statute (articles 2315 and 2322) so as to exclude from its protection members of a lessee's family, or the guests, or other person on the leased premises by invitation of the lessee. A tenant's wife or guests are not parties to his contract, and certainly the presence of a wife in her husband's home, or the gathering of invited guests there, cannot be said to be unlawful.

In the case at bar the lease contract contained a stipulation that the tenant received the premises in good order and obligated himself to keep the same in like good order during the term of the lease, and a covenant that the lessor will not be responsible for damages caused by any vices or defects of the leased property, except in case of positive neglect on his part to have the repairs made within a reasonable time after receiving from the lessee written notice of such defects. The plaintiff is not the wife of the tenant, but is the wife of one to whom the tenant rented two rooms of the demised tenement, with the appurtenant gallery. It would be carrying the doctrine of privity of contract beyond its legitimate scope to classify her as privy to the contract with the owner of the building. She comes within the protection of the statute, and the owner's contract with his tenant that he shall

perform the duty imposed by statute does not absolve from liability the owner of the building for the neglect to perform his statutory duty, personally or through his contractual substitute—the tenant.

The facts authorized a recovery, and we discover no error in the trial. The judgment is affirmed.

ROBINSON v. SEABOARD NAT. BANK OF NEW YORK et al.*

In re W. S. KUHN & CO.

(Circuit Court of Appeals, Third Circuit. February 2, 1918.)

Nos. 2261–2263.

BANKRUPTCY ⊂=309—CLAIMS—PARTNERSHIP AND INDIVIDUAL ASSETS.

Holders of the joint and several obligations of the members of a partnership, signed in their individual names, but executed in connection with a partnership transaction, are entitled to prove them against both the partnership estate and the individual estates of the partners.

Appeals from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of the bankruptcy of James S. Kuhn and William S. Kuhn, partners doing business as J. S. & W. S. Kuhn and W. S. Kuhn & Co. From orders (241 Fed. 935) allowing the claims of the Seaboard National Bank of New York and others against the partnership assets, A. C. Robinson, trustee in bankruptcy, appeals. Appeals dismissed.

J. M. Wright, Alvin A. Morris, and A. J. Barron, all of Pittsburgh, Pa. (Reed, Smith, Shaw & Beal, Patterson, Crawford, Miller & Arensberg, Chantler, McClung & Alexander, and McKee, Mitchell & Alter, all of Pittsburgh, Pa., of counsel), for appellant.

W. F. Knox, of Pittsburgh, Pa. (Herman Aaron, of New York City, of counsel), for appellee Seaboard Bank.

J. M. Shields, of Pittsburgh, Pa., for appellee Purdy.

Sterrett & Acheson, of Pittsburgh, Pa., for appellees Hutchins and Wheeler.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. The large record in this case finally narrows to a few undisputed facts and the deductions to be drawn therefrom. In the court below, a petition in bankruptcy was filed against James S. Kuhn and William S. Kuhn, individually and as partners doing business as J. S. & W. S. Kuhn, and also as partners doing business as W. S. Kuhn & Co. On settlement, there were for distribution assets of J. S. Kuhn individually, of W. S. Kuhn individually, of the partnership of J. S. & W. S. Kuhn, and of the partnership of W. S. Kuhn & Co. J. H. Purdy, the Seaboard National Bank, and Edward Hutchins et al., trustees, proved their respective claims and participat-

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

*For opinion on reargument, see 247 Fed. 1007, — C. C. A. —.

ed without objection in the individual estate of J. S. Kuhn and in the individual estate of W. S. Kuhn. When the assets of the partnership of W. S. Kuhn & Co. came on for distribution, Purdy presented his claim, and was allowed again to participate. Thereupon the trustee in bankruptcy took an appeal from such allowance of Purdy's claim in the partnership assets of W. S. Kuhn & Co.

The claim of Purdy is based on a note dated October 10, 1910, for $173,750, signed by J. S. Kuhn, and also by W. S. Kuhn, by which "we jointly and severally promise to pay to J. H. Purdy, or order," etc. Of the general right of Purdy to participate in the individual estates of each of the makers of said note, no question was raised, or indeed could have been. So, also, of the general right of Purdy to prove his note and participate in the partnership estate of W. S. Kuhn & Co., no question was, or indeed could have been, raised, because the proof was that the proceeds of this note were borrowed for and were used in and by said partnership of W. S. Kuhn & Co., and this note was carried in the books of said firm as a partnership indebtedness. The proofs further showed that this was the customary, and indeed virtually the only, way in which that partnership raised funds, and that, of the millions of dollars it borrowed and used in its business, it virtually gave no obligations in its own firm name of W. S. Kuhn & Co., but the individual names of its two partners were always used.

It is, however, contended by the trustee that, although under such circumstances Purdy had a right to resort to either the individual estate or the partnership estate, he could not prove against both partnership and individual estates, but was compelled to elect between the two. To this contention counsel for Purdy answers that they are not driven to an election, but that by the provision "severally promise" of the note Purdy has a contractual right to resort to the personal estate of the makers of the note, and by the superadded provision "we jointly promise" he has a contractual further right to also resort to the joint estate of the makers of the note as well, to wit, to the assets of W. S. Kuhn & Co. They further contend that this superadded joint promise was meant to subject the joint ventures or joint business of the makers of the note to this contract obligation, and that the contract was entered into with a view to such joint liability, that Purdy's money was applied to that purpose, that the note equitably should share in what it helped to create, that the partnership carried it as a partnership debt, and that unless this contract, "we jointly promise," is thus enforced against the joint estate of the makers of the note, the note would be construed and enforced as though it contained no such superadded contract words. The referee sustained this contention, and allowed Purdy's claim against the firm assets of W. S. Kuhn & Co., and his action was approved by the court below, saying:

"I think the doctrine of election between inconsistent remedies on the same claim has no application. When the partners jointly agreed to pay (this being a firm transaction), they bound the firm; and when they severally agreed to pay, they bound themselves as individuals. It is not apparent why this joint or firm obligation, and the several or individual obligations, should differ in principle or legal effect from that where the firm executes the obligation and the individual indorses it."

We think this reasoning covers the case. This is not a case of double proof on a single contract, but of single proof of two separate contracts. The referee and the court below enforced the two distinct contract obligations, embodied in the one note, by enforcing each contract. Those contracts were cumulative, and Purdy's right of enforcement was cumulative, and not restrictively selective. The general principle applicable to the Purdy note is also, mutatis mutandis, decisive of the Hutchins note, because its express terms are the same as Purdy's, and of the Seaboard Bank's note, because the Pennsylvania Negotiable Instrument Act (Act May 16, 1901 [P. L. 194]) makes the statutory construction of its terms the same as Purdy's.

In announcing this conclusion, it is due to counsel, litigants, and this court to here add that the many cases, English and American, bearing on the double proof of claims in bankruptcy, which were cited and discussed at the hearing, have all had due consideration in the preparation of this opinion. Such consideration opens two courses: One, the tempting field of judicial discussion, covering pages and involving long lists of cases, copious extracts of what is now in the reports, and restatements of what has already been said or decided. The other course is to condense in a few lines a syllabus of these authorities. This latter course we have followed in saying that these cases eventually crystallized in the American courts holding that, where there was a double contract obligation in a security, there could be a corresponding double proof. We may add that, in abstaining from a protracted discussion of cases and confining ourselves to a statement of our deductions from them, we respond to that insistent and increasing demand that, in view of the startling growth of judicial reports in these latter days, courts should rigidly limit their opinions to those matters of fact and law which are absolutely necessary to a decision of the case in hand.

The three appeals here involved are dismissed, and the decree below affirmed.

SAMET v. FARMERS' & MERCHANTS' NAT. BANK OF BALTIMORE.

(Circuit Court of Appeals, Fourth Circuit. December 12, 1917.)

No. 1541.

1. BANKRUPTCY ⊂⊃407(1)—DISCHARGE—"OBTAINING PROPERTY ON CREDIT UPON FALSE STATEMENT."

The securing by a bankrupt of the renewal of matured notes to a bank by means of a "materially false statement in writing" is the obtaining of property on credit by means of such statement, which deprives him of the right to a discharge under Bankruptcy Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (Comp. St. 1916, § 9598).

2. PROPERTY ⊂⊃2—SUBJECTS OF.

"Property" is a term of very broad signification, embracing everything that has exchangeable value or goes to make up a man's wealth,

every interest or estate which the law regards of sufficient value for judicial recognition.

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

Appeal from the District Court of the United States for the District of Maryland, at Baltimore, in bankruptcy; John C. Rose, Judge.

In the matter of August Samet, doing business as A. Samet & Co., bankrupt. From an order denying him a discharge on objections by the Farmers' & Merchants' National Bank of Baltimore, the bankrupt appeals. Affirmed.

For opinion below, see 243 Fed. 203.

Bernhard Cline, of Baltimore, Md., for appellant.

Edward Duffy, of Baltimore, Md., for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. [1] August Samet, who was adjudicated a bankrupt on March 14, 1916, appeals from a decree refusing him a discharge on the objection of the Farmers' & Merchants' National Bank, one of his creditors. The objection was founded on section 14b (3), which provides against the discharge of the bankrupt if he "has obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person." The evidence that a statement known to be false was made by Samet to the bank was conclusive. The serious question is whether upon the statement he obtained "money or property on credit."

From time to time the bank had discounted Samet's notes. On February 26, 1915, the aggregate indebtedness to the bank represented by notes was $4,400. On that day Samet made a written statement to the bank as a basis of credit showing on January 15, 1915, a stock of goods of the value of $10,993.92, and good accounts due to the amount of $9,871.08. The evidence showed clearly that the bankrupt could not have failed to know that neither the goods nor the accounts were worth more than half of the valuation stated. On the faith of the statement the bank on February 26, 1915, and on subsequent days, allowed Samet to give new notes in the place of the old as they matured, crediting him with the amount of the new notes less the discount and taking his check for the old notes. The checks given in payment exceeded the new notes; so that at the date of the bankruptcy Samet owed $3,600, less by $800 than on the day he made the statement. At various times, however, when these transactions took place, there was a balance to the credit of Samet which the bank had a right to apply to the matured notes. Thus it appears that the specific thing which Samet obtained from the bank at the maturity of each note by means of his false statement was a note already due, by substituting for it a new note due at a future time.

If, when Samet took up the old note by giving his check for it, and then rediscounted the new note to provide for the payment of the check, the intention was to pay and not renew the old note, evidently that

would be a transaction in which Samet obtained money for the new note by the false representation after payment of the old. If the intention was that the new note should operate as a mere renewal, and not as payment of the debt, that would be a transaction in which, by means of his false statement, he obtained from the bank at the maturity of each note the note already due by substituting for it a new note payable at a future time. This would be obtaining property by false representations.

[2] A note is property because of the value of the contract which it represents. The transfer of a note four months before bankruptcy is a preference under section 67e of the statute. Property is a term of very broad signification, embracing everything that has exchangeable value or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition. So the business world understands it, and so the courts should regard it, without drawing technical distinctions, in the application of the bankruptcy statute. In construing the words "transfer of property" under section 67e, the Supreme Court says in Pirie v. Chicago, etc., Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171:

"It seems necessarily to mean that a transfer of property includes the giving or conveying anything of value—anything which has a debt-paying or debt-securing power."

It is true that when a note is surrendered at maturity, and a new note taken merely as a renewal, the debt is not paid, nevertheless the old note and the renewal are two different pieces of property because they represent two different contracts. One represents a contract with the valuable quality of the right of immediate enforcement—the other represents a contract without that right. Regarding the new note as a renewal, and not payment of the debt, when by the false statement Samet obtained from the bank the note immediately enforceable against him, he "obtained property"; when he obtained it on promise to pay in the future, he "obtained property on credit"; and when he did this on the strength of a "materially false statement in writing," he forfeited under section 14b (3) his right to a discharge.

In this case the contracts represented by the notes which Samet obtained by the false representation had the additional quality of value that the bank could have applied to them the balances appearing on Samet's deposit account when they fell due. For the reasons stated we think the view on the subject expressed by the District Judge in this case and in the case of In re Waite (D. C.) 223 Fed. 853, and by Judge Chatfield in the case of In re Wylly (D. C.) 210 Fed. 954, is correct.

Affirmed.

TROY CARRIAGE SUNSHADE CO. v. KINSEY MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. November 16, 1917.)

No. 2994.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—WIND SCREEN FOR VEHICLES.

The Lingley patent, No. 890,667, for a wind screen for motor vehicles, claim 1, discloses invention over the prior art, and is not subject to any limitation beyond that expressed on its face; also *held* infringed.

2. PATENTS ⟸35—INVENTION—PRIOR ART.

Where a prior patent is introduced, not to show anticipation, but that the step in advance by the patent in suit was not sufficient to constitute invention, the fact may be considered that the device of the earlier patent never went into use.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suit in equity by the Troy Carriage Sunshade Company against the Kinsey Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

Alfred M. Allen and Marston Allen, both of Cincinnati, Ohio, for appellant.

Owen, Owen & Crampton, of Toledo, Ohio (Wilber Owen, of Toledo, Ohio, of counsel), for appellee.

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

DENISON, Circuit Judge. The District Court, because it thought there was no infringement, dismissed the bill brought by the appellant against the appellee and based upon the first claim [1] of patent No. 890,667, granted June 16, 1908, to Lingley, for a weather screen for motor vehicles.

By way of improvement upon the solid one-piece glass windshield extending from the dash of the vehicle up to a level above the driver's head it had become common, before Lingley appeared, to make the shield in two sections and to provide for the separate manipulation and adjustment of either or both sections; and it was known to be desirable to provide for tilting the upper section forward at its lower edge, so as to provide an open space through which the driver could see the road in front, and so as to permit the driver to receive some air, but not too much. It was also the common practice that this upper

[1] Claim 1.—In a wind screen for vehicles, a fixed lower part carried by standards and an upper movable part centrally mounted upon centers permanently fixed at the upper ends of solid arms, the lower ends of which are mounted upon centers permanently fixed upon the lower fixed part, and means for fixing the arms at any desired angle with the lower fixed part and means for fixing the upper movable part at any desired angle with the arms, substantially as herein shown and described and for the purpose stated.

part of the shield should be capable of turning entirely down opposite the lower section, so that there would be no obstacle in front of the driver's head and shoulders. The rigid permanently up-standing surrounding frame, carrying separately the upper and the lower sections, which has of late become the accepted form, did not readily lend itself to this entire removal of the upper section, and (perhaps for that reason) was then not largely used.

[1] It is not claimed that Lingley's device was anticipated, but it is insisted that his advance was not of the inventive character. The prior art, so far as it is close enough to be important, is represented by Sprague (unpatented) and Bill (British patent, No. 10,652, of 1906). Sprague supported his upper section upon the lower one by resting the bottom of the upper frame directly on the top of the lower frame, and the weight was chiefly, if not wholly, carried in this way. At each end he provided a sliding bolt carried by the upper frame and dropping into sockets in the lower frame, whereby he prevented lateral motion of the upper on the lower. Upon the dash and just at the bottom of the lower frame, he provided suitable brackets upon which the bottom of the upper frame could be supported and carried and having sockets into which the sliding bolts could be dropped. When the driver did not wish the upper section of the windshield in place, what happened, in substance, was, that he raised the sliding bolts from their engagement, lifted the upper section out of position, placed it on the lower brackets and slid the bolts into their new sockets. So far, we see no resemblance to Lingley; but for the purpose of preserving the parallelism of the sections while the upper one was being lowered, and probably also for assisting to hold the upper one against vertical displacement while in either upper or lower position, Sprague provided links pivoted to the lower frame at its outside upper edges, and to the upper frame at the centers of its outside edge. These links were metal rods or bars, and have a close mechanical resemblance to the rigid arms of Lingley; but, functionally, they were wholly distinct, because Sprague contemplated nothing and could do nothing except to carry his upper section fastened in the extreme upper or extreme lower position.

In Bill, the resemblance is closer, functionally, and less, mechanically. He also carried his upper section upon the lower one and intended to fold the former all the way down beside the latter on occasion, but he also contemplated adjusting the upper section and holding it at intermediate tilted positions. His thought seemingly was that the upper section should have almost unlimited freedom of movement and be movable forward or back, up or down, and tilted in either direction. To accomplish this, he provided, on the outside of his frames, a wide and deep slot continuous in upper and lower sections. Closely fitting in this slot or groove, he carried a flat metallic bar about as long as the height of either section. This bar itself was centrally slotted, and through this central slot passed threaded studs, projecting, respectively, from the lower section near its upper edge and from the upper section near its lower edge. Obviously, the slotted bar could move up and down, guided by these studs in its central slot. Upon

the threaded studs were provided binding means in the form of wing nuts. The result was that, when the upper section was placed upon the lower and all four winged nuts were tightened, the two sections were rigidly located in that position through the connecting metallic bars bound into the upper and lower parts of their grooves. When it was desired to change the position, all four wing nuts must be loosened and screwed out far enough, so that the slotted bars could be lifted out of their grooves. Then they became mere links, not with fixed end pivots, as in Sprague, but sliding freely for a relatively long distance. If the upper section was tilted forward, the bars, resting upon the edges of their grooves, would assume an angular position, and all four nuts could then be tightened, and the parts held in that position. After this had been done, so that the bars were out of their grooves, further tilting of the upper section alone could be accomplished by loosening only the two upper wing nuts.

[2] Inspection of this Bill device is sufficient to condemn it as impractical, though not inoperative in the strictly mechanical sense. If manufactured of the necessary full size and weight, it is doubtful whether it could be manipulated by one man—certainly not without stopping his car and using both hands at once. As soon as all four nuts were loosened, the bars would drop to their lowest position, leaving nothing to support the upper section when moved. It does not seem that the binding of the arms in their angular position against the edges of their grooves would be sufficient to maintain them against jarring loose. At any rate, there is nothing to indicate that the Bill device ever went into use; and, since we are not concerned with the question of anticipation, but only with that of the character of the step in advance, this seems the typical instance when it may be of some logical importance that the earlier patent is rightly named a "paper patent." Its nonuse commercially, unexplained, has some tendency to indicate that the device was not of practical value, and that it lacked some essential element of commercial utility, the supplying of which might call for the inventive faculty.

It is clear enough that what Lingley did involved invention over Sprague alone, or over Bill alone; the question, when we consider both of them and their possible composite effect, as we must, is close and by no means free from doubt. If the solid arm with fixed end centers of Sprague is substituted for the slotted bar or free link of Bill, or if the threaded studs and binding nuts of Bill are substituted for the mere pivots of Sprague, we disclose at once the functional operation of Lingley. Either one of these seems now a rather natural and simple change; but we are convinced that more was involved than the mere substitution of known equivalents. Sprague did not contemplate any intermediate adjustment of the upper section; he guarded against it by his locking bolts. To make his device work with the addition of wing nuts like Lingley's, these bolts must be removed and Sprague's primary idea forgotten. So, if we substitute the Sprague arm for the Bill link, it involves a reorganization of both, and such a solid arm would be inconsistent with the thing which Bill was trying to do. If the arm remained of Sprague's length, so as to be pivoted

at the center of the upper section, it would be impossible for that section to take many of the positions which Bill indicated; while, if the arm were shortened and pivoted to the upper section, as in Bill, the extreme lower position could not be reached at all, and the tilting of the upper section outward at the bottom would result mainly in tilting it in at the top. The fundamental theories of the two devices were so distinct and inconsistent that we are satisfied there was invention in taking features from each and modifying and combining them as Lingley did. He attained an efficiency and a convenience in the adjustment of the upper section which were not reached by either of the others, and he had a folding and practically useful clear-vision windshield which neither of the others had. This was, fairly speaking, a new result, and we think the claim should be sustained.

There seems no occasion for any limitation not expressed on the face of the claim. Lingley was the first to make a two-part windshield in which the lower part was supported by the vehicle body and the upper section was supported and carried by the frame of the lower section; this support being through rigid arms pivoted to the lower section near its upper edge and to the upper section near its center, these pivots being capable of being loosened to permit adjustment and tightened to hold in position. By this means it resulted that, without the aid of any surrounding frame, the upper section could be tilted forward in its lower part to provide clear vision underneath, and by adjusting only the pivots of the upper section, and yet the whole upper section could be folded all the way down, if desired. The utility of this is not to be denied. It is true that, with the upper section pivoted at the center, some rain or snow will go in at the top, when the bottom is tilted forward; but the same thing is true of defendant's device, and it cannot be heard to claim anything on account of this practical imperfection.

We do not understand it to be claimed in this court that defendant's device differs essentially from Lingley, except in the one respect now to be considered; the equivalency between Lingley's shield-supporting standards and defendant's shield frame and supporting clips is apparent. So far as may be inferred from Lingley's specification and drawings, he contemplated adjustment of the upper section only by tilting its lower part forward; indeed, he shows such an overlapping that inward tilting would have been impossible. In the defendant's form, the two sections meet flush, and the bottom of the upper one can be tilted inwardly, the result of which is that a current of air is driven inwardly and downwardly. This type of ventilation became desirable after the date of Lingley's patent, by reason of the later adoption of the fore doors, which for the first time, caused the necessity for ventilating the lower part of the driver's compartment; and it is said that the defendant accomplished a result which Lingley intended to prevent. We are unable to give this consideration any force upon the question of infringement, because, when we observe Lingley's claim, the defendant's position is that infringement is avoided because, though it has used all of the claim, it has added something more. Lingley contemplated, and his first claim secured to him, a device capable of

use in three positions: Extreme upper, extreme lower, and intermediate forward tilting. The defendant takes substantially the same form of device, capable of the same use in all three of the same positions, but makes a slight alteration so that it is capable of use in another position. Lingley had functions 1, 2, 3; defendant has functions 1, 2, 3, 4. Of course, this does not avoid infringement.

The second claim of Lingley (not in suit) makes reference to the overlapping which would prevent inward tilting and which accomplished one of the declared objects of the invention. This is not mentioned in the first claim, which relates to another declared object; and this alone would be sufficient reason for not importing the overlapping into the first claim, even if its broad language would justify such importation. Nor do we find any difficulty arising from the claim provision that the upper removable part is capable of being fixed "at any desired angle." It is difficult to see how this bears on the question of infringement, since the defendant's device responds to this specification even more accurately than the patent drawings do. In defendant, the fixing may be at any desired angle throughout the circumference. In the form shown in the Lingley drawing, and covered specifically by the second claim, the permitted adjustment extends through a quarter of the circumference only. The utmost effect which the presence in Lingley of the specific drawing and description could have is that the first claim should be interpreted as referring only to the forward angles; but this would not help defendant, which uses the same forward adjustment shown by Lingley.

We find nothing of importance in defendant's favor to be drawn from the commercial history of the patent and the device. Plaintiff's manager devised a windshield and plaintiff put it on the market. It was some time afterwards practically copied by the defendant. Plaintiff's manager undertook to get a patent on his construction, and failed to do so on account of the existence of the Lingley patent, disclosed to him in the Patent Office. Plaintiff then bought the Lingley patent and continued to exploit the device commercially on a very large scale. If, as is held in the Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, a patent is not to be denied its reasonable and apparent validity and scope merely because its owner had deliberately withheld it from commercial use, much less can such denial be claimed where the first owner, for unknown reasons, did not get it into public use, but where the second owner has put it into very general use. The fact that the second owner discovered the patent in the Patent Office, and made the first move to buy it, and bought it for a small price, cannot be of much, if any, importance. The patent must stand or fall on its own merits.

We think there should be the usual decree for injunction and accounting upon the first claim, and the decree below must be reversed, and the case remanded for that purpose.

WHEELER v. BUSINESS MEN'S ACC. ASS'N OF AMERICA.

(District Court, W. D. Missouri, W. D. February 9, 1918.)

No. 4616.

1. INSURANCE ⟸445(2)—STATUTES—APPLICABILITY.
Rev. St. Mo. 1909, § 6945, declaring that, in all suits on life policies hereafter issued by any company doing business in the state to a citizen of the state, it shall be no defense that the insured committed suicide, unless he contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void, which is found in the article entitled "Life and Accident Insurance," is applicable to a policy issued by a Missouri corporation organized under the laws pertaining to life and accident insurance under the assessment plan, where the policy provided for a quarterly payment, called interchangeably "premium" and "assessment"; it appearing that the indemnity in case of death was fixed in amount, and that, while the dates for payments were subject to change, no departure from the fixed annual amount was contemplated.

2. INSURANCE ⟸125(2)—WHAT LAW GOVERNS.
A resident of California forwarded to defendant, a Missouri corporation engaged in writing life and accident insurance, his application for insurance, and defendant issued the policy and forwarded it to the applicant. The application, which was made a part of the contract of insurance, declared that the policy must be acceptable or the payment would be returned, and that the applicant, upon receipt of the policy, should, if satisfactory, accept it, and, if not satisfactory, return it within three days. The policy further stipulated that it should not cover any injury, fatal or otherwise, sustained by the insured prior to his acceptance of the policy. *Held*, that the contract of insurance, the applicant having accepted the policy, was entered into in the state of California, acceptance being in that state, and hence governed by the laws of California, under which the stipulation of nonliability for suicide was valid, instead of the Missouri laws, making suicide a defense only if the insured at the time of his application contemplated self-destruction.

3. CONSTITUTIONAL LAW ⟸206(4)—INSURANCE ⟸445(2)—PRIVILEGES AND IMMUNITIES OF CITIZENS OF SEVERAL STATES.
Rev. St. Mo. § 6945, declaring that in all suits on life policies hereafter issued by any company doing business in the state, to a citizen of the state, it shall be no defense that the insured committed suicide, unless he contemplated suicide when he made his application, is not, though restricted to citizens of the state of Missouri, invalid with respect to the restriction on the ground that it abridged the privileges or immunities of citizens of the United States or denied equal protection of the law, for the statute does not impose any affirmative burden on citizens of other states from which it relieves its own, but merely restricts the freedom of contract of Missouri citizens with respect to life insurance. *Held*, further, that this statute in the instant case denies to plaintiff no privilege in the Missouri courts that would not be denied to her equally if she were a citizen and resident of Missouri.

At Law. Action by Isabelle Wheeler against the Business Men's Accident Association of America. Judgment for defendant.

Williams, Hunter & Guffin, of Kansas City, Mo., for plaintiff.
Gilmore & Brown, of Kansas City, Mo., for defendant.

VAN VALKENBURGH, District Judge. Plaintiff, the widow of James Anson Wheeler, sues to recover the sum of $5,000 on an in-

demnity policy issued by the defendant association to her said husband, in which plaintiff was named as beneficiary. The plaintiff is a citizen and resident of the state of Texas, and the insured on the date of the issuance of the policy, the 24th day of June, 1916, was a citizen and resident of Los Angeles, Cal. The defendant is a Missouri corporation, organized as an assessment company under section 6950, R. S. Mo. 1909, and is located at Kansas City, Mo., within this division and district. September 12, 1916, less than three months after the issuance of the policy, the insured committed suicide. The policy of insurance specifically excludes recovery for suicide under any circumstances, and that is the ground of defense in this action. The case is tried upon an agreed statement of facts, in which it is stipulated that the policy was not procured in contemplation of suicide.

Section 6945 of the Revised Statutes of Missouri provides as follows:

"*Suicide No Defense, When.*—In all suits upon policies of insurance on life, hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

Defendant, as an incident to its defense claims: (1) That defendant is incorporated under the laws of Missouri pertaining to life and accident insurance upon the assessment plan, and was, at the time the policy was issued, engaged in business upon that plan under and by virtue of a license issued by the insurance department of this state to so carry on its business, and therefore does not come within the purview of the statute prohibiting the defense of suicide. (2) That the contract is not a Missouri contract, but a California contract, governed by the laws of that state, in which the defense of suicide is permitted. (3) That the insured was not a citizen of Missouri, and therefore not within the prohibition of the statute in any event.

Plaintiff insists: (1) That the defendant company is in fact an old line company. (2) That the contract is a Missouri contract. (3) That the language in the statute which restricts the application of the section to a citizen of Missouri is in violation of section 2 of article 4 of the Constitution of the United States, and with section 1 of article 14 of the Amendments to the Constitution of the United States, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

[1] The contract provides for a quarterly payment, called interchangeably "premium" and "assessment," of $6, on the 15th days of March, June, September, and December of each year, as required to keep the policy in continuous effect, beginning with September 15, 1916, "until notice is given the insured by the secretary of the association of a change in said time." I take it that this provision of the policy is intended to provide fixed quarterly payments; that the dates

on which these payments are made are subject to change, but departure from the fixed annual amount charged for the insurance is not contemplated. The indemnity for loss of life is fixed in amount, and I do not find that this company, with respect to the nature of its business, is excepted from the provisions of section 6945 of the Missouri Statutes, provided this policy is otherwise subject to such provisions. Elliott v. Des Moines Life Ins. Co., 163 Mo. 132–157, 63 S. W. 400; Logan v. Fidelity & Casualty Co., 146 Mo. 114, 47 S. W. 948; Williams v. Insurance Co., 189 Mo. 70, 87 S. W. 499.

[2] It appears that the insured forwarded from Los Angeles, Cal., to the defendant at Kansas City, Mo., by mail, his application for this insurance, accompanied by $8, the sum required by the defendant company to accompany the application, and that the defendant issued the policy in suit and forwarded it to the applicant at Los Angeles, Cal., accompanied by a letter congratulating him upon the protection that would be afforded by that policy. The application is annexed to and made a part of the contract of insurance. It is dated June 21, 1916, and at the top prominently appear these words:

"Your policy must be satisfactory or your payment will be returned."

Thereafter:

"Application for Membership in Business Men's Accident Association of America.

"I hereby apply for membership and insurance in the Business Men's Accident Association of America, to be based upon the following statement of facts. The policy issued on this application is to take effect when received and accepted by me.

"Q. 29. Do you agree that upon receipt of the policy issued, you will examine it and if satisfactory accept it, and that if not satisfactory you will return it to the association within three days, in order that the amount paid with this application may be returned to you? A. Yes."

In the body of the policy, to wit, section 2, article 13, this provision appears:

"This policy does not cover any injury, fatal or otherwise, sustained by the insured prior to the date of his acceptance of this policy."

Even though the shortest possible period of acceptance be presumed, that acceptance could not take place prior to receipt by the applicant. That receipt and acceptance were in the state of California. The final act which consummated the agreement by the assent of both parties took place in the latter state. Prior thereto there was no contract of insurance in effect. This contract, therefore, is clearly a contract of the state of California, and subject to the provisions of its laws. Equitable Life Assurance Co. v. Clements, 140 U. S. 226–232, 11 Sup. Ct. 822, 35 L. Ed. 497; Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788; Northwestern Mutual Life Insurance Co. v. McCue, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57; Rogers v. Insurance Co., 41 Conn. 97; Hubbard v. Insurance Co., 129 Iowa, 13, 105 N. W. 332; Craven v. Insurance Co., 148 Mo. 600, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628.

[3] The foregoing, adduced by counsel, are but a few of the many confirmatory of the point ruled. It was practically conceded in argument that, if this is not a Missouri contract, then the defense of suicide in accordance with the express terms of the policy may be maintained. Therefore it would seem unnecessary to deal at length with the contention that the restriction of the statute is unconstitutional; nevertheless it is proper to add that I am of opinion that the section is constitutional as it stands, and that such is the conclusive construction of the courts of last resort. In Whitfield v. Ætna Life Insurance Company, 205 U. S. 489–495, 27 Sup. Ct. 578, 51 L. Ed. 895, this statute was considered and upheld. It is true that in that case this precise question did not arise. The validity of the statute was, perhaps, not attacked in terms, but it was urged to be in derogation of the common law, of doubtful public policy, and should be strictly construed. Mr. Justice Harlan, for the court, discusses the question upon broad grounds. He says:

"That the statute is a legitimate exertion of power by the state cannot be successfully disputed."

And further:

"It is the province of the state, by its Legislature, to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the Constitution of the State or the Constitution of the United States. There is no such conflict here."

The adjudication made is at least strongly persuasive. But, in what is said to be its latest utterance upon this subject, the Supreme Court of Missouri has construed this statute in a case involving this identical question. I concur fully in the opinion in that case. Lukens v. International Life Ins. Co., 269 Mo. 574, and particularly pages 585 to 588, 191 S. W. 418. This citation is also pertinent upon the question of whether this is a Missouri or a California contract. It is, perhaps, unnecessary to emphasize the very great weight of this construction by the highest court of the state in which the statute in question was enacted.

But I think the Supreme Court of the United States, by its decision upon a closely analogous question, has still further adjudicated the constitutionality of this section in the particular in which it is assailed in the case at bar. In Chambers v. Baltimore & Ohio R. R. Co., 207 U. S. 142, loc. cit. 150, 151, 28 Sup. Ct. 34, 36 (52 L. Ed. 143), that court quotes the following from a Pennsylvania decision construing a Pennsylvania statute:

"And the right of action was not given to the person suffering the injury, since no man could sue for his own death, but to his widow or personal representative. It was not survivorship of the cause of action which the Legislature meant to provide for by this section, but the creation of an original cause of action in favor of a surviving widow or personal representative."

Mr. Justice Moody then says:

"It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce was one created for her benefit and vested originally in her. She has not been denied access to the Ohio courts because she is not a citizen of that state, but because the cause of action which she presents is not

cognizable in those courts. She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial. We are unable to see that in this case the plaintiff has been refused any right which the Constitution of the United States confers upon her."

This legislation of the state of Missouri does not deal with rights or immunities which are fundamental. In a sense it creates no rights at all. It imposes no affirmative burden upon the citizens of other states from which it relieves the citizens of its own state, such as taxation, unequally and inequitably imposed, would be. In effect it invades and restricts the freedom of contract of its own citizens, and its action in this respect is confined to the terms of the enactment, as is proper in the case of legislation in derogation of the common law and restrictive of the ultimate force and effect of contract provisions. The deceased was a citizen and resident of California. The plaintiff in this action is a citizen and resident of the state of Texas. Neither were in Missouri at the time this policy became effective, nor was the contract executed within this state as matter of law. The plaintiff is not denied access to the Missouri courts, and she is denied no privilege in those courts that would not be denied to her equally if she were a citizen and resident of Missouri. The defense invoked would be operative against all similarly situated irrespective of citizenship.

All courts naturally incline to any construction of the law which permits the payment of indemnities to beneficiaries in policies of insurance, but that inclination, however natural and commendable, must not be carried beyond legitimate boundaries. The conclusions I have reached necessarily result in a judgment for the defendant.

PRUDENTIAL INS. CO. OF AMERICA v. HEROLD, Collector of Internal Revenue.

(District Court, D. New Jersey. February 8, 1918.)

1. COURTS ⟸96(1)—PRECEDENTS—BINDING FORCE.
A federal District Court is bound by decisions of the Circuit Court of Appeals of that circuit.

2. INTERNAL REVENUE ⟸9—CORPORATION EXCISE TAXES—INCOME.
A joint-stock company engaged in writing industrial and also life insurance on the level premium plan adopted the practice, the premiums charged exceeding the cost of the insurance, of returning the excess to policy holders as so-called dividends which could be used to reduce renewal premiums or to purchase paid-up additions to the policies already mentioned. Only a few of the company's policies were participating, and the payment of such dividends was voluntary as to all other policy holders. *Held* that, notwithstanding the payment of the so-called dividends was to a great extent voluntary, those amounts should not be added to the company's gross income for tax under Corporation Excise Tax of 1909 (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112), imposing taxes on corporate income.

3. INTERNAL REVENUE ⟸9—CORPORATE INCOME.
Corporation Excise Tax Act of 1909 declares that the net income of corporations engaged in the insurance business shall be ascertained by de-

ducting from the gross income, among other items, the net addition, if any, required by law to be made within the year to reserve funds. New Jersey corporations authorized to do insurance business are required to file annual statements in such form and containing such matters as the Commissioner of Banking and Insurance shall prescribe, who is in return required to annually cause a valuation to be made of all outstanding policies of every life insurance company. Pursuant to that law and regulation of the commissioner, a New Jersey corporation engaged in writing life and industrial insurance was required to make additions to its reserve funds for all business written including those policies on which the premiums had not been paid at the time of making the valuation. *Held* that, as such sums paid into the reserve could not be used by the corporation as income, they should not be considered in computing its income for taxation, for, in case the policies on which premiums were due lapsed, sums set aside as a reserve therefor would in succeeding years become available as income and subject to taxation.

At Law. Action by the Prudential Insurance Company of America against Herman C. H. Herold, Collector of Internal Revenue for the Fifth District of New Jersey, to recover alleged excess taxes exacted under the Corporation Excise Tax Law of August 5, 1909. Judgment for plaintiff.

Lindabury, Depue & Faulks, of Newark, N. J., for plaintiff.

Charles F. Lynch, U. S. Atty., of Newark, N. J., and Joseph L. Bodine, Asst. U. S. Atty., of Trenton, N. J., for defendant.

HAIGHT, District Judge. The plaintiff seeks to recover certain moneys which it claims were illegally assessed and exacted from it, by way of taxes, under the Corporation Excise Tax Law of August 5, 1909 (36 Stat. L. 112, c. 6, § 38). The case was tried without a jury, pursuant to sections 649 and 700 of the Revised Statutes (U. S. Comp. Stat. 1916, §§ 1587, 1668). By reason of a stipulation entered into between the parties, and the abandonment by the plaintiff of any claim to recover on certain items referred to in the stipulation, the questions to be decided have been reduced to two. They will hereafter appear.

[1, 2] 1. The plaintiff is a life insurance company, having been incorporated under the laws of the state of New Jersey, in 1873. It was the first insurance company in America to do what has now come to be known as an "industrial life insurance business." That was exclusively its business until 1886. In that year it began to issue ordinary life insurance policies also. Practically all of the latter were of the participating kind up until 1907. The industrial policies were, however, nonparticipating until 1896. In the latter year it inaugurated the practice of issuing some industrial participating policies, and continued to do so until 1907, in which year, because of certain legislation in New Jersey, it discontinued the practice of issuing participating policies (both ordinary and industrial); but, of course, it was obliged to, and did, continue to meet its obligations on the participating policies which it had already written. In 1896, although under no legal obligation to do so, it began to award so-called "dividends" to holders of nonparticipating policies, both industrial and ordinary, and permitted them to be used by the insured either to reduce the amount of future premiums or to secure additional paid-up insurance. This course was adopted, both because it was considered that good business judgment required it, especially in view

of criticism which had arisen in connection with the excessive cost and heavy lapse rate of the industrial insurance feature of the plaintiff's business, and because it seemed to the plaintiff's directors only fair and just that this should be done, as the premiums, which had theretofore been paid by the industrial policy holders, especially in the early years of the company's existence, had proved to be considerably in excess of the cost of that insurance.

It seems entirely clear that, when the rates were first fixed, it was thought that they might prove to be excessive and that a future retroactive adjustment was contemplated, if such should prove to be the fact. As the plaintiff was the first company to engage in industrial life insurance in America, it had, in the beginning, no standards, either in respect to expenses or mortality, by which it could be guided in the fixing of premiums. I shall not attempt to discuss the method or methods by which insurance premiums are ordinarily fixed, or how and out of what funds the so-called "dividends" to policy holders are ordinarily declared, because, as these have so often been stated in the reported cases, especially those to be hereinafter referred to, it would unnecessarily lengthen this opinion to do so. It is sufficient to say that plaintiff has always conducted its business on what is known as the "level premium plan," and the so-called "dividends" awarded to policy holders have been declared from funds accumulated in the same manner as is set forth in the opinion of this court in Mutual Benefit Life Ins. Co. v. Herold (D. C.) 198 Fed. 199. The plaintiff was, however, from the time of its incorporation, up to and including the years when the taxes in question were assessed, a stock company, as distinguished from a mutual company. In its returns for the years 1909, 1910, and 1911, filed pursuant to the before-mentioned act of August 5, 1909, it failed to include in its gross income the amounts which it had allowed, by way of the so-called "dividends," to policy holders—both participating and nonparticipating—merely to reduce renewal premiums and to purchase paid-up additions to policies already existing, as before mentioned. The Commissioner of Internal Revenue, however, added these amounts to the plaintiff's gross income for these years and assessed the tax, provided for in the before-mentioned act, against the plaintiff thereon. Such additional tax was paid, the plaintiff first having taken the necessary steps to procure its return, if illegally assessed.

It is the object of this suit to recover the amounts thus assessed and paid. The first question, therefore, is whether the amounts allowed by the plaintiff to policy holders out of the before-mentioned accumulated funds, merely to reduce renewal premiums and to purchase paid-up additions to existing policies, are taxable, under the before-mentioned act, as "income received" by the plaintiff during the years in question. It is apparent that unless the fact that the plaintiff was a stock company, as distinguished from a mutual company, and the fact that it was under no legal obligation to make any returns or concessions to the policy holders on some of its policies differentiates it, the case comes clearly within the before-mentioned decision of this court, rendered by the late Judge Cross in Mutual Benefit Life Ins. Co. v. Herold, supra. That decision was affirmed by the Circuit Court of Appeals of the

Third Circuit in Herold v. Mutual Benefit Life Ins. Co., 201 Fed. 918, 120 C. C. A. 256, and a certiorari to review it was denied by the Supreme Court, 231 U. S. 755, 34 Sup. Ct. 323, 58 L. Ed. 468. While that case is, of course, standing alone, binding upon me, it is proper to observe that it has since been followed, in Connecticut Gen. Life Ins. Co. v. Eaton (D. C. Conn.) 218 Fed. 188, and in Connecticut Mut. Life Ins. Co. v. Eaton (D. C. Conn.) 218 Fed. 206, both of which were affirmed by the Circuit Court of Appeals of the Second Circuit (223 Fed. 1022, 138 C. C. A. 663); and in the Northwestern Mut. Life Ins. Co. v. Fink (D. C. E. D. Wis.), 248 Fed. 568, decided in November, 1917. The Supreme Court of Pennsylvania also recently reached the same conclusion in construing a similar statute of that state, Commonwealth v. Penn. Mut. Life Ins. Co., 252 Pa. 512, 97 Atl. 677.

It remains therefore to consider only whether the distinctions before mentioned between the case at bar and the Mutual Benefit Case are of any materiality. It seems unnecessary to attempt to reiterate or enlarge upon the reasons on which the decisions in the latter case were based. They are quite as applicable to this case as to that. The so-called "dividends" awarded to holders of participating policies were no more earnings or profits—"dividends" as that term is ordinarily understood —of the plaintiff, they were no more dividends "paid," then were those in the Mutual Benefit Case. In this case the real earnings and profits were distributed among the stockholders. The "dividends" in question were mere excess premiums—overpayments which had been collected, and to which the participating policy holders were entitled as a matter of right, and the nonparticipating policy holders, both industrial and ordinary, as a matter of equity and fair dealing. Nor did they "arise from income received during any of the tax years, but from income received during previous years" (201 Fed. 918), as in the Mutual Benefit Case. If any part of them represented interest or income received during any of the tax years, it had already been taxed as such. For the purposes of this case, the only difference between the plaintiff and a mutual company is that the "cost" of insurance to the policy holders of the former, but not of the latter, includes dividends to the stockholders; anything over and above that cost, in both kinds of companies, represents, not earnings, but excess premiums.

What conceivable difference can it make what kind of a company makes the distribution among its policy holders? It is the character of the funds distributed, not that of the company making the distribution, which is the decisive factor. In Connecticut Gen. Life Ins. Co. v. Eaton, supra, it was held that the decision in the Mutual Benefit Case was applicable to the "dividends" awarded to the holders of participating policies of a stock company. If all that has just been said to demonstrate that the case at bar, at least as respects the "dividends" awarded to participating policy holders, cannot be differentiated from the Mutual Benefit Case, does not apply with equal force to those "dividends" awarded by the plaintiff to its nonparticipating policy holders—those to whom it was under no legal obligation to make awards—as I think it does, surely the latter dividends did not "arise from income received during the tax years," at least such as had not

already been taxed, nor were they "received" by the plaintiff during those years. These facts were apparently considered by the Circuit Court of Appeals of this circuit, in the Mutual Benefit Case, sufficient to exempt so-called dividends awarded to policy holders from the provisions of the act of 1909. Whether or not the plaintiff was under a legal obligation to award the dividends is therefore of no materiality. Accordingly, the Mutual Benefit Case must govern the decision of this case on the point in question. Hence it follows that the plaintiff is entitled to recover the sum fixed in the stipulation as representing taxes assessed against and collected from it, for the years 1909, 1910, and 1911, on account of the so-called "dividends" allowed to policy holders in the ways before mentioned.

[3] 2. The plaintiff is required by the laws of the state of New Jersey (as it is also by the laws of the other states in which it does business) to file annual statements, showing its financial condition, in such form and containing such matters as the Commissioner of Banking and Insurance shall prescribe, who is, in turn, required to, annually, cause a valuation to be made of all outstanding policies of every life insurance company. 2 N. J. Comp. Stat. pp. 2859 and 2847, §§ 70, 24. In making the valuations, the Commissioner of New Jersey (and in this respect the practice prevailing in the different states varies) proceeds on the "all business written" basis, as distinguished from the "all paid for" basis; that is to say, he values, in addition to the policies on which the premiums have been fully paid at the time of the making of the valuation, policies upon which premiums are due and uncollected, and policies where a part of the annual premium—when it is payable in installments—has not at that time become due and payable. The latter are generally referred to as "deferred premiums." This results in the plaintiff being required by the Commissioner of New Jersey to maintain a "reserve" for those policies. The act of August 5, 1909, provides that the net income upon which the tax is to be assessed shall be ascertained by deducting from the gross income, among other items, "the net addition, if any, required by law to be made within the year to reserve funds." In reporting its net income for the years in question, the plaintiff properly deducted from its gross income the net additions made during the respective years to reserve funds. In ascertaining the latter, it included, in the "reserve" which it was required to maintain for those years respectively, the value of the policies upon which the premiums were due and uncollected, and deferred. The defendant contends that it was not justified in doing so.

The question to be decided, therefore, is whether the plaintiff, in figuring its net addition to the reserve funds which it was required by law to make, was justified in including the value of such policies. The argument upon which the defendant's contention in this respect is based seems to be that as part of the assets making up the plaintiff's "reserve" consisted of these uncollected and deferred premiums, and as they are not included in the plaintiff's gross income (as, clearly, they should not be so included, Mutual Benefit Life Ins. Co. v. Herold, supra; Conn. Gen. Life Ins. Co. v. Eaton, supra), that the value of such policies should not be included, for purposes of taxation, in its

net addition to reserve funds. But this argument, I think, begs the question, which is, as clearly defined by the Supreme Court in McCoach v. Insurance Co. of North America, 244 U. S. 585, 37 Sup. Ct. 709, 61 L. Ed. 1333, what sum or sums in the aggregate did the state laws require the plaintiff to maintain as a "reserve fund," not the character of the assets making up the actual "reserve funds." No matter what their character, they were as effectively withdrawn from the plaintiff's use as if they had been expended. If therefore the law of New Jersey, or any other state in which it did business, made it obligatory on the part of the plaintiff to maintain a "reserve" on account of the policies of the character in question, it is of no materiality what the "reserve funds" actually consisted of, whether cash, securities, real estate, or due and uncollected premiums. The latter were perfectly good assets, because they could be realized on if there should be a loss on the policy. The law of New Jersey, to which the plaintiff is subject (N. J. Comp. Stat. 2854, § 56), provides that if the assets of any life insurance company, at any time, shall not equal the net value of all its outstanding policies, computed according to such "standards of valuation" as the Commissioner of Banking and Insurance may adopt, pursuant to the authority vested in him by law, and its other liabilities, that he may apply for an injunction restraining the company from doing any further business.

Since the Commissioner of Banking and Insurance of New Jersey has valued, among the plaintiff's outstanding policies, those upon which premiums were either due and uncollected or deferred, and both, and since the plaintiff was clearly required by the law of New Jersey to maintain a "reserve" at least equal to the net value of all its outstanding policies, as the commissioner might value them, it follows that, within the meaning of the act of 1909, the "reserve" which the company was required by the state law to maintain, from year to year, properly included a "reserve" for the policies of the character now in question. The term "reserve funds" clearly does not mean money, as defendant seems to contend, for the greater part of the "reserve" is, of course, invested in one way or another. I cannot see any force in the defendant's contention that this holding would permit the plaintiff to escape taxation, to the extent of such "reserve" maintained for such policies, because, if in any year the "reserve" has increased on account of the policies of the character in question, the result will be reflected in the next year's return, in that, if the premiums are subsequently collected, they will be included in the company's gross income for the year collected and hence be subject to a tax; and, if they are not collected, the policies will be canceled, and hence the net "reserve" in that year will be reduced to just that extent. If it may be said that this does not apply to the first year that the act of 1909 went into effect, it may be said with equal force that it would be necessary, in ascertaining the net additions to the "reserve" for that year, to include in the "reserve" of the previous year to be deducted, all "reserve funds" which the company had maintained on account of the policies of the character in question. The net result, except as it might be affected by the slight difference in the aggregate value of such policies from year to year,

would be the same. It follows therefore that the plaintiff was justified in making the deduction which it did in the respect just discussed.

3. As the plaintiff makes no claim in respect to the subject-matter of paragraph 4 of the stipulation before referred to—that is to say, that it is entitled to add to its "reserve funds" the value of the "supplementary contracts not involving life contingencies"—it is unnecessary to determine whether or not they could properly be included in ascertaining the item of "net additions to reserve fund." The same applies to three other items referred to in the first part of paragraph 4 of the stipulation, which aggregate, so far as the tax collected is concerned, $882.33. The result is that the plaintiff is entitled to a judgment of $48,231.85 with interest at the rate of 6 per cent. per annum from August 1, 1912.

SAUER v. DETROIT TIMES CO.

(District Court, E. D. Michigan, S. D. September 4, 1917.)

No. 165.

1. COPYRIGHTS ⊂⊃83—ACTIONS FOR INFRINGEMENT—EVIDENCE.
In an action for infringement of complainant's copyright on a map, evidence *held* insufficient to show that defendant's representative was by complainant's partner granted permission to use the copyrighted map.

2. COPYRIGHTS ⊂⊃48—LICENSE TO USE—PERMISSION TO REPRODUCE.
That the owner of a copyright allowed a firm of which he was a member to dispose of the copyrighted publication does not, the copyright not having been assigned to the firm, authorize one of the partners to license another to reproduce the copyrighted publication.

3. COPYRIGHTS ⊂⊃50—SUBSEQUENT COPYRIGHTS—SCOPE.
Where complainant, after copyrighting in 1915 a map for a city, prepared a new map in 1916, showing added subdivisions, and copyrighted the same, the latter map was entirely distinct from the first, and the fact that defendant had previously obtained permission to reproduce in its newspaper the 1915 map does not, after the preparation of the 1916 map, authorize it to reproduce that one for the purpose of advertising the new subdivisions; this being so, even though additions to the 1915 map were in respect to size relatively small.

4. COPYRIGHTS ⊂⊃83—ACTIONS FOR INFRINGEMENT—EVIDENCE.
In an action for infringement of a copyrighted map, evidence *held* insufficient to show that complainant, by consenting to defendant's publication of an earlier map, consented to defendant's publication of the map involved.

5. COPYRIGHTS ⊂⊃87—DAMAGES—AMOUNT.
Under Copyright Law (Act March 4, 1909, c. 320) § 25, 35 Stat. 1081 (Comp. St. 1916, § 9546), declaring that, if any person shall infringe a copyright in any way protected under the copyright laws, such person shall be liable to pay to the copyright proprietor such damages as he may have suffered, or in lieu of actual damages such damages as to the court shall appear to be just, and that in assessing such damages the court may in its discretion allow, in the case of a newspaper reproduction of a copyrighted photograph, damages not more than $200 nor less than $50, and in other cases damages not exceeding $5,000 nor less than $250, which damages shall not be regarded as a penalty, the owner of a copyrighted map, which was reproduced in a newspaper without permission, may, without showing any actual damages, recover at least the minimum

amount of $250 despite the contention that it would amount to the infliction of a fine, the statute expressly declaring such damages shall not be regarded as a penalty.

6. COPYRIGHTS ⊂=87—INFRINGEMENT—DAMAGES—AMOUNT.

Under such statute, though the defendant newspaper published the map in both its regular edition and a special noon edition, yet as it acted in good faith, under the assumption that it had permission, and surrendered infringing plates as soon as its attention was called to the matter, the holder of the copyright is not entitled to recover damages on the basis of two acts of infringement, for, as the statute declares that, if any person shall infringe the copyright in any work protected by the copyright laws of the United States, he shall be liable to such damages as to the court shall appear just, the court may treat the several publications as one infringement.

In Equity. Bill by William Sauer against the Detroit Times Company. Decree for complainant.

C. R. Stickney, of Detroit, Mich., for plaintiff.
William Lucking, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This is a bill alleging infringement of a copyright and containing the usual prayer for an injunction and damages. The questions involved are those of infringement and damages.

Plaintiff, William Sauer, is the owner of two copyrights on maps of the city of Detroit, one published and copyrighted in the year 1915, and the other in 1916. He and his brother, Joseph, are engaged, as partners under the name Sauer Bros., in publishing and selling these and other maps in said city of Detroit.

Defendant is engaged in publishing a daily newspaper in Detroit. On August 28, 1915, the defendant by its advertising manager obtained permission from the plaintiff to publish in its newspaper the former of the maps already mentioned, which had been on the market for several months, and many thousand copies of which had been already sold by the plaintiff. The defendant desired to publish this map in conjunction with certain real estate advertisements of subdivisions in the city, and it was for that purpose that it obtained this permission to publish such map. The plaintiff also at that time, at the request of defendant, drew a map of a certain portion of the city not contained in the printed map, and this was added to the latter map when published by the defendant.

[1] In the latter part of March, 1916, defendant again desired to publish a map of the plaintiff in connection with its advertising, and especially with respect to certain new subdivisions covering a different district of the city than that featured in its publication of the map of the previous year. Accordingly, the same representative of the defendant, Mr. McKeown, went to the place of business of the plaintiff, as he claims, for the purpose of requesting plaintiff to draw for him, as he had done the previous year, an addition to the map showing these new subdivisions. Plaintiff was not there when Mr. McKeown arrived, and the latter had his interview with the former's brother, Joseph. There is practically no dispute as to what occurred at this interview. On the cross-examination of Joseph Sauer, he testified as follows:

"Q. When you came into the place of business of the Wolverine News Company and found Mr. McKeown there, what conversation took place exactly? A. He explained to me he knew my brother and mentioned that my brother had loaned him a map previous to that time. Q. Did he tell you what for? A. For publishing in the paper. And he asked to see one of our latest—the latest copy of our map, explaining to me he wished to buy it. On finding he only wanted to purchase one map, I referred him to Mr. Groscup, who, I think, sold him a map. * * * Q. He told you, you say, that he wanted to buy the latest map? A. Yes, sir. Q. He first explained he had used one before for publication purposes, and had dealt with your brother in that regard, did he? A. Yes, sir. * * * Q. Did Mr. McKeown tell you what he wanted that map for? A. He did not. Q. Did he describe what kind of a map he wanted —what section? A. He did not."

Mr. McKeown testified as follows:

"Q. Explain briefly what took place. A. I got hold of the Wolverine News Company and asked for Mr. Sauer. As far as I knew at that time, there was but one Mr. Sauer. I went down to the Wolverine News Company and asked for Mr. Sauer, and this other Mr. Sauer came out— Q. You mean Mr. Joseph Sauer? A. Yes, sir; and I told him, 'You are not the Mr. Sauer I talked with previously;' and he told me he was his brother. That was the first intimation I knew he had a brother. Q. What took place, briefly? A. I told how Mr. Sauer had been kind enough to allow the use of one of his maps before, and how he told me that he would be glad to serve me at any time, and I told him I was looking for a map of the North Woodward avenue district to be published later on; and Mr. Sauer said, 'You probably want one of our maps just coming out; we can take care of you.' As I remember, Mr. Joseph Sauer then went out, and I bought a map of this gentleman that was in the Wolverine News Company."

The only dispute as to what occurred at this interview was as to whether McKeown explained the exact purpose for which he wished to use this map. This, however, it seems to me, is immaterial, as in any event there can be no doubt that the defendant did not then receive permission to publish in its paper this 1916 map thus purchased by its representative.

[2] Nor does it appear that the brother of plaintiff was authorized to grant such permission. It is true that the partnership Sauer Bros., consisting of plaintiff and his brother, were authorized by the plaintiff, as owner of the copyright on these maps, to publish and sell such maps. Neither the copyright, however, nor any rights therein had been assigned by plaintiff to such partnership, but they remained the property of plaintiff. The fact that property covered by a copyright or patent is sold by others than the owner of such patent or copyright under a license from him does not affect his interest therein or his right to relief from the infringement thereof by third persons. Yale Lock Manufacturing Co. v. Sargent, 117 U. S. 536, 6 Sup. Ct. 934, 29 L. Ed. 954; Hanson v. Jaccard Jewelry Co. (C. C.) 32 Fed. 202; Tully v. Triangle Film Corporation (D. C.) 229 Fed. 297.

[3] It is undisputed that this 1916 map differed in some respects from that of the previous year. The defendant admits it "contains a few subdivisions marked on it that Exhibit 6 (the 1915 map) does not contain," but contends that these new subdivisions covered a space on the map of "possibly a square inch" and that, therefore, the two maps should be considered as substantially the same. I am unable to agree with this contention. It seems to me clear that in considering differ-

ences between maps the substantial character between such differences cannot be tested in terms of inches. It appears that the main purpose in publishing new editions of these city maps was to keep pace with the growing development of the city and adding to the map of the previous year the new subdivisions platted and placed upon the market since the previous year. The object of the defendant in using this new map was to aid in advertising these new subdivisions, and for this purpose the old map would have been inadequate. The very reason for publishing the 1916 map, instead of the earlier one, was the desire to obtain the benefit of the latest map.

[4] The permission thus relied on by defendant as excusing its conduct in publishing the 1916 map was not broad or general enough to cover any map except that furnished at the time. There is no substantial dispute between the parties as to the circumstances surrounding the giving of this permission. The plaintiff testified on this point as follows:

"Q. (by Mr. Stickney). What was the occasion of this first meeting with Mr. McKeown? A. It was in regard to the using of a part of my map in the Detroit Times. Q. Do you remember what copyrighted edition that was, if it was copyrighted? A. Yes, sir. Q. What edition was that? A. 1915. Q. State just what happened between you and Mr. McKeown, in your own words, just as fully as you please. A. Mr. McKeown called at my place of business at the Wolverine News Company, and asked me for the use of the map in the Detroit Times, with an additional part of the lower subdivision in Ecorse which he wanted added, and I let him use that at that time."

The sole reference to this interview by Mr. McKeown was as follows:

"Q. I believe that he has testified that he met you along in August sometime, of 1915, when you asked for a map of the down-river section to publish, to advertise some additions or subdivisions he had, and it was given to you, and you published it. Do you recollect that? A. Yes, sir."

It cannot, in my opinion, be said that there is any evidence that by thus permitting the use of his 1915 map the plaintiff intended to, or did, consent that this other and different map of 1916 could be used in the same manner, and such former permission does not excuse the defendant in its publication of the later map or render such publication the less an infringement thereof. That such publication constituted an infringement of plaintiff's copyright on this 1915 map cannot be denied, and is not disputed by the defendant except in so far as it may be affected by the objections already discussed and the question of the relief to which plaintiff is entitled here.

[5] At the hearing, plaintiff admitted that it was impossible to prove the extent of the actual damages sustained by him from such infringement and elected to recover the damages allowed, in lieu of actual damages, by section 25 of the Copyright Law, the act of March 4, 1909 (chapter 320, 35 Statutes at Large, 1075 [Comp. St. 1916, § 9546]). This section provides, among other things, that:

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable * * * to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement * * * or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in

assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated. But in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty."

It is urged by defendant that this provision does not apply to the present case for the reason that it was not shown that the plaintiff had sustained any damages from this infringement and that the award of the minimum amount apparently required by this section would constitute merely the infliction of a fine against the defendant, which, under the circumstances in this case, it would be inequitable to compel it to pay. In view of the plain language of the section just quoted and the construction thereof by the Circuit Court of Appeals for this circuit in L. A. Westermann Co. v. Dispatch Printing Co., 233 Fed. 609, 147 C. C. A. 417, this contention must be overruled. In the case just cited, the defendant had infringed the copyright of plaintiff upon certain design sketches illustrative of styles in clothing, by publication thereof in its newspaper on different dates. Plaintiff in its bill alleged that it was impossible to show by proof the actual damages suffered, and that he elected to take the alternative damages given by this section of the Copyright Law. The lower court refused to grant the minimum damages fixed by said section. In reversing the decree, the court, speaking by Judge Denison, used the following language:

"By the clause 'in lieu of' it contemplates an election or discretionary choice between actual damages and profits on the one side, and, on the other side, an assumed or somewhat arbitrary award of such damages as may be just. Plaintiff claims that the copyright proprietor is entitled to make this election, and to plant his action arbitrarily and absolutely upon one theory or the other; defendant insists that the election or the discretionary choice is to be made by the court upon the trial. The plaintiff here made the election, if he had the power to do so; and on the evidence there can be no doubt that this was not a case for actual damages, as distinguished from those damages which might be fair and just, and that the court, if called upon to act, must make the same election as plaintiff did. Defendant made no profits, so far as the proofs indicated; the plaintiff's damages rested in the injury to his Morehouse contract and in the discouragement of and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible. This case must therefore be treated, from any point of view, as one calling for the application of the 'in lieu' portion of the statute. The statute says that 'such damages shall' be governed by a maximum and minimum. Whether this phrase, 'such damages,' and the maximum and minimum limitations, apply to the actual damages which may be proved and established under the first part of this section, or only to the 'just' damages given 'in lieu of actual damages,' cannot be determined from mere arrangement of the language, but must depend upon more indirect interpretation. This question likewise does not directly require decision in this case. The limitations unquestionably apply to the 'in lieu' damages, which are the only ones here involved; their application to actual damages may be passed over. * * * We see no escape from the application of the $250 minimum in a case like this. * * * It seems to us the plain meaning of the language that Congress intended that the plaintiff should not recover less than $250 damages in any copyright infringement suit not based upon a newspaper reproduction of a photograph—at least in any case where the actual damages fail to appear so clearly and so fully as to forbid resort to the 'in lieu' clause. The necessary effect of the provision is to prohibit the award of merely nominal damages. This intent implies no undue harshness. Not only does the

typical copyright infringement, if not every one, involve indirect damages almost sure to be considerable, but in few cases would one sum of $250 more than compensate plaintiff for his time, trouble, and expense in detecting, following up, and prosecuting an infringement. It would seem that the words 'shall not be regarded as a penalty' were added out of abundant caution, for under such a situation as usually exists on this subject the awarding of a round sum in damages is no more a penalty, when the damages are liquidated by a court than when they are liquidated by a contract."

This case, in my opinion, controls the present case, and the language just quoted therefrom so completely covers the questions here involved and the contentions made by defendant that no further discussion thereof is necessary.

[6] The only question remaining for consideration is whether damages should be awarded on the basis of one or of two acts of infringement. The infringing acts consisted of the publication of the map in question in the regular edition of the defendant's newspaper on March 31, 1916, and another publication thereof in its noon edition of the following day. It appeared that this second edition was in some respects identical with that of the previous day. A considerably less number of copies thereof were printed, and it contained much of the matter contained in the earlier edition, with a rearrangement thereof, and the addition of some new items and features. It was published in the forenoon of the day following the publication of the previous edition already referred to, which was the regular afternoon edition. Plaintiff contends that, as the defendant published this map in two separate editions, each of which reached a different class of subscribers, it was guilty of two separate acts of infringement and that the damages should be awarded on that basis, at least the minimum amount allowed by the statute being doubled.

Conceding that the publication of this map in each of these editions was a separate act of infringement, it does not follow that these alternative damages are recoverable on that basis. L. A. Westermann Co. v. Dispatch Printing Co., supra. In the case just cited the same contention was made, and overruled by the court in the following language:

"The 'infringement' for which an action will lie is not necessarily the same 'infringement' for which the minimum damages are provided. The same word may have different meanings, even in parts of the same statute, if the context and reasonable construction so require. American Co. v. District of Columbia, 224 U. S. 491, 494, 32 Sup. Ct. 553, 56 L. Ed. 856. The language of the statute is: 'If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable * * * to pay * * * the copyright proprietor * * * such damages as to the court shall appear to be just,' etc. What did Congress mean when it referred to the 'infringement' for which not less than $250 must be paid? The common instance, such as Congress probably had in mind, is clear. In case of an unauthorized publication of a copyrighted book, or an infringing edition of a copyrighted song, there are clearly one right and one violation, though an infringing edition may contain many copies. The statute has recognized that in some instances acts of infringement, though connected and united, may require separate treatment, and in other instances (newspaper reproduction of photographs) a number, perhaps a vast number, of acts are treated collectively as one infringement; but in still other instances the statute is wholly silent in these respects. The publishing of an edition of a thousand books is an infringement; so is the putting on sale of one of them. Using

the analogy of the patent law, the manufacture and sale of one article is an infringement sufficient to support an action; yet all the conduct of the defendant in continuing the manufacture and sale over a period of years may be 'the infringement' for which damages will be assessed at the end of the action. There is no corresponding damage statute in the patent law to make the analogy complete; but can it be supposed that the copyright proprietor can take each infringing act out of a series or group, because each one is sufficient to support an action, and then plant a separate action or complaint upon each, and so recover his minimum damages practically as many times as he chooses? These and other considerations convince us that the 'infringement' which calls for minimum damages is that conduct of the defendant, whether being one act or many, which constitutes a connected and fairly unitary invasion of the proprietor's rights. Intermittent newspaper publication forms merely an extreme instance of difficulty in applying this definition. * * * We are satisfied to interpret the statute as saying in effect that in any case where a party shows that a property right and interest protected by the copyright law have been invaded by the defendant, the damages (under the 'in lieu' clause) must not be more or less than the stated amounts, even though the right is composite and the invasion is composite. It will follow that it must be determined by the court as a fact in each case whether one right or more than one has been impaired, and whether the acts of the defendant in taking are to be considered as one infringement or more than one. * * * The defendant newspaper published on several days several items of this group, but these publications were all incidents of one course of conduct; they all occurred within a short time; they ceased as soon as complaint was made. We think it reasonable to say that within the purview of this minimum damage clause they constituted one infringement."

I think that, under all the circumstances, including the fact that the defendant appears to have acted in good faith, and ceased its infringement and surrendered its infringing plates as soon as its attention had been called to the matter, it is equitable to consider, and it should be held, that the acts of the defendant constituted one infringement, for the purpose of computing the damages, and that the plaintiff should recover the minimum amount allowed by the statute for one infringement, namely, $250 and costs; and a decree may be framed along those lines.

BRIEN v. DETROIT UNITED RY.

(District Court, E. D. Michigan, S. D. October 25, 1917.)

No. 5871.

1. RAILROADS ⟸330(1)—INJURIES TO PERSONS ON TRACKS—RIGHT OF TRAVELER.

   A traveler on a highway, who sees an approaching interurban electric car, has the right to assume, until the contrary becomes apparent, that the motorman is keeping a proper lookout, and can and will see him and his position at least as far as he himself can see the car.

2. NEGLIGENCE ⟸75—CONTRIBUTORY NEGLIGENCE—EXCUSE.

   A person placed in a dangerous position is not justified in remaining there in order to save property from injury, if he has reason to believe that his remaining will result in his own injury; yet it is the duty of the person to make reasonable efforts to save his property, and he is not justified, on the ground of self-preservation, in abandoning property to probable injury, before such abandonment appears reasonably necessary to avoid personal injury.

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3. RAILROADS ⊂⊃350(13)—INJURIES TO PERSONS ON TRACKS—JURY QUESTION.
In an action by plaintiff, an executrix, for the death of her decedent, resulting from a collision between defendant's electric interurban car and the motorcar, which decedent had been driving from the center of the city to a suburban resort, where it appeared that decedent remained for a moment in the car, which had become stalled on defendant's tracks, after seeing the approach of defendant's car, the question of the decedent's contributory negligence *held* for the jury.

4. RAILROADS ⊂⊃329—CROSSING ACCIDENTS—NEGLIGENCE.
Where the motorcar which deceased was driving became stalled on defendant's tracks, and his companion alighted to crank the car, deceased cannot, though he remained in the car for a short time after seeing defendant's electric car approaching, be deemed guilty of contributory negligence, because his choice proved unwise, having only a moment to decide his course.

5. RAILROADS ⊂⊃320—CROSSING ACCIDENTS—LAST CLEAR CHANCE DOCTRINE.
Where a motorman in charge of an electric interurban car either sees or by the exercise of reasonable care should see that a traveler rightfully on crossing cannot or apparently will not remove himself therefrom in time to avoid being struck, and the motorman fails to stop his car, although able by the exercise of ordinary care so to do, and thereby injures the traveler, the motorman is guilty of negligence, for which his employer, operating the street car, is liable.

At Law. Action by Harriett C. Brien, executrix of the estate of James Brien, against the Detroit United Railway. There was a verdict for plaintiff, and defendant moved for new trial. Motion overruled.

Dohany & Dohany, of Detroit, Mich., for plaintiff.
William G. Fitzpatrick, of Detroit, Mich., for defendant.

TUTTLE, District Judge. This is an action of trespass on the case, brought by the plaintiff, a resident of Massachusetts, as executrix of the estate of James Brien, deceased, to recover from the defendant, a Michigan corporation, damages for the negligent killing of plaintiff's decedent by the defendant, through one of its motormen. The cause was submitted to a jury, which returned a verdict for plaintiff, and the defendant has moved for a new trial, alleging error in the instructions of the court and urging that the verdict is against the weight of the evidence.

The testimony showed that on the day of the accident in question, late in the afternoon, in June, plaintiff's decedent, James Brien, and his brother, Christopher, drove in an automobile belonging to Christopher, but being driven by James, northward on Woodward avenue from Detroit to Poplar Park, a suburban community about 10 miles north from the center of the city. About 6:30 o'clock, and while it was quite light, they arrived at Poplar Park avenue, a driveway running into Poplar Park westerly from, and at right angles to, Woodward avenue, which runs in a general northerly and southerly direction. The defendant operates fast interurban electric cars on a double track on Woodward avenue from Pontiac to Detroit, a distance of about 25 miles. These tracks are parallel with the public highway, and are 8 feet westerly of the west side of the cement paved portion

of such highway. Such tracks and highway intersect Poplar Park avenue at right angles. When the automobile mentioned reached Poplar Park avenue, it was turned to the left in order to cross said tracks and enter Poplar Park. It safely passed the easterly (being the north-bound) track, but before crossing the westerly (or south-bound) track it was struck by a south-bound electric freight car operated by defendant, and plaintiff's decedent sustained injuries from which he died soon afterwards. There is a sharp conflict in the testimony as to how the accident occurred. It was the claim of plaintiff, and the testimony produced by plaintiff tended to show, that while the automobile, driven by plaintiff's decedent, was on the south-bound track the engine stalled, because of rough places in the crossing, and the automobile stopped suddenly upon such track; that just before turning to cross the tracks both plaintiff's decedent and his brother looked northerly along said tracks, but no car was visible; that at the time the engine stalled, the south-bound electric car already mentioned was visible near the so-called 10-mile road, about 850 feet north from Poplar Park avenue; that plaintiff's decedent at first tried to start the engine from his seat, but was unable to do so; that as soon as the car was stalled the brother, Christopher, who was sitting on the left of the front seat, James sitting on the right, opened the left-hand door of the automobile and stepped out upon the ground and to the front of the automobile, and endeavored to crank it so that decedent, who kept his seat, could drive off from the track; that he then looked again to the north, and saw the car between 100 and 150 feet from them; that before he was able to take hold of the crank his attention was attracted by the fact that the car was almost upon them, and he was forced to jump backward to avoid being struck; that he then noticed that his brother was trying to get from behind the steering gear and to leave the machine through the door which he had left open; that while decedent was attempting to escape from the automobile the latter was struck by the electric car and the decedent hurled to the ground, sustaining injuries from which he died two days later.

It was the claim of the defendant, supported by the testimony of the motorman and of the conductor in charge of the car in question, that this automobile was turned upon the crossing and across the track suddenly and when the car was about 300 or 400 feet distant; that the car did not stall and did not come to a stop before the accident; that neither of the two men left the automobile before it was struck; that the motorman and the conductor were in the front vestibule of the car, looking ahead at the time, and saw the automobile as it was driven upon the track; that the power was then shut off; that soon after the air was applied, the application being completed when the car was about 150 or 200 feet from the crossing; that when the automobile was first seen it was impossible to stop the car in time to avoid a collision, although as soon as it was seen that the automobile was in danger every possible effort was made to stop the car and avoid such collision. The evidence showed that this crossing was in daily use by traffic, and had been for a considerable period before this accident; that the automobile could have been seen at the 10-mile road, which was, as already

stated, about 850 feet distant to the north; and that the car could have been stopped within from 500 to 650 feet.

The questions as to the contributory negligence of the plaintiff and the negligence of the defendant were submitted to the jury. The substance of the instructions of the court on these points is shown by the following extracts from the charge:

"I say to you, as a matter of law, that if the accident occurred in the manner that the defendant claims—if the automobile did not stall upon the track—there can be no recovery in this case, and that would dispose of the case in favor of the defendant. * * * If he turned and drove upon that track, in front of that car, he would be negligent, and guilty of negligence which caused the accident, for failure to do several things that he ought to do.

"So, while I will give you more specific and definite charges later with reference to the law, the real necessities for charging you with reference to the law from this point on, are made necessary on the theory, and in case that you find, that the accident occurred in the manner that the plaintiff claims, and by the stalling of the automobile.

"In the event that the accident occurred by the stalling of the automobile, then, as a general proposition, this is the rule of law governing the situation: There is a duty resting upon parties that drive across street car tracks, inter-urban street car tracks, at the usual crossings, and there are also duties resting upon the companies who operate the cars, the street cars. There is a duty resting upon the motorman, and by the 'motorman' I mean the street car company; and when I say 'street car company' in that regard I mean the motorman. Each has his rights. The street car company has a right to operate its trains up and down its tracks, and the drivers of automobiles have a right to cross the tracks at these regular crossings. Each, however, at the same time has its duties to perform in so passing along the track or across the track. Now, it is the duty of the motorman in driving the street car—and it was the duty of the motorman in driving this car—to use reasonable care in keeping a lookout for people and vehicles ahead of him upon the track; and if he saw people in an automobile stalled upon the track ahead of him, to use reasonable care to avoid striking them and injuring them, provided he saw they were in danger, and were not going to be able to get out of his way. If he failed to perform that duty, and his failure to perform it was the proximate cause of the injury, and his failure resulted in striking the automobile, then the operator of the car, and the company employing the operator of the car, were guilty of negligence.

"On the other hand, it was the duty of the driver of the automobile—the plaintiff's decedent, in this case—to look and to use reasonable care and diligence for his own safety, to look, before turning across the street car track, to see if there was any street car approaching, and then, if he turned to drive across the track, to use reasonable care and caution in driving across the track, and operating his car, to see that he did not become stalled upon the track, to use reasonable care and caution and to keep watch to see if a car was approaching, and, if he got stalled upon the track, to use reasonable care and caution to get out of the way of the car and off the track before he himself was injured. * * *

"I use the word 'negligence,' meaning that if the defendant's motorman, in operating the train, two freight cars, at the time in question, kept such a lookout for passengers, for people or vehicles on the track ahead of him, at the time and place in question, as a reasonably prudent motorman would, under the surrounding circumstances—or, rather if he failed to do that, and his failure to do that was the proximate cause of the injury in this case, then the defendant was guilty of negligence, or, if he saw the automobile upon the track, and failed to use reasonable care, such care as an ordinarily careful motorman, under similar circumstances, would have used to stop his car and prevent the collision, and such failure was the proximate cause of the accident, then the defendant would be guilty of negligence. * * *

"I want to relieve the case of some other unnecessary issues. There can

be no recovery except upon the issue I have already pointed out to you, and no recovery by the plaintiff upon any other issue, or upon any other theory. If at all, it must be on the theory that the automobile was stalled, and that the motorman either saw it, or, with reasonable care, would have seen it, in sufficient time, so that, with the exercise of reasonable care, he could have stopped the street car and prevented the accident. I say, this lawsuit is entirely upon that theory; and there can be no recovery—if there is a recovery —upon any other theory. There can be no recovery upon any theory of negligence on the part of the defendant company, or any of its employés, prior to the time when the automobile—if you find it was stalled upon the southbound track—could have been seen by the motorman approaching from the north. There can be no recovery for anything that occurred before that time, because, as you will see under the charge in this case, as I have outlined it to you, if there was any negligence for which the plaintiff can recover, it must occur after that time. * * *

"If the jury believes, from the evidence, that the plaintiff's decedent, as a reasonable man, acting prudently under all the circumstances, should have noted the approach of that car, and its closeness to him, in time to have permitted him to leave the car and get to a place of safety, then the jury would be justified in finding him guilty of such negligence as would defeat plaintiff's right to recover.

"As a matter of law, the plaintiff's decedent's first duty was to himself in the protection of his life and limb, and he was not justified in remaining unreasonably in a place of peril for the purpose of conserving or protecting property, and his desire to conserve property would not excuse him from the exercise of his senses of sight or hearing for the purpose of apprising himself of the rapid approach of the car and its proximity to the automobile in time to enable him, if necessary, to leave the car and go to a place of safety."

It is urged by defendant that on the present record plaintiff's decedent was guilty of contributory negligence as a matter of law, and also that the court erred in instructing the jury that, if the motorman might by the exercise of reasonable care have seen the automobile in time to have avoided the accident, his failure to see such automobile within such time constituted negligence; it being the claim of defendant that the motorman would be guilty in this respect only if, after actually seeing the automobile, he failed to exercise ordinary care in stopping his car in time to avoid a collision.

[1-3] On the evidence introduced, I am of the opinion that reasonable men might honestly differ on the question whether plaintiff's decedent was guilty of negligence in failing to leave the automobile immediately after it became stalled. It seems to me that he might well have reasonably believed that, with the electric car over 800 feet away, it was not necessary that he should immediately abandon his brother's automobile to injury or destruction without an attempt to save it, if indeed he supposed that there was any danger of its being struck by the approaching car. It is a matter of common knowledge that a stalled automobile can often be started within a very few seconds. He had a right also to assume, until the contrary became apparent, that the motorman was keeping a proper lookout, and could and would see him and his position at least as far away as he himself could see the electric car. It is true that a person placed in a dangerous position is not justified in remaining there in order to save property from injury, if he has reason to believe that his remaining will result in his own injury. It is also true that it is his duty to make reasonable efforts to save his property, and that he is not justified, on the ground of self-

preservation, in abandoning such property to probable injury before such abandonment appears to him reasonably necessary to avoid personal injury. Whether, under the circumstances here presented, decedent waited, in the effort to save this automobile from harm, longer than he should have done in the exercise of ordinary care before abandoning it to its fate and proceeding to a place of greater safety, was, in my opinion, a question of fact for the jury under the instructions given them, portions of which have been already quoted. Southern Railway Co. v. Smith, 214 Fed. 942, 131 C. C. A. 238; Great Northern Railway Co. v. Harman, 217 Fed. 959, 133 C. C. A. 631, L. R. A. 1915C, 843; King v. Grand Rapids Railway Co., 176 Mich. 645, 143 N. W. 36; Kansas City-Leavenworth Railway Co. v. Langley, 70 Kan. 453, 78 Pac. 858.

[4] It should also be remembered that deceased was placed in a position where he was obliged to decide quickly what he should do, and he is not to be considered negligent merely because he chose a course of action which the event proved was an unwise choice. As was said in Lehigh Valley Railroad Co. v. Kilmer, 231 Fed. 628, 145 C. C. A. 514:

"What the plaintiff did after he got upon the track is not a matter of controlling importance. In such a case as that in which the plaintiff then found himself suddenly put in peril, he is excusable if he made an unwise decision as to what he should do. The rule on this phase of the matter is correctly laid down in Shearman & Redfield (6th Ed.) vol. 1, par. 85a, where it is said: 'If one is placed by the negligence of another in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance. Even if, in bewilderment, he runs directly into the very danger which he fears, he is not at fault. The confusion of mind caused by such negligence is part of the injury inflicted by the negligent person, and he must bear its consequences.'"

[5] It will be noted that, in so far as the alleged negligence of the defendant is concerned, the only question as to such negligence submitted to the jury was that involved in the so-called last clear chance doctrine. As already stated, it is the contention of the defendant that this doctrine applies only when one person has actually discovered that another person is in a position of danger, from which he apparently cannot or will not remove himself in time to avoid an impending peril, and after such discovery fails to exercise ordinary care to avoid causing injury to such other person, and it is strenuously urged that this doctrine has no application to a case where it is alleged, not that the person injuring another actually knew, in time to avoid such injury, of the danger of the latter, but that he should, in the exercise of reasonable care, have discovered such danger within such time. I cannot agree with this contention. Applying the last clear chance doctrine to the facts in the present case, I think it well settled that where a motorman in charge of an electric car either sees, or by the exercise of reasonable care should see, that a person rightfully on the track in front of such car cannot, or apparently will not, remove himself therefrom in time to avoid being struck by such car, and thereafter such

motorman fails to stop his car, although able, by the exercise of reasonable care, so to do, and thereby injures such person, the latter not being guilty of contributory negligence, concurring with that of the motorman, up to the moment of collision, such motorman is guilty of negligence, causing such collision, for which his employer is liable. Texas & P. Ry. Co. v. Nolan, 62 Fed. 552, 11 C. C. A. 202; Baltimore & O. R. Co. v. Anderson, 85 Fed. 413, 29 C. C. A. 235; Robinson v. Louisville Ry. Co., 112 Fed. 484, 50 C. C. A. 357; Philadelphia & Reading R. R. Co. v. Klutt, 148 Fed. 818, 78 C. C. A. 508; Illinois Central R. R. Co. v. O'Neill, 177 Fed. 328, 100 C. C. A. 658; Smith v. Baltimore & O. R. Co., 210 Fed. 414, 127 C. C. A. 146; Middlesex & B. St. Ry. Co. v. Egan, 214 Fed. 747, 131 C. C. A. 53; Dickson v. Chattanooga Ry. & Light Co., 237 Fed. 352, 150 C. C. A. 366, L. R. A. 1917C, 464; Huff v. Michigan United Traction Co., 186 Mich. 88, 152 N. W. 936; Hull v. Seattle R. & B. Railway Co., 60 Wash. 162, 110 Pac. 804; McKinney et al. v. Port Townsend & P. S. Ry. Co., 91 Wash. 387, 158 Pac. 107.

As was said by the Circuit Court of Appeals for this circuit in Robinson v. Louisville Ry. Co., supra:

"It was the duty of the motorman, in exercising the care incumbent on him, to ascertain whether the track ahead was clear, and to have his car under such control as to admit of its being stopped after he saw obstructions ahead of it. La Pontney v. Cartage Co., 116 Mich. 514, 74 N. W. 712, and cases there cited. It follows that if he could, by the exercise of due care, have seen the wagon in which the plaintiff was riding as far as other witnesses testified to have seen it, and if he could, after he should, by the exercise of due care, have seen it, gotten his car under such control as to have prevented the collision, it was his duty to have done so, and those questions should have been left to the determination of the jury."

In the language of Philadelphia & Reading R. R. Co. v. Klutt, supra:

"Not to have discovered what should have been under all the circumstances discovered was a part of defendant's negligence, subsequent to that of the plaintiff. The so-called doctrine of Davies v. Mann [10 Mees. & W. 546] supra, has been the subject of much refinement by courts and text-writers. We think, however, that Judge Acheson, speaking for this court in the former case, has laid down the true principle applicable to this case, as follows: 'It is a settled principle of law that, although a plaintiff, who sues for an injury inflicted by the defendant, might, by the observance of proper care, have avoided exposing himself to the injury, yet this will not prevent him recovering damages from the defendant, if the latter discovered, or by the exercise of ordinary care might have discovered, the exposed situation of the plaintiff in time, by the exercise of ordinary care and diligence, to have averted the effect of the plaintiff's negligence and avoided the injury which happened.'"

In Dickson v. Chattanooga Ry. & Light Co., supra, the Court of Appeals for this circuit said:

"It is well settled that one who is injured by a railroad train at a highway crossing, or by a street car in a street, may recover for such injury, notwithstanding his own initial or preceding contributory negligence in exposing himself to danger, provided he is using the street or highway at the time for a proper and legitimate purpose and his negligence has terminated, and provided, further, that the driver of the engine or street car, by the exercise of reasonable care and diligence, could have discovered his peril in time to avoid and prevent the accident."

In Huff v. Michigan United Traction Co., supra, it was said:

"We have carefully examined the authorities cited and relied upon by the defendant, and are of the opinion that the question whether the defendant's agent, the motorman, should have discovered from the actions and situation of plaintiff his peril, and should have, but did not, take ordinary precaution to avert that peril, was one for the determination of the jury, under all the circumstances disclosed by the record in this case. Richter v. Harper, 95 Mich. 221, 54 N. W. 768; La Pontney v. Shedden Cartage Co., 116 Mich. 514, 74 N. W. 712; La Barge v. Pere Marquette R. Co., 134 Mich. 139, 95 N. W. 1073."

The principle applicable was thus stated in the somewhat similar case of McKinney v. Port Townsend & P. S. Ry. Co., supra:

"If the engineer or fireman had actually seen the automobile at a standstill on the track in time to stop, they could not have failed to appreciate the danger and necessity for stopping the train. Whether they did see the automobile come to a standstill in time to stop, or by the exercise of a reasonably careful lookout could have seen it in time to stop, were plainly, under the evidence in this case, questions for the jury."

In view of the testimony already referred to, it seems clear that the questions whether the motorman would, if keeping a proper lookout, have discovered the dangerous position of plaintiff's decedent in time to have avoided injuring him, and whether after such discovery he could, by the exercise of reasonable care, have stopped his car before the collision, were properly submitted to the jury.

I am satisfied that no error was committed on the trial, or in the charge to the jury, and that the verdict is not contrary to the weight of the evidence, and the contentions of defendant must therefore be overruled, and the motion for a new trial denied.

In re BERRY.

(District Court, E. D. Michigan, S. D. September 11, 1917.)

No. 3305.

1. BANKRUPTCY ⟸293(4)—PLENARY PROCEEDINGS—JURISDICTION OF COURT OF BANKRUPTCY.

Where respondent answered on the merits a petition of the trustee in bankruptcy praying for an order requiring respondent to execute and deliver in blank an assignment of certain stock certificates upon fulfillment of an executory contract with the bankrupt and his wife for the acquisition by the latter of certain corporate stock and land, and made no objection on hearing before the referee or on hearing on the petition for review to the jurisdiction of the court of bankruptcy, an objection, first made in a brief filed in the proceedings on the petition for review, that the court was without jurisdiction under Bankruptcy Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (Comp. St. 1916, § 9607), providing that suits by the trustee shall only be brought in courts in which the bankrupt might have brought them, had no proceedings in bankruptcy been instituted, unless by consent of the proposed defendant, because the property was in the possession of respondent, must be deemed waived.

2. BANKRUPTCY ⟸254—TRUSTEE—RIGHTS OF.

Under Bankruptcy Act July 1, 1898, § 70a (5), being Comp. St. 1916, § 9654, declaring that the trustee of the estate of a bankrupt shall be

vested with the title of the bankrupt as of the date he was adjudicated a bankrupt to the property, except in so far as it is exempt, which prior to the filing of the petition the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process, an adjudication in bankruptcy does not terminate or dissolve the contractual relations of the bankrupt, but vests in the trustee an option to assume or renounce executory contracts of the bankrupt.

3. BANKRUPTCY ⟸140(½)—TRUSTEE—RIGHTS OF—WHAT LAW GOVERNS.
In determining whether any particular property of a bankrupt might have been transferred by him, or levied upon and sold under judicial process against him, prior to the filing of the petition for the purpose of ascertaining whether it passes to the trustee in bankruptcy, the laws of the state in which the property is located govern.

4. HUSBAND AND WIFE ⟸14(10)—TENANCY BY ENTIRETY—NATURE OF.
In Michigan, the interest of either a husband or wife in land held by them as tenants by the entirety cannot be sold, incumbered, or in any manner transferred by one tenant without the consent of the other, nor can the interest of one be levied upon and sold under judicial process against him alone.

5. HUSBAND AND WIFE ⟸14(2)—TENANCY BY "ENTIRETY"—CONTRACTS.
In Michigan, the interest of a husband and wife in land under a contract for its purchase by both is an estate by the entirety.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Entirety.]

6. BANKRUPTCY ⟸143(1)—TRUSTEE—RIGHTS OF—TENANCY BY ENTIRETY.
Under Bankruptcy Act July 1, 1898, § 70a (5), vesting the trustee with the property which the bankrupt could transfer, or which might be levied upon and sold under judicial process against him, the interest of a Michigan bankrupt in land which he and his wife had contracted to purchase does not pass to the trustee for the rights of the parties are those of tenants by the entirety.

7. HUSBAND AND WIFE ⟸14(1)—TENANCY BY ENTIRETY—PERSONAL PROPERTY.
In Michigan, there can be no estate by the entirety in personal property.

8. HUSBAND AND WIFE ⟸14(2)—TENANCY BY ENTIRETY—CREATION.
A corporation organized under Pub. Acts Mich. 1897, No. 230, entitled "An act to provide for the formation of corporations for the purpose of owning and improving lands and other property kept for the purpose of summer resorts or for ornament, recreation or amusement," which provides in section 3 that every such corporation shall be capable in law of owning, holding, or purchasing and disposing of, in such manner as a majority of the stockholders shall direct, any real or personal property, and in section 21 that, whenever any such corporation shall cause to be platted any part or portion of its lands, it may by its by-laws provide the manner in which the lot or lots may be assigned, allotted, or confirmed to its several stockholders, provided that any such lot or lots so assigned, allotted, or confirmed shall be deemed and considered as appurtenant to shares of capital stock, by its by-laws authorized the board of directors to deed to each incorporator one or more lots of the property owned by the corporation, each deed to contain a condition that the grantee, his heirs and assigns, should never convey the lot or lots to any person except an authorized stockholder, and that no sales should be made to any person not a stockholder in the corporation. An incorporator and stockholder, who received a warranty deed to a lot which contained a condition declaring that it was appurtenant and attached to certain shares of capital stock, and that such lot should not, during the existence of the corporation, be sold, separated from the stock or contrary to the rules of the corporation, entered into a contract with the bankrupt and his wife to transfer to them his stock and convey the lot by a deed subject to a

similiar condition. *Held*, that the bankrupt and his wife became tenants by the entirety in the contract for the purchase of the land, subject to be divested upon breach of the condition subsequent, which was attached to the deed of their grantor and would be attached to their deed, and hence the interest of the bankrupt in the land did not pass to his trustee.

9. HUSBAND AND WIFE ⊂=14(2)—TENANCY BY ENTIRETY.
In such case, the provision in the act of 1897 authorizing the corporation to provide the manner in which lots might be assigned, allotted, or confirmed to stockholders did not prevent the passage of the legal title to such land, and so preclude the bankrupt and his wife from becoming tenants by the entirety.

10. CORPORATIONS ⊂=445—CONVEYANCES—PERSONAL PROPERTY.
Nor did the provision in section 14 that the stock of every such corporation shall be deemed personal property prevent passage of the legal title, and so preclude the bankrupt and his wife from becoming tenants by the entirety, for that provision was obviously inserted to make it clear that, though the corporation held land, the stock should not for that reason be treated as land.

11. BANKRUPTCY ⊂=138(1)—TRUSTEE—RIGHTS OF—RENUNCIATION.
Where the ownership of corporate stock, apart from any interest in land conveyed by the corporation as appurtenant to the stock, would be of no benefit to the trustee in bankruptcy, and the land could not be reached, the trustee should renounce any interest which he might be entitled to assert against the stock by virtue of a contract by the bankrupt and his wife for acquisition of the stock and the land.

In Bankruptcy. In the matter of the bankruptcy of Frank Berry. Plenary proceedings by the trustee against one Quinn. The petition of the trustee was denied by the referee, and he petitions to review the order. Petition of trustee denied.

Paul R. Dailey, of Detroit, Mich., for trustee.

Bishop & Kilpatrick, of Detroit, Mich., for respondent.

TUTTLE, District Judge. This matter is before the court on a petition to review an order of the referee in bankruptcy in proceedings brought by the trustee against one Quinn, respondent herein, for the recovery of certain property alleged by said trustee to belong to the estate of the bankrupt. The referee by his order denied the petition of the trustee, and the latter seeks to review such order here. The question involved is whether the trustee is entitled to complete a certain executory contract made by the bankrupt and his wife for the purchase, from respondent, of certain land connected with the ownership of shares of stock in an incorporated summer resort association.

The corporation in question, the Hickory Island Company, was organized under Act 230 of the Michigan Public Acts of 1897 (sections 10034–10056 of the Compiled Laws of Michigan of 1915), entitled "An act to provide for the formation of corporations for the purpose of owning, maintaining and improving lands and other property kept for the purposes of summer resorts or for ornament, recreation or amusement." Section 3 of the act in question provides that every such corporation shall be "capable in law of owning, holding or purchasing and disposing of, in such manner as a majority of the stockholders shall direct, any real or personal property or estate whatever," etc.

Section 14 of the act provides that "the stock of every such corporation shall be deemed personal property, and may be transferred as shall be prescribed by this act and by the by-laws of the corporation." Section 21 of the act is as follows:

"Whenever any such corporation shall cause to be platted any part or portion of its lands in the manner prescribed in the foregoing section of this act, it may by its by-laws, provide the manner in which the lot or lots may be assigned, allotted or confirmed to its several stockholders, and the terms and conditions upon which the same shall be held by them: Provided, That any such lot or lots so assigned, allotted or confirmed to such stockholders shall be deemed and considered as appurtenant and attached to a certain share or shares of capital stock in such corporation, which shall be designated at the time of such assignment, allotment or confirmation, and any assignment, transfer or other disposition of such capital stock shall be held to carry with it, the right to such lot or lots so appurtenant or attached to the same; and it shall not be lawful for such stockholder to in any manner whatsoever, sell, assign, transfer or dispose of any right, title, claim or interest he may have or acquire in [an] any lot or lots assigned, allotted or confirmed under such by-laws and regulations, separated or detached from the share or shares of capital stock to which it shall be appurtenant or attached."

The by-laws of the corporation in question authorize the board of directors to deed to each incorporator thereof one or more lots of the property owned by the corporation, each deed to contain a condition "that the claimant therein, his heirs and assigns, shall never convey said lot or lots to any other person except a stockholder in this corporation; said condition to be valid and operative so long as this corporation shall continue in existence." They also provide that the lots not sold to incorporators may be sold to others on the same condition, no sales to be made "to any person who is not a stockholder in the corporation to the extent of one share of stock for each five feet front of the lot he desires to buy."

The respondent, who was an incorporator and stockholder of this corporation, received from such corporation a warranty deed to one of these lots, lot 14, which deed was in the usual form of a warranty deed, except that it contained the following conditional clause:

"Provided, however, and this conveyance is upon the express condition * * * that said lot is appurtenant and attached to certain shares of capital stock of the party of the first part * * * issued to the party of the second part and dated of even date herewith, and said lot or any interest therein shall never, during the existence of said corporation, the party of the first part, be sold, assigned, transferred or disposed of separated or detached from said shares of capital stock or contrary to the rules of the corporation governing the transfer of capital stock as that shall at the time of said transfer be in force."

The certificate of the shares of stock referred to in said deed stated that respondent was the owner of such shares of stock "appurtenant and attached to lot 14 of the said company's subdivision of the southeast part of Hickory Island, and not transferable separate from said lot," and that such stock was transferable only by the consent of the board of directors of said corporation and on compliance with the rules and by-laws thereof. Thereafter, and before the filing of the petition in bankruptcy herein, respondent entered into a contract with the bankrupt and his wife, jointly, for the sale to them of

said lot and shares of stock for the sum of $368.20, payable in equal monthly installments. This contract, in addition to the usual recitals in a land contract, contained the following clause:

"And it is further agreed that the parties of the second part agree to accept a deed of the within described property subject to all conditions set forth by the Hickory Island Company, said deed to be of the same printed form as all other landholders in said subdivision, these conditions being a part of the purchase price of said lot."

The printed form of deed thus referred to was the same as that received by respondent as already mentioned. On this contract there is still due $185.29, but the contract has not been abandoned or terminated and the respondent recognizes the rights of bankrupt and his wife therein.

The trustee filed a petition with the referee in the bankruptcy proceedings praying for an order requiring the respondent to execute and deliver in blank an assignment of the said stock certificate upon the fulfillment of the contract with respondent, on the ground that the interest of the bankrupt therein became by his bankruptcy vested in the trustee, who was authorized to complete said contract on behalf of the estate of the bankrupt, and that thereupon the trustee would acquire the title therein which would otherwise have been acquired by the bankrupt. The trustee also contended that this interest in said stock is connected with, and carries with it, the same kind of an interest in the lot already mentioned, which is an interest in personal property. The referee declined to make such an order, ruling that the interest of the bankrupt and his wife in the land contract covering said lot constituted an estate by the entirety, and that, therefore, the interest of the bankrupt therein did not vest in this trustee, but an order was entered requiring the respondent, upon the payment to him by said trustee, but not out of the funds of the bankrupt estate, of the sum due him as already mentioned, to execute an assignment of the certificate of stock to the bankrupt and his wife, and to deliver the same to the bankrupt, who was restrained, by such order, from transferring such stock without the further order of the court. The trustee thereupon filed his petition to review such order, alleging that it was erroneous because it "failed to direct respondent, upon payment to him of the sum of $185.29 by the trustee, but not from the assets of the bankrupt's estate, to execute an assignment of certificate No. 14, representing eight shares of the capital stock of the Hickory Island Company, to petitioner herein, said trustee, and to deliver the said certificate to petitioner."

The questions, therefore, here presented concern and involve the nature and extent of the rights of the trustee in this stock and lot.

[1] A preliminary objection to the jurisdiction of the bankruptcy court to entertain the present petition should be first considered. The respondent contends, first making the objection in this court, that as he is in possession of this certificate of stock, claiming adverse rights therein, the rights of the respective claimants in this property cannot be determined by the bankruptcy court in these proceedings, relying on

section 23b of the Bankruptcy Act (Comp. St. 1916, § 9607), providing that:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

The respondent raised no objection before the referee to his jurisdiction in these proceedings, answering the petition of the trustee upon the merits, going to a hearing before the referee and another hearing in this court on the petition for review, without making such objection, and presenting it first in his brief in this court. Under these circumstances, it must be held that the respondent has consented to the institution of these proceedings in the bankruptcy court, and he has therefore waived his right to object to the jurisdiction of the court to entertain such proceedings. In re Connolly (D. C.) 100 Fed. 620; In re Steuer (D. C.) 104 Fed. 976; Ryttenberg v. Schefer (D. C.) 131 Fed. 313; Sheppard v. Lincoln (D. C.) 184 Fed. 182; Detroit Trust Company v. Pontiac Savings Bank, 196 Fed. 29, 115 C. C. A. 663.

The question as to the rights of the trustee in bankruptcy in property held by the bankrupt under the circumstances here presented appears never to have been judicially determined. No case has been cited, and I have been unable to find any, involving precisely the same question, which apparently is here presented for the first time.

[2] Section 70a (5) of the Bankruptcy Act (Comp. St. 1916, § 9654) provides that the trustee of the estate of a bankrupt shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to exempt property, to all "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The question presented, therefore, is whether the interest of the bankrupt in this property prior to the filing of the petition was property which "he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Of course, the mere fact that this interest was that of a vendee in a contract does not prevent it from passing to the trustee in bankruptcy. In re Clark (D. C.) 118 Fed. 358; Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719. As was said in the case last cited:

"An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt. * * * Its effect is to transfer to the trustee all the property of the bankrupt, except his executory contracts, and to vest in the trustee the option to assume or to renounce these."

[3] It is well settled that whether any particular property of a bankrupt might have been transferred by him or levied upon and sold under judicial process against him prior to the filing of the petition in bankruptcy is a question to be determined by the laws of the state in which such property was located. Hesseltine v. Prince (D. C.) 95 Fed. 802; In re Shenberger (D. C.) 102 Fed. 978; In re Butterwick (D. C.) 131 Fed. 371; In re Waite-Robbins Motor Co. (D. C.) 192 Fed. 47; Gibbons v. Goldsmith, 222 Fed. 826, 138 C. C. A. 252.

[4-6] It is the well-established rule in Michigan that the interest of either a husband or wife in land held by them as tenants by the entirety cannot be sold, incumbered, or in any manner transferred by either one of such tenants without the consent of the other. Naylor v. Minock, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595; Bauer v. Long, 147 Mich. 351, 110 N. W. 1059, 118 Am. St. Rep. 552. 11 Ann. Cas. 86; Ernst v. Ernst, 178 Mich. 100, 144 N. W. 513, 51 L. R. A. (N. S.) 317. Nor can such interest be levied upon and sold under judicial process against one of such tenants by the entirety. Vinton v. Beamer, 55 Mich. 559, 22 N. W. 40; Schliess v. Thayer, 170 Mich. 395, 136 N. W. 365.

The interest of husband and wife in land under a contract for the sale of such land to such husband and wife is an estate by the entirety and subject to the rules just stated. Comfort v. Robinson, 155 Mich. 143, 118 N. W. 943. If, therefore, the interest of the bankrupt in the lot here involved was an interest in an estate by the entirety, such interest did not pass to his trustee, and the latter is not entitled to a conveyance of such interest, or to restrain the bankrupt from a conveyance thereof. In re Beihl (D. C.) 197 Fed. 870; In re Meyer, 232 Pa. 89, 81 Atl. 145, 36 L. R. A. (N. S.) 205, Ann. Cas. 1912C, 1240. As was said in the case first cited:

"This 'venerable and unique common-law estate,' to use Mr. Justice Stewart's phrase, is founded upon the fiction that husband and wife are one person, and not two; but it is nevertheless conceived of as giving the entire interest in the whole property, not to the two jointly, but simultaneously to each, and as giving it without possibility of severance. These completely interfused interests cannot be divided by partition; neither owner can dispose of it except as a whole, and neither can dispose of it without the concurrence of the other. But, from another point of view, each has only an expectancy, for, upon the death of one, the other takes the whole in severalty, not by survivorship, but by the original title. Of course, it is possible to reason about such a perplexing abstraction, and rules have been gradually evolved to govern the necessarily conflicting interests that are thus compelled to live together without the possibility of divorce. But, as may be supposed, while these rules may be the result of reasoning in forms of the syllogism, they are apt to be artificial, and sometimes they lead to a contradiction in terms. For example: Each of these curious tenants owns what may be a valuable interest, but cannot exercise the most distinctive characteristic of ownership—the power of disposition. The husband owns the entire estate, but so does the wife, and therefore, if he should be permitted to sell it, he would be selling her property. Nor may he incumber it, except contingently—since incumbrance may be the first step to a sale, and this would be to pledge her property to his creditors. Nor may his creditors seize it by any process of the law, for she owns it all, and, unless he survives her, it will never be either at his disposal or at theirs."

[7] It is, however, equally well settled in Michigan that there can be no estate by the entirety in personal property. Wait v. Bovee, 35 Mich. 425; Luttermoser v. Zeuner, 110 Mich. 186, 68 N. W. 117; State Bank of Croswell v. Johnson, 151 Mich. 538, 115 N. W. 464.

[8] I am of the opinion that the interest in this land acquired by the bankrupt through the contract for the purchase thereof by him and his wife from the respondent was an interest in an estate by the entirety in real property. It cannot, of course, be denied that the land itself was, while owned by the corporation already referred to, real

property. The corporation was expressly authorized by the statute already considered to dispose of "in such manner as a majority of the stockholders shall direct any real or personal property." The stockholders authorized the corporation to deed this lot to the respondent subject to the condition above mentioned. In pursuance of this authority the corporation conveyed such lot by warranty deed and issued the aforesaid stock to the respondent, subject to said condition.

It is quite clear that this deed was a deed of land containing a condition subsequent restricting the power of alienation of such land in the manner already referred to and as expressly authorized, and therefore made legal, by the provisions of the statute hereinbefore quoted. It seems to me equally clear that, when respondent contracted with the bankrupt and his wife to convey to them this land subject to the same condition, he thereby agreed to sell them an interest in real property subject to a condition subsequent on the breach of which such interest might revert to him. Therefore, under the rules just stated, the bankrupt thus acquired an interest, with his wife, in an estate by the entirety in this land in fee, subject to be divested upon the breach of the condition subsequent attached thereto.

[9] It is urged that the provision in the statute quoted, authorizing the corporation to "provide the manner in which the lot or lots may be assigned, allotted or confirmed," indicates an intention on the part of the Legislature to limit the power of the corporation, in disposing of these lots, to a transfer in the nature of a lease or license to use such lots. The words, however, "assigned, allotted or confirmed," are certainly broad enough to include a conveyance of the fee subject to the condition attached. It seems to me that by such words it was merely intended to refer to the condition thus attached to the transfer of these lots, the effect of which would naturally make such transfer in the nature of an assignment or allotment of these lots to the stockholders as distinguished from an absolute and unconditional conveyance thereof to strangers. It will, moreover, be noted that a clause in the same section of the statute containing the words just quoted authorizes the stockholders of the corporation to provide by the by-laws "the terms and conditions upon which the same (the lots) shall be held by them," subject to the aforementioned condition. It will also be noted that by the by-laws previously referred to the corporation was authorized to "convey" its lots by deed, "each deed to contain a condition," etc. There is, therefore, in my opinion, nothing in the statute which was intended to, or did, have the effect of limiting the power of the corporation to conditionally convey an interest in its real property, or having the effect of making the interest of one receiving a deed from the corporation an interest in personal property.

[10] It is also contended that the language of the act, already quoted, providing that "the stock of every such corporation shall be deemed personal property," indicates an intention to make the interest of its stockholders in the land appurtenant to such stock personal property. It seems probable that the motive prompting the Legislature in thus expressly providing that the stock of such a corporation should be deemed personal property was to avoid the possibility of any doubt

as to whether, in view of the fact that such corporation was organized to hold real property, its stock might not also be considered real property. It is well known that at one time there was some doubt on this question, and it would not be strange that the Legislature should wish to make it clear that this stock should be deemed personal property. But, whatever the motive prompting the enactment of this section of the statute, the application of such section is expressly limited to the stock of such corporation, and I find nothing in the statute which can be construed as evincing an intention to make the interest of the stockholders in lots acquired from the corporation personal rather than real property, simply because the ownership of such lots is attached to the ownership of such stock.

For the reasons thus stated, I am clearly of the opinion that the interest of the bankrupt in this lot did not pass to his trustee, and that the latter is not entitled to any interest therein. In the language of the court in the case of In re Russie (D. C.) 96 Fed. 609:

"This property is excluded from the description of property given in subdivision 5 of section 70 of the Bankruptcy Act, which describes as one of the classes of property to be taken by the trustee property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. This is not such property, and it is clearly the intention of Congress that property should not pass to the trustee which could not be the subject of conveyance or disposition by the bankrupt at the time the bankruptcy proceedings were inaugurated."

[11] Whether the trustee is entitled to an interest in the stock, aside from any interest in the lot, is a question which it is unnecessary to consider, for the reason that it is apparent that the ownership of such stock apart from any interest in such lot would be of no financial benefit to the estate, but, on the contrary, would be detrimental thereto, as it would subject the latter to the payment of dues for membership in the Association without any rights in the only real advantages arising from such membership. It would therefore be the duty of the trustee to renounce any interest which he might have in such stock. Dushane v. Beall, 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791; In re Zehner (D. C.) 193 Fed. 787.

The petition of the trustee should be denied, and an order entered in conformity with the views herein expressed.

UNITED STATES v. WERNER et al.

(District Court, E. D. Pennsylvania. January 15, 1918.)

No. 89.

1. TREASON ⊂⇒1—ELEMENTS OF OFFENSE.

Under Const. art. 3, § 3, providing that treason against the United States shall consist only in levying war against them or in adhering to their enemies giving them aid and comfort, and that no person shall be convicted of treason unless on the testimony of two witnesses to the

same overt act or on confession in open court, "treason" embraces the existence both of a state of mind and the commission of overt acts.

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

2. TREASON ⟸12—INDICTMENT—SUFFICIENCY.

Where an indictment for treason charged defendants with adhering to a nation at war with the United States and giving it aid and comfort, not by levying actual war upon the United States, but by other overt acts equally criminal and traitorous, and while it was claimed that it charged only the entertaining, because of expressing, treasonable sentiments, it could be so read only by ignoring or restricting the meaning of some of the legal verbiage employed, it could not be assumed on demurrer that the indictment meant less than it charged, and it was sufficient.

3. INDICTMENT AND INFORMATION ⟸147—DEMURRER—GROUNDS.

Under the approved practice in the courts of the United States, questions which can as well and better be raised at the trial should not be raised by demurrer, especially in view of Rev. St. § 1025 (Comp. St. 1916, § 1691), requiring all defects in pleadings except such as tend to the prejudice of the defendant to be ignored.

Louis Werner and another were indicted for treason. On demurrer to the indictment. Demurrer overruled.

Ernest Harvey, Asst. U. S. Atty., Francis Fisher Kane, U. S. Atty., and Samuel Rosenbaum, Sp. Asst. U. S. Atty., all of Philadelphia, Pa.

Wm. A. Gray, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The substantial question raised by the demurrer is whether the treason indictment charges a crime in the sense of an offense against the law. This is in turn determined by an inquiry into what constitutes treason. Except to the extent to which the ample store of learning on the subject of treason enables us to better understand "treason" as defined in the Constitution of the United States, this learning does not concern us. The statutory definition follows, as it must, the constitutional definition. We may therefore confine our attention to the latter. It is found in article 3, § 3, and is:

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

[1] In addition to obviously necessary elements, treason, as thus defined, embraces the existence both of a state of mind and the commission of overt acts, and prescribes how the latter shall be proven. The latter requirement demands a trial ruling and is not a demurrer question or in any proper sense a question of pleadings. Treason, as we are now concerned with it, assumes, as the proper attitude of all who are subject to this law, that of being well disposed toward the United States and of being its well wisher, and brands as traitor one who adheres to its enemies and who also levies war upon the United States, or who, in adhering to its enemies, gives those enemies aid and comfort. It is conceivable that a defendant may have this condemned attitude of mind or be what is termed "traitor at heart," and yet not expose him-

self to the charge of legal treason because he has committed no traitorous act. It is also conceivable that one under the domination of folly or of factional feeling or directed by a perverted view of what he is doing, or even a wrong-headed conscience, may do what would otherwise be traitorous acts, and yet not expose himself to that charge because the acts, although carrying all the consequences of traitorous acts, were done without traitorous purpose or intent. Such a man plays the part of a traitor, but is not a traitor at heart.

[2] This indictment, in appropriate words, avers the presence of both these elements in what the defendants are charged with doing. It avers their attitude to be the opposite of that of those who are well disposed toward the United States, and charges the defendants with adhering to a nation against which this nation is waging a just war, giving this enemy nation aid and comfort, not, it is true, by the bold act of levying actual war upon the United States, but by other overt acts equally criminal and just as traitorous. Words may be acts, and acts words. Emphasis is given to the expression of the latter thought in the oft-quoted phrase that "acts sometimes speak louder than words." Words, on the one hand, may be "mere sound and fury signifying nothing," or, on the other hand, they may be fraught with the most frightful significance, and be acts followed by the most dreadful consequences.

The question which has been sought to be raised by this demurrer is one which can only be raised, or at least is more properly raised, as a trial question. Counsel for defendants reads this indictment in such way as to give plausibility to the argument that the question the defendants seek to raise may be raised as a demurrer question. The reading is that the overt act charged is the publication of a newspaper. Even if the indictment be read as charging as the overt act the publication of a newspaper containing certain utterances, it nevertheless means only giving expression to the quoted sentiments, and, however disloyal and traitorous the sentiments may be, the utterance of them does not constitute the crime of treason. This, it is asserted, is the offense charged, and if it is not treason the court may so pronounce upon demurrer.

To put the thought in another way, it is confidently asserted that mere words, no matter how vilely disloyal nor how clearly they evidence "the black heart of a traitor," if accompanied by no other overt act than their utterance or publication, cannot be made the basis of a charge of treason. Such seditious utterances are misdemeanors at common law, and, of course, properly made statutory offenses; but the point made is they are not treason. For this, the expression of the opinion of Judge Nelson in his Charge to a Grand Jury, as reported in 5 Blatchf. 550, Fed. Cas. No. 18,271, is quoted as authority. The quotation is:

"Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime."

We do not feel called upon at this time to announce in advance of trial what a proper trial ruling upon the suggested question would be.

This can be made only after the evidence is in, and the whole scope and effect of the overt acts, which are charged in the indictment to be treasonable in intent, purpose, and effect, is known. Judgment can then be pronounced whether treason has been proven, if the facts as disclosed are found by the jury against the defendants. It is, of course, clear that if the law of treason be as thus stated, and (for the purpose of presenting the point upon which this demurrer is ruled) we will assume it is, and if, at the close of the case, the United States has proven against the defendants only the utterance of treasonable sentiments, the law of the case must be so pronounced. To so pronounce it now is to find, not only the law to be as stated, but to find also the charge to involve nothing more than the mere utterances quoted. The evidence might disclose more than this and enough more to justify a finding of the guilt of treason.

The opinion expressed by Judge Nelson will bear the construction that although words, so long as they are mere words, "do not constitute an act of overt treason," yet, when "printed in relation to an act or acts which if committed with a treasonable design might constitute such overt act," they may be part of the treasonable act, in addition to being evidence of treasonable intent. Letters written, or oral messages sent, to convey information of value to an enemy, could not be deemed otherwise than as treasonable, whether the former were sent by post or telegraph, and the latter by a messenger or a shout. If sent by the wireless operation of a publication which would make the facts known through making them notorious, the essential character of the act would be in no wise changed. The ingenuity of the criminal cannot be permitted to hide the criminality of his act.

The form of this indictment lays it open to the criticism that it voices only the charge of entertaining because of expressing treasonable sentiments. It can be so read, however, only by ignoring or restricting the meaning of some of the legal verbiage employed. It in apt and appropriate words charges the offense of treason, and we have no warrant to assume that it means less than what it charges.

[3] If the wish is to secure a ruling upon the question argued, the record should be put in such shape as to present that question only. The approved practice in the courts of the United States is to discourage the raising of mere procedure questions by demurrers to indictments by reason of formal defects or otherwise. This discouragement extends to raising by demurrer questions which can as well or better be raised as trial questions. R. S. 1025 is a command to ignore all defects in pleadings except such as "tend to the prejudice of the defendant."

It is the right of the people, as well as the defendants, that there shall be open public inquiries into every charge of crime, and that the guilt of the defendant shall be submitted to a jury as the lawfully constituted tribunal to pass upon it. This, of course, does not lessen the responsibility of prosecuting officers and grand juries to see to it that no defendant shall be unjustly harassed by unfounded charges, nor does it relieve the trial judge of the duty of unflinchingly pronouncing judgment that the evidence is insufficient to convict, if such be the

case, and of seeing to it that no man be unjustly convicted, if entitled to an acquittal under the facts or the law. It does mean, however, that when officials charged with that responsibility have submitted an indictment, and a grand jury has found a true bill, the court shall not usurp the functions of the trial jury, and shall not dismiss the indictment unless it charges no offense against the law, or discharge the defendants unless the evidence will not warrant a conviction. The former we cannot find, because this indictment is admittedly good as an indictment, unless limitations are read into it which we do not feel justified in inserting, and the latter cannot be known until the evidence is in. What the law is, in case the indictment were read as counsel for the defendants reads it, is a speculation upon which we do not care to enter, unless the United States concurs in this reading.

The demurrer is overruled, and judgment of respondeat ouster is entered as required by R. S. 1026 (Comp. St. 1916, § 1692).

SCATTERGOOD et al. v. AMERICAN PIPE & CONSTRUCTION CO.

(District Court, E. D. Pennsylvania. December 18, 1917.)

No. 1731.

1. CORPORATIONS ⟸553(1) — RECEIVERS — APPOINTMENT — JURISDICTION OF COURT.

In view of the increasing liberality in chancery practice, both in the federal and state courts, and of the long-continued precedents, a court of equity has jurisdiction to appoint a receiver for a private corporation performing functions of a public character, to act as caretaker of its property, and to prevent creditors' collection of their demands during a specified period of time for the purpose of enabling the corporation to gather its resources and to continue operations; the appointment of the receiver having the same effect as the legislative declaration of a moratorium.

2. CORPORATIONS ⟸638—STATUTES—EXTRATERRITORIAL FORCE.

The laws of the state under which a corporation doing business in another state was chartered have no extraterritorial force.

3. CORPORATIONS ⟸684—RECEIVERS—APPOINTMENT—AUTHORITY.

Where a New Jersey corporation doing business in Pennsylvania got into difficulties, a receiver may be appointed by the federal District Court for Pennsylvania to care for its property and take over its assets, regardless of the fact that the corporation might be subject to dissolution under the New Jersey laws, for such laws have no extraterritorial effect and could not even under the principles of comity be given effect by the federal District Court sitting for Pennsylvania; this being particularly true as the purpose of the receivership was to prevent creditors from immediately collecting their demands and to enable the corporation to continue operations, while a dissolution would, of course, end them.

4. EQUITY ⟸363—MOTION TO DISMISS—EFFECT—"DEMURRER."

A motion to dismiss a decree appointing a receiver, rendered on the bill praying the appointment, is essentially a "demurrer," and the court cannot go beyond the facts pleaded.

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

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

In Equity. Bill by Alfred G. Scattergood and others against the American Pipe & Construction Company, for the appointment of a receiver. On motion to vacate decree. Motion denied.

Runyon & Autenrieth, of Jersey City, N. J., and Horace L. Cheyney, of New York City, for the motion.

F. B. Bracken and Morgan, Lewis & Bockius, all of Philadelphia, Pa., and Collins & Corbin, of Jersey City, N. J., opposed.

DICKINSON, District Judge. The considerations which lead to the disposition to be made of this motion are of the very broadest and most general character. Every legal controversy of sufficient importance to be taken seriously presents two phases. It has its practical side, involving very practical consequences, and its legal side, involving the formulation of legal principles and their application, and these may be approached through forms of procedure, and raise questions of the appropriateness of the special remedy invoked. These purely professional or legal considerations are also of importance because they directly affect or indirectly influence the development of the science of the law and enter into the building up of our system of laws. In this molding process, the legal profession, as well as the courts, cannot avoid having a part and are expected to have a part. The profession can make its influence felt only through the courts, and the courts must stop short of any invasion of the proper domain of the Legislature. Even when the power of the Legislature is not in question, wisdom would dictate that there should be no purely arbitrary interference on its part with the natural growth and development of the remedial side of the law along proper and approved lines. This freedom to grow and develop is one of the many claims to merit which the so-called common-law system possesses. To it we are indebted for many of our most effective and efficient legal and equitable remedies. The possession of this judicial power has led, it is true, to the courts being subjected to general criticism for being overconservative, and in notable specific instances to the charge of usurpation of power. On the whole, however, it has worked to the common good, and as the Legislature has amply adequate defensive power at its command there is little practical danger of permanent harm from judicial action.

[1] All this seems very academic, but these considerations are really intensely practical, and the practice of the courts in appointing receivers for corporations, which has grown almost literally by leaps and bounds, affords a good illustration of the thought intended to be expressed. If bills under which such receivers have been appointed were listed and analyzed, the growth and development of this branch of remedial law would be disclosed. It would doubtless be found that of all of them, from the beginning, at least 80 per cent., resulted in the making of a decree which has nothing more or less than the declaring of a moratorium against creditors, and of the proceedings in late years, 95 per cent. of the bills had this more or less veiled end in view. It is difficult for a solicitor devoted to old established principles of chancery practice to understand how the courts can protect a corporation, which is in financial straits, against suits by its creditors, when

it would not protect an individual under like circumstances, and yet so widespread and general a recognition and acceptance of the assertion of the power has been accorded its assertion, that in at least two notable instances in Pennsylvania it was even attempted to be extended, and, until halted by the Supreme Court, actually was extended to individual debtors. We do not need to search far for the reasons for this acquiescence. The end reached was a good end, and the remedy applied justified itself in practical results. The lawyer, who advised his clients who were interested in such a corporation that no such remedy could be had through a bill in equity, would have found himself supplanted by other counsel who promptly had the needed remedy applied through just such a bill. Such an analysis would disclose two other things. One is that in the early cases the solicitor, who filed the bill, resorted to the subterfuge of formally averring something of no real importance, for the sole purpose of presenting technical grounds of equitable jurisdiction; in the later cases, such subterfuges are abandoned. The other is that the early cases disclose a reluctance on the part of the courts to appoint receivers, and a refusal in many instances to appoint them; the later cases disclose appointments made evidently almost as a matter of course. It will further be observed that this change came about by gradual approaches. It doubtless had its beginning in the resort to receiverships by corporations having public functions to perform, but the practical need to conserve the assets of other corporations was so real and so urgent that the courts yielded to it to the extent of naming a temporary receiver with leave to move to vacate, and a recognition of this same practical need prevented any such motion being made. Indeed, the history of this very case discloses precisely that condition—not a single creditor has appeared to avail himself of this right, leave to assert which was invited by the decree. It may be further said that even the broad distinction between different forms of action, and the necessity to assert a given cause of action by means of its appropriate form of action, is breaking down under the assaults, legislative and otherwise, which are being made upon it. In Pennsylvania, for instance, under the provisions of the act of 1907, resort may be had to a bill in equity to redress almost any wrong, of which the complainant may complain, leaving to respondent the right to raise the question of equitable jurisdiction by a prompt application to have the case referred to the law side of the court.

Our present equity rules show a like attitude in the permission given by Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) for such transfers. To those of us who have been schooled in the older and more strictly logical system of practice, these new doctrines may seem almost heretical; but, however reluctant an acquiescence in them, we cannot refuse recognition of the fact that they have been accepted, and further cannot deny to them the merit of bringing good results. Numberless precedents establish the facts of such acceptance from the multitude of which we cite at random one as an illustration, although perhaps not the best illustration. Stokes v. Williams, 226 Fed. 146, 141 C. C. A. 146.

Our conclusion is that these precedents establish the jurisdiction and power of the court to appoint receivers in proceedings such as the

instant one, and that the challenge of such jurisdiction cannot be deemed ground to vacate the decree. Our view being that the jurisdiction having been authoritatively found to exist, we are bound to uphold it. There is no occasion to vindicate the ruling by bringing it into accord with accepted principles of chancery practice. The duty is best left to counsel. If we sought to support it, we might choose different grounds from those selected by counsel. Established precedent is in itself a sufficient ground.

This disposes of the present motion to dismiss, so far as it is based upon absence of jurisdiction.

[2] The other basis grows out of this state of facts. The defendant is a New Jersey corporation. All its activities are, however, here displayed, and here it admittedly can be and was served with process. In addition to this, it had appeared and voluntarily submitted itself to the jurisdiction of this court, and is in no sense contesting such jurisdiction. So far as jurisdiction is of the parties as distinguished from the subject-matter, it is therefore not denied. The intervening stockholder has, however, moved to dismiss both on the ground of what may be called want of jurisdiction of the subject-matter of the bill, and on the further ground that exclusive jurisdiction of the real subject-matter of the bill is vested in the court in and for the district of New Jersey in which a bill for the appointment of a receiver is now pending. The substantial thought (although counsel doubtless prefer their own mode of expressing it) is that a condition in which the defendant corporation, as disclosed by this bill, is one of insolvency, and calls for the winding up of its affairs, its dissolution, and the distribution of its assets equitably among its creditors, such dissolution, to seize one of these elements of its condition, is to be decreed by a court having power to apply the laws of the state of its creation and is to be affected in conformity with such laws which point out the mode and manner and by decree of what tribunals it shall be done. The corporation, which is the creature, is bound by the laws of its creation, and can be dissolved only as its creator has decreed. The laws of New Jersey prescribe what shall be the effect of the insolvency of a New Jersey corporation, and provides a remedy and a mode of procedure in all such cases. As this act of Assembly, at least so far as it is a procedure act and gives a remedy, has no extraterritorial force, the proceeding to which resort must be had must be sought where it can be found. It is the same thought upon which is based the like principle of disclaiming jurisdiction to decide controversies over internal management. Abundant support for this position is found in the following rulings, among many others which might be cited: Madden v. Penn. Co., 181 Pa. 617, 37 Atl. 817, 38 L. R. A. 638; McCloskey v. Snowden, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867; Maguire v. Mortgage Co., 203 Fed. 858, 122 C. C. A. 83.

[3] If the purpose of the bill here pending were such as is predicated in this argument, the convincing power of the argument could not be denied. We do not, however, so view the bill. It has not the purpose, nor does it have in view either the dissolution of the corporation or a winding up of its affairs. Its evident and real, in the sense

of its practical, purpose is just the opposite of this. The purpose is to have the business of the corporation continue without interruption, and the aid of the court is invoked to prevent such interruption by the act of others. There is no averment of insolvency and not only an avoidance, perhaps even a studied avoidance, of the averment of insolvency, but an expression of the purpose to put or at least the expectation that when the present emergency has passed the corporation will be again upon its feet. Any conflict of jurisdiction, or even danger of it, is of course to be avoided, and we heartily second and join in every effort to avoid it; but we see no real danger of it more than there would be if a receiver had been appointed in one jurisdiction, and afterwards asked for in another. The doctrine of comity supplies us with a good working principle. This would extend in a proper case to the refusal to permit a proceeding, which was instituted for one purpose, to oust or forestall the proper jurisdiction of another tribunal by expanding its final purpose to include what really came under the second jurisdiction. As applied to a situation, such as that suggested, if the real purpose was to wind up the affairs of a corporation and distribute its assets, a court which did not have the jurisdictional power to do this would not entertain a bill for this purpose. For the same reason that it would not entertain a bill for such a purpose it would entertain a bill for the opposite purpose. A bill, whose purpose is to keep the corporation in the performance of its functions, is properly filed in the jurisdiction within which the corporate business is done. The concept, which even the professional mind has of a corporation, has been much modified from what it was at first. It is no longer an abstraction incapable of doing anything except in strict accordance with the words of its creation. More and more recognition is given to it as an existing personality, not even as yet perhaps possessing a soul, but having a mind and purpose, and even a motive of its own, so that it may be answerable for its deceit or for an assault or other trespass and be guilty of many forms of crimes, even those which have the element of intent. So it is with the distinction between foreign and domestic corporations. The practical situation has so changed that, so far as affects its relation with others, the place of its creation is of little more importance than the place of birth of a natural person who is a litigant, plaintiff or defendant. The fact may be of importance, or it may not. The distinction between domestic and foreign corporations rests upon some grounds which are substantial the existence of which is recognized when present. The corporation itself, and even its managers and stockholders, may by acceptance of the terms of its creation have subjected themselves to the jurisdiction of the courts of the place of its creation, and may have assumed duties and obligations by the breach of which the penalty of a decree of dissolution has been incurred to be declared and enforced in accordance with laws which have no extraterritorial force. The jurisdiction of the courts of that jurisdiction to decree such dissolution would not be ousted, nor would jurisdiction be conferred upon foreign courts to so decree by the mere fact that all the activities of the corporation were carried on within the to it foreign territory. The same thought

would apply to a proceeding involving as its subject-matter what may be called the internal management or organization of the corporation. Other kinds of proceedings, however, may be brought, as in fact they are daily brought, in any court which has jurisdiction of the subject-matter and of the parties, whether the proceeding be in equity or be an action at law and whether the corporation be a plaintiff or a defendant. The bringing of an action in one jurisdiction may or may not have an effect upon a proceeding instituted in another as evidential, or even to give a cause of action in the other, or it might operate so as to induce a refusal to entertain the second proceeding as uncalled for. All such questions the latter tribunal would determine. These consequences would, however, not affect the jurisdiction of the first tribunal. The proceeding in the second tribunal might materially affect the character of the decree which the first tribunal would finally enter, precisely as the fact that one proceeding had already been begun might affect the question of whether another court would entertain a second proceeding. Whatever rights, legal or equitable, are conferred upon the corporation or others by the act of its creation of course belongs to them, and (aside from mere rights to particular remedies) go with them wherever they go. This is the distinction by which we determine whether local laws have any extraterritorial force. It is asserted, in support of the present bill, that the New Jersey statute confers rights which may be asserted in such a proceeding. Whatever support is thus given to the bill it has, but we prefer not to put the ruling on this ground, and to refrain from giving any construction to the New Jersey statute. In its general character, it partakes of the nature of a statute against fraudulent conveyances by insolvent corporations, providing for their dissolution, and of a bankruptcy statute affecting the assets of corporations which have been dissolved.

[4] This is a motion to dismiss and is essentially a demurrer, and we cannot go beyond the facts pleaded. Our conclusions upon the averments of the bill are:

1. The bill is substantially for the appointment of a receiver as a caretaker of the assets of the corporation within this district, and to enable it to perform functions which are of real public character. It is itself strictly a holding company, but it in effect performs strictly public functions. Whatever criticism on general legal and equitable principles the practice of appointing receivers in the cases of private corporations may invite (and we think the critics are justified), such practice in cases of corporations of the character of this defendant has been too firmly established by a long line of precedents to be judicially condemned. This court does therefore have jurisdiction of the subject-matter and admittedly has jurisdiction of the parties.

2. The jurisdiction of this court is not affected by the fact which does not appear by this bill that by reason of the conduct of its affairs, its insolvency, or otherwise, it has subjected itself to liability to a proceeding under the New Jersey Statute for its dissolution.

In reaching those conclusions, we have had in mind the distinction between the power of a court to appoint a receiver when such appointment is merely ancillary to the exercise of undoubted jurisdiction of

the main subject-matter of the bill. The practice is to appoint receivers as caretakers, and to assure the continuance of corporate activities as a temporary expedient. If this practice is wrong, it should be condemned. This court cannot condemn it because we feel bound by precedents which we cannot overturn. The argument against it, as well as its support, is each in capable hands.

The motion to dismiss is denied.

BAKER et al. v. JACKSONVILLE TRACTION CO. et al.

(District Court, S. D. Florida. November 3, 1917.)

Nos. 522, 643.

1. REMOVAL OF CAUSES ⊜49(3)—JOINDER—SEPARABLE CONTROVERSY.
Comp. Laws Fla. 1914, § 1389, declares that causes of action, of whatever kind, by and against the same parties in the same rights, may be joined in the same suit, except that replevin and ejectment shall not be joined together. Section 3148 declares that a railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, cars, or other machinery of such company, unless the company shall make it appear that their agents have exercised all ordinary reasonable care and diligence; the presumption being against the company. Plaintiffs, claiming damages for injuries asserted to have been inflicted through the joint negligence of defendant traction company, a foreign corporation, and its motorman, jointly sued the two in the state court. *Held* that, as section 3148 has been construed by the Florida Supreme Court as a rule of evidence, the two causes of action could be joined; the fact that the motorman was directly liable and the corporation under the doctrine of respondeat superior not changing the rule, negligence being the basis for the right against each. Hence the foreign corporation could not remove the case to the federal court on the ground of its diversity of citizenship; there being no separable controversy.

2. REMOVAL OF CAUSES ⊜48—SEPARABLE CONTROVERSIES—RIGHT TO REMOVE.
Where a declaration in an action in the state court, in which a resident and a nonresident were joined as defendants, states a cause of action, there is no separable controversy which the nonresident can remove to the federal court.

3. COURTS ⊜508(8)—REMOVAL—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.
A nonresident defendant may, its petition for removal having been denied, file the transcript in the federal court, and, it appearing that the joinder of a resident as defendant was fraudulent and that the declaration did not state a cause of action against both, secure an order enjoining further proceedings in the state court; but, unless the declaration is defective and there is a fraudulent joinder, the cause should be remanded.

At Law. Action by Julia P. Baker and George B. Baker, her husband, begun in state court, against the Jacksonville Traction Company and W. C. Godboldt. The first-named defendant's petition for removal of the cause on the ground that the controversy was separable having been denied, it filed the record in the federal District Court, together with a bill to restrain plaintiffs from further proceeding in

the state court. On motion to remand. Injunction denied, and motion for remand granted.

A. H. & Roswell King and N. P. Bryan, all of Jacksonville, Fla., for plaintiffs.

John L. Doggett and W. K. Jackson, both of Jacksonville, Fla., for defendants.

CALL, District Judge. In the above case a declaration was filed in the state court claiming damages for injuries claimed to have been inflicted through the joint negligence of the defendants. One of these defendants is a foreign corporation, and the other defendant is a resident and citizen of this state. Petitions for removal of cases No. 522 and No. 643 were filed by the foreign corporation on the ground that the cause of action was separable and the citizenship diverse. The order of removal was entered in case No. 522, and denied in case No. 643. A motion to remand case No. 522 is made. In case No. 643, having the record filed in this court, the nonresident corporation filed its bill to restrain the plaintiffs from further proceeding in the state court.

[1] The main question in these cases is: Can the corporation employer and the motorman in charge of the street car, the negligent running of which it is claimed caused the injury, be joined in the action as joint tort-feasors? There is no question that joint tort-feasors, as a general rule, may be sued jointly, and a recovery had against one or more or all. But the corporation defendant claims that section 1389 of the Compiled Laws of Florida makes the joinder of the corporation and the motorman improper; that the right of action against the corporation is in case, and against the motorman is in trespass, and not in the same rights—the motorman being responsible for the result of his negligence under a common-law liability, and the corporation under the rule of respondeat superior under the statutes of the state of Florida. Section 1389 reads:

"Causes of action, of whatever kind, by and against the same parties in the same rights, may be joined in the same suit, except," etc.

Does this statute make it improper to sue the master and servant jointly for a tort? I think not. The cases in the Supreme Court of Florida, referred to by counsel for the defendant, were claims by the plaintiff in a different right and capacity. Not so in this case; the right of the plaintiffs against each of the defendants is the same—to be remunerated for the injury. The liability of the master and servant to make such remuneration existed before the passage of section 3148 of the Compiled Laws, and that section has been construed by the Supreme Court of Florida to be a rule of evidence. Negligence is still the basis of the action. The fact that the defense of the two defendants is different, that contributory negligence would excuse one and not the other, that presumption of negligence arises against one on proof of injury, and not the other, does not to my mind make the rights different, but does make different defenses, and does not make a separable case removable from a state court to the United States court.

[2] The test applied by the Supreme Court of the United States in many decisions seems to me: Does the declaration state a good case of joint liability under the state laws? If it does, the case is not separable.

[3] Now, in case No. 643, petition for removal, bond, etc., were duly filed, and upon hearing the state court denied the petition and is proceeding with the case. The defendant corporation thereupon procured and had filed in this court the transcript, and thereupon filed its bill seeking to enjoin the plaintiffs from further proceeding in the state court. The petition for removal sets out the declaration on its face, and shows that the cause of action is not joint, etc. In C. & O. Ry. Co. v. Cockrell, Adm'r, 232 U. S. 154, 34 Sup. Ct. 278, 281, 58 L. Ed. 544, Mr. Justice Van Devanter says:

"In this case, had the petition contained a sufficient showing of a fraudulent joinder, accompanied as it was by a proper bond, the state court would have been in duty bound to give effect to the petition and surrender jurisdiction, leaving any issue of fact arising upon the petition to the decision of the federal court. * * * And, had the state court refused to give effect to the petition, it and the bond being sufficient, the railway company might have obtained a certified transcript of the record, * * * and, upon filing the transcript in the federal court, might have invoked the authority of the latter to protect its jurisdiction by enjoining the plaintiff from taking further proceedings in the state court, unless the cause should be remanded."

There is no question of fact in this case. The petition for removal makes it a question of law whether the defendants were improperly joined as joint tort-feasors. The question of the sufficiency of the petition in this respect was what, I suppose, the state court decided in this case denying the petition. It was because the petition was insufficient in the charge of fraudulent joinder that the court sustained the jurisdiction of the state court in C. & O. Ry. Co. v. Cockrell, supra.

According to my view as above expressed, the petition in this case was insufficient to show a separable cause of action, and the injunction will therefore be denied, and the motion to remand No. 522 will be granted.

McCLELLAND v. ROSE et al.

(Circuit Court of Appeals, Fifth Circuit. January 10, 1918.)

No. 3111.

1. JUDGMENT ⇐677—PERSONS CONCLUDED—PERSONS REPRESENTED BY PARTIES.
That one is not named as a party to a suit in equity does not necessarily prevent his being concluded by the decree, since his interest may be represented by others who are formal parties.

2. PARTIES ⇐23—DEFENDANTS—SUING ONE OR MORE ON BEHALF OF ALL INTERESTED.
Where members of a class are joined as representatives of the class, such fact should appear from the record as well as the reason why the others are not brought in and the relation of those sued to the subject-matter of the suit, so as to present to the court for determination the question whether or not they properly represent others not before the court.

3. COURTS ⇐492—PRIORITY OF JURISDICTION—FEDERAL AND STATE COURTS.
Complainant brought a suit in equity in a federal court to obtain a construction of his father's will and a decree adjudging him to be entitled to the entire beneficial interest in the estate. The bill made defendants the trustee under the will and a nephew and niece of testator who were alleged to claim an interest as heirs at law. It also averred that there might be other collateral heirs, but, if so, they were unknown to complainant. The answer of the two latter defendants set up their claims, and alleged on information and belief that there were other collateral heirs having like interests, but that their names were unknown to the answering defendants. The case was contested, and resulted in a decree in accordance with the prayer of the bill, and directing an accounting by the trustee to complainant. Before such accounting a suit was brought in a state court by a large number of persons against complainant and the trustee seeking to establish the right to the estate in themselves and other collateral heirs. *Held*, that the issues sought to be raised in such suit were the same as those litigated and determined by the federal court; that the jurisdiction of the subject-matter first acquired by that court was exclusive, and that complainant was entitled to an injunction to restrain the prosecution of the suit in the state court.

Appeal from the District Court of the United States for the Western District of Texas; Duval West, Judge.

Suit in equity by Peter McClelland, Jr., against John K. Rose, trustee, and others. From a decree dismissing a supplemental bill filed by him, complainant appeals. Reversed.

Francis Marion Etheridge and Joseph Manson McCormick, both of Dallas, Tex. (Henri Louie Bromberg, of Dallas, Tex., on the brief), for appellant.

Oscar L. Stribling and Marshall Surratt, both of Waco, Tex. (J. F. Brinkerhoff, of Waco, Tex., on the brief), for appellees.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. This is an appeal from a decree dismissing a supplemental bill filed by the plaintiff in the case of Peter

McClelland, Jr., against John K. Rose, trustee, and others. The main case mentioned—the bill in which asserted the claim that the plaintiff therein was, under the will of his deceased father, Peter McClelland, Sr., entitled to the entire estate of the testator absolutely, or subject to trusts created by the will—twice before has been in this court. The first appeal was from a decree sustaining a demurrer to the plaintiff's bill and dismissing it. The decree then under review was reversed, and the cause was remanded for further proceedings. McClelland v. Rose, 208 Fed. 503, 125 C. C. A. 505. The second appeal was from a decree—rendered on a submission of the cause on the bill as amended, answers, evidence, and objection thereto—which adjudged that the plaintiff, subject to the trust created by his father's will, was the owner in fee of all and singular the latter's estate, ordered an accounting between John K. Rose, trustee, and the plaintiff, and appointed a commissioner to take testimony and make and state the account decreed. That decree was modified and affirmed by this court. McClelland v. Rose, 222 Fed. 67, 137 C. C. A. 519. Subsequent to the last-mentioned action of this court, but before the taking and stating of the account provided for in the modified and affirmed decree, a defendant in that suit, John K. Rose, trustee under the will of Peter McClelland, Sr., brought in a court of the state of Texas a suit, in which he sought an injunction against an alleged threatened sheriff's sale of property belonging to the estate of Peter McClelland, Sr.; suggested the names and residences of more than 70 persons, all citizens of states other than California, the state of which Peter McClelland, Jr., is a citizen, who are collateral heirs at law of Peter McClelland, Sr., and who were not named as parties in the above-mentioned suit brought by Peter McClelland, Jr., and submitted to the court "whether or not all parties claiming as legatees under said will should be made parties hereto and be required to litigate among themselves * * * and have determined by a final adjudication, binding upon all said parties, the construction of said will, and in whom the remainder of said estate is vested, * * * and to whom this trustee shall turn over said property at the expiration of said trust as provided by the terms of said will." Pursuant to the quoted and other suggestions made in that suit many persons were made parties to it as collateral heirs at law of Peter McClelland, Sr.; and, under orders made in a cross-action instituted by some of such persons, Peter McClelland, Jr., and two other persons who claimed property which was part of his deceased father's estate under a conveyance or transfer made by Peter McClelland, Jr., were cited to appear in that suit. The cross-petitioners prayed in behalf of themselves and other collateral heirs at law of Peter McClelland, Sr., for judgment establishing their claim to the entire estate of Peter McClelland, Sr., decreeing that Peter McClelland, Jr., and his said transferees or assigns have no interest therein or thereto, and that John K. Rose, trustee, be ordered and directed, upon the expiration of the trust created by the will, viz. at the death of Peter McClelland, Jr., to turn over to the heirs at law of Peter McClelland, Sr., all property of his estate in the possession of such trustee. The above-mentioned supplemental bill—after setting out the

proceedings in the suit brought in the state court, and averring that the institution and prosecution of that suit was in contempt of the jurisdiction of the District Court and of its decree in the case of Peter McClelland, Jr., against John K. Rose, trustee, and others, and was an attempt to involve the plaintiff in the last-named suit and those claiming under him in a relitigation of the identical issues which were involved in that suit, and were finally adjudicated therein—prayed that the further prosecution of said suit in the state court be enjoined, except in so far as it sought relief against the alleged threatened sheriff's sale of property belonging to the estate of Peter McClelland, Sr.; that the final decree as modified and affirmed by this court be so extended as to embrace by name all persons who are collateral heirs at law of Peter McClelland, Sr.; and for such other special and general relief as in the premises the plaintiff may be entitled to.

It appears from the opinion rendered by the District Judge that the dismissal of the supplemental bill was the result of the conclusion reached that the final decree which was modified and affirmed by this court was without effect against the individuals by and in whose behalf an adjudication against the claim set up by Peter McClelland, Jr., to the entire estate left by his father was sought in the suit brought in the state court. When the suit brought by Peter McClelland, Jr., was first in this court, the will of Peter McClelland, Sr., was construed, and it was decided "that, on the averments of the bill, the plaintiff is the owner of the estate devised and in controversy, subject to the trusts created by the will; that the defendants, testator's collateral kin, have no interest, under the will, in the same; and that the plaintiff, the averments of the bill being admitted or proved, should have a decree to that effect." McClelland v. Rose, 208 Fed. 503, 512, 125 C. C. A. 505, 514. The subsequently rendered decree, as it was modified and affirmed by this court, was to the effect just stated. McClelland v. Rose, 222 Fed. 67, 137 C. C. A. 519. It is quite obvious that the right of Peter McClelland, Jr., to the entire estate of his deceased father, subject to the trusts created by the latter's will, is no longer subject to be questioned in any court by any one who was bound by the decrees just referred to. The contention made in behalf of the appellant is that the persons by or in whose behalf the claim that they are entitled to the estate of Peter McClelland, Sr., was asserted in the suit in the state court are bound by the final decree in the suit brought by the appellant though they were not by their names made parties to that suit, and did not in person or by attorney appear therein. The opposing contention, which prevailed in the trial court, is that those persons were strangers to the main suit brought by the appellant, and were not affected by the decree therein. These contentions call for a determination of the scope of that suit and a decision as to who is bound by the decree rendered in it.

[1] From the fact that one's name does not appear as a party to a suit in equity, it does not necessarily follow that he is not bound by the result of it. There are cases involving a subject-matter common to a number of individuals in which some only of such individuals, who in fact are representatives of the entire class of which they are members,

may be permitted to sue or defend for all, with the result of making the judgment or decree rendered binding upon all having the common interest the same as if all were before the court. Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, 672, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765; Wallace v. Adams, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547; Smith v. Swormstedt, 16 How. 288, 14 L. Ed. 942; Mandeville v. Riggs, 2 Pet. 482, 487, 7 L. Ed. 493; Hale v. Hale, 146 Ill. 227, 258, 33 N. E. 858, 20 L. R. A. 247; Society of Shakers v. Watson, 68 Fed. 730, 15 C. C. A. 632; Stevens v. Smith, 126 Fed. 706, 61 C. C. A. 624; Equity Rule 38 (198 Fed. xxix, 115 C. C. A. xxix).

[2] In order for a judgment or decree in a suit to be binding upon others than those who are brought before the court, it should be made to appear from the record in the case that such a result is contemplated; that there are persons not before the court having an interest in common with those who sue or defend, and why such others are not brought in; and, further, the relation to the subject-matter of the suit of those who sue or defend for others as well as themselves should be so disclosed as to present for the determination of the court the question whether they do or do not properly represent, not only themselves, but others not before the court, who are similarly concerned in the issues they raise or contest. McArthur v. Scott, 113 U. S. 340, 395, 5 Sup. Ct. 652, 28 L. Ed. 1015; American Steel & Wire Co. v. Wire Drawers', etc., Union (C. C.) 90 Fed. 598, 606, 607; 1 Street's Federal Practice, § 543. Where it is fairly made to appear by the allegations of a bill that such an adjudication is sought as will be effective, not only against those who are brought before the court as defendants, but against others similarly related to the subject of dispute, it is not necessary to aver in terms that those who are made defendants are sued as representatives of the class of which they are shown to be members, especially when it is disclosed that those who defend contest the plaintiff's claim by setting up the claim that the subject of the suit belongs in common to an entire class which they admit does or may include others besides themselves.

[3] The original bill filed by the appellant named as defendants John K. Rose, trustee under the terms of the will of Peter McClelland, Sr., Hugh McClelland, alleged to be a nephew of the testator, and Mrs. M. E. Grismer, alleged to be a niece of the testator. Its allegations showed the following: That the plaintiff claimed that he, under the terms of his father's will, a copy of which was set out, was entitled to all of the latter's estate either absolutely or subject to a trust created by the will; that the defendant Rose, as trustee under the terms of Peter McClelland, Sr.'s will, was in possession of all the property belonging to his estate; that the other two defendants, Hugh McClelland and Mrs. M. E. Grismer, are comprehended within the terms "my heirs at law," as employed in the testator's will, and that "there may be others who are also comprehended within that designation, but they are unknown to complainant, and he is therefore unable to make them parties hereto;" that the defendants Hugh McClelland and Mrs. M. E. Grismer were each of them falsely asserting that the plaintiff is without interest in the estate of his father; and that said estate upon plaintiff's death

will belong to them and to such other persons, unknown to plaintiff, as may also be comprehended within the designation "my heirs at law." The bill prayed for the following, besides other, relief: That the defendant Rose, as trustee, be required to account to the plaintiff for all the property belonging to the estate of the testator that had come into the possession of him as such trustee; that the claims adverse to the plaintiff's set up by the defendants Hugh McClelland and Mrs. M. E. Grismer be decreed to be null and void and of no force and effect; and that the plaintiff be decreed to be the owner in fee of all the property belonging to the estate of Peter McClelland, Sr. By the answer of Hugh McClelland and Mrs. M. E. Grismer to the bill they admitted that they were respectively a nephew and a niece of the testator, and are comprehended within the terms "my heirs at law," as employed in the will, and, in connection with these admissions, their answer stated "on information and belief that there are others within the same class, or their descendants, but whose names and residences are not known to these defendants."

It is apparent from the above statement that the appellant by his original suit sought an adjudication which would have the effect either of giving him absolutely the entire estate of his father or of recognizing him as the sole beneficiary of that estate subject to a trust as to the income of it created by the terms of his father's will. It is equally apparent that the claims adverse to the plaintiff's which were disclosed by the suit were made by the defendants Hugh McClelland and Mrs. M. E. Grismer, not for themselves alone, but in behalf of a class of persons of which they were members. The above quotation from the answer of those defendants shows plainly that in resisting the claim set up by the plaintiff they were not acting for themselves alone, but were making a defense which inured equally to the benefit of other unknown parties who had not been brought before the court. The language above quoted from the opinion of this court rendered on the first appeal shows that it understood that the result of the plaintiff's success in the suit would be a decree adjudging that he is the owner of the estate devised and in controversy, subject to the trust created by the will, and also adjudging that the testator's collateral kin have no interest, under the will, in that estate.

The record in the main case shows that the conflicting claims which were litigated were, on the one side, that of the plaintiff that, under his father's will, he was entitled to the entire estate disposed of by that will, and, on the other side, that set up by the two individuals who were the only collateral kin of the testator known to any party to the suit, that all who constituted that class, including unknown as well as known members of it, were entitled to that estate. It was unsuccessfully made a ground of objection to the bill by demurrer that it showed on its face that there were unknown heirs of the testator, shown by the bill to stand in the same relation to the property in controversy as the heirs of the testator who were named as defendants. From the action of the court in proceeding with the cause, notwithstanding the objection just mentioned, it may be inferred that the bill was regarded as showing a good excuse for the plaintiff's failure

to name as defendants all who are next of kin of the testator, in that it showed that no members of that class other than the two who were named as defendants were known to the plaintiff. It also may be inferred from the record that the conclusion was reached that those of the testator's collateral heirs who were brought before the court fairly represented the right asserted by them, which was one belonging in common to all of the class of which they were members, as well those who were not as those who were before the court. The way in which the conflicting claims were fought out to a conclusion indicates that the litigation was by no means a collusive one, and that the interests of all were properly asserted and maintained. A manifest purpose of the appellant's original suit was to have claims adverse to the one he asserted so disposed of as to leave no obstacle in the way of his either being put in possession of his deceased father's entire estate as the sole and unconditional owner of it or securing an adjudication that, subject to a trust created by the will, he was the sole beneficial owner of that estate. The claim of the appellant was resisted by individuals brought before the court as defendants, not on the ground that those individuals alone were entitled to that estate, but on the ground that, under the testator's will, it belonged to a class of persons, the collateral kin of the testator, in behalf of all the members of which class the members of it brought before the court resisted the granting of the relief prayed for in the bill. The scope of the bill, as disclosed by its averments and prayers for relief, and the terms of the decree rendered under it, we think, negative the conclusion that that decree affected no interest or claim other than that of the individuals who were before the court as defendants to the suit.

The original suit brought by the appellant was such a one as vested the court in which it was brought with jurisdiction of the entire controversy raised by the conflicting claims to the estate of Peter McClelland, Sr. Whether that suit has or has not passed beyond the stage at which individuals who were parties to it only by representation may intervene and claim the right to be heard, such individuals may not avoid the effect upon them of the decree rendered in favor of the appellant by resorting to another jurisdiction for a relitigation of the questions passed on in that suit. American Steel & Wire Co. v. Wire Drawers', etc., Union (C. C.) 90 Fed. 598, 606, 607; Sharon v. Terry (C. C.) 36 Fed. 337, 1 L. R. A. 572; Alger v. Anderson (C. C.) 78 Fed. 729, 733; Cornue v. Ingersoll, 176 Fed. 194, 99 C. C. A. 548.

The appellant was cited to appear in the state court to confront the assertion there of the identical adverse claim of ownership of his deceased father's estate which previously had been finally ruled against in the suit brought by him. Such claim of ownership was made in the state court at the instance of and by individuals who actually or by representation were in the position of defendants in the suit brought by the appellant. If the decree in the appellant's suit had been adverse to him, it would have inured to the benefit of the individuals who sought a renewal of the same controversy in the state court. The prosecution of the suit in the state court involved an attempt to deprive

the decree rendered in the suit brought by the appellant of the effect he was entitled to have accorded to it. The court which rendered that decree, having first acquired jurisdiction of the parties and subject-matter involved, had the power to restrain proceedings in another court having for their object an adjudication inconsistent with the conclusive one previously made. The averments of the appellant's supplemental bill disclosed a state of facts warranting the granting of relief it sought, to the end that the first acquired jurisdiction of the court in which it was filed be protected, and that the decree of that court be made effectual. Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; Oppenheimer v. San Antonio Land & Irrigation Co., 246 Fed. 934, — C. C. A. —, U. S. Circuit Court of Appeals, Fifth Circuit. .

The conclusion is that the dismissal of the supplemental bill was error. The decree to that effect is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

UNION TERMINAL CO. et al. v. TURNER CONST. CO.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1918.)

No. 3104.

1. MORTGAGES ⟸173—LIEN AND PRIORITY—MORTGAGE AND MECHANIC'S LIEN.
Where a contractor for the construction of buildings had knowledge that the money for the buildings was to be borrowed from a trust company and to be secured by mortgage on the property, and by its contract was to be paid a specified part of the contract price by the trust company, it is not entitled to a lien prior to the company's mortgage for any amount remaining due on its contract which, together with the payments received from the trust company, would be in excess of such specified sum, although the mortgage was not recorded until after the work was begun.

2. CONSTITUTIONAL LAW ⟸248—MECHANICS' LIENS ⟸310(1)—EQUAL PROTECTION OF LAWS—STATUTE ALLOWING ATTORNEY'S FEES.
Gen. St. Fla. 1906, § 2218, which provides that the plaintiff in a suit to enforce a mechanic's or materialman's lien, if successful, shall recover an attorney's fee, regardless of whether or not he recovers the amount sued for, is unconstitutional, as denying to defendants in such suits the equal protection of the laws.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit in equity by the Turner Construction Company against the Union Terminal Company and another. Decree for complainant, and defendants appeal. Modified and affirmed.

J. T. G. Crawford, of Jacksonville, Fla. (H. B. Hurd, of Chicago, Ill., on the brief), for appellants.

Sam R. Marks, of Jacksonville, Fla. (Marks, Marks & Holt, of Jacksonville, Fla., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

BATTS, Circuit Judge. The Union Terminal Company negotiated with the Central Trust Company of Illinois, for funds with which to construct warehouses and other improvements at Jacksonville, and, contemporaneously, with the Turner Construction Company of New York, to construct the buildings. The latter company knew of the negotiations with the Trust Company, and had notice of the fact that the Trust Company was to furnish the money, or most of the money, required for the construction, and that the amount was to be secured by a lien upon the buildings. It was agreed that $205,000 of the amount to be furnished by the Trust Company was to be paid over to the Construction Company. As the work progressed, payments were made of 85 per cent. of the estimates. The balance was put in the Barnett Bank, and at the time of the institution of the suit this deposit amounted to $20,219.98. A part of the contract price for the construction not having been paid, suit was instituted by the Turner Construction Company against the Union Terminal Company for the balance due. The Central Trust Company, having been made a party, set up its mortgage. The Construction Company asserted a materialman's lien, claiming that, by the making of the contract, the furnishing of material, and the beginning of work prior to the record of the mortgage of the Central Trust Company, it fixed a lien superior to that of the mortgage.

The Construction Company had knowledge of the mortgage, and of the arrangement made by the Warehouse Company for financing the building, and participated in its benefits. It was to have received the sum of $205,000 from the fund to be provided by the Trust Company, and actually received $140,695.89, and is to get the benefit of $20,219.98 deposited in the Barnett Bank, as the retained 15 per cent. on estimates. A judgment was given the Construction Company against the Union Terminal Company for $78,370.45, with interest at 8 per cent. per annum from August 15, 1913, and 10 per cent. attorney's fees. Of this amount $44,084.13, with interest and attorney's fees, was adjudged a first lien on the property, and $34,286.32 thereof, with interest and attorney's fees, a lien subject to the mortgage of the Central Trust Company. The $44,084.13 was the difference between the amount to have been received by the Turner Construction Company from the Central Trust Company and the amount actually paid by the latter. With interest and attorney's fees the aggregate is $60,767.36.

The Construction Company now contends that all of its debt should have been given a first lien, upon the ground that its rights were fixed prior to the record of the mortgage of the Trust Company. It also insists that to the judgment should be added an amount equal to the deposit in the Barnett Bank. The Central Trust Company objects to the judgment, upon the ground that interest and attorney's fees ought not to have been included in the amount for which a preferential lien was given.

[1] The contention of the Turner Construction Company, based on the record of the mortgage after the beginning of the work, is without merit. This concern knew that the Trust Company was to furnish

the money, and looked to it for $205,000 of the contract price. It must have known that the intention was to secure the advances made by the Trust Company to the Warehouse Company by the mortgage on the property of the latter company. With this notice it accepted more than $140,000 of the money furnished by the Central Trust Company, and judgment has been given it for the difference between the amount paid for its benefit and the $205,000 it was to have received from the Trust Company. It has no cause to complain of this part of the judgment. As to the amount in the Barnett Bank, the Construction Company is entitled to its receipt, and the judgment herein should be so reformed as to require its payment to the Construction Company. The bank is not a party to this suit, but an order may be issued to the Warehouse Company to join the Construction Company in the execution of a joint check to cover the amount.

The objection of the Central Trust Company to the allowance of interest in the preference lien will be held without merit, inasmuch as the money was in possession of the bank during the period for which interest is charged, and it was held under conditions which did not preclude the Trust Company from receiving interest on it, and was not paid to the Construction Company when it should have been paid.

[2] Attorney's fees were awarded upon an act of Florida of 1903 (chapter 5143), entitled:

"An act to provide liens for materialmen, mechanics, artisans and laborers, and to provide the manner in which such liens shall be acquired and to provide a remedy for the enforcement of such liens."

Section 17 of this act, constituting section 2218 of the General Statutes of Florida of 1906, is to this effect:

"If the plaintiff shall prevail, the court shall allow him reasonable attorney's fees, to be fixed by the court, not to exceed $10, if the amount recovered do not exceed $100, and not to exceed 10 per cent. of any recovery greater than $100."

The statutes of Florida do not make like provisions for any other character of cases. Similar statutes with reference to attorney's fees in favor of materialmen and laborers have been passed in Montana, Illinois, Washington, California, Colorado, Kansas, Ohio, Alabama, Utah, Wyoming, Michigan, and Oklahoma, in all of which states the provision, in so far as it applies to the materialmen, has been held in violation of the Fourteenth Amendment to the Constitution of the United States. Like statutes in Idaho, Oregon, New Mexico, Indiana, and Florida have been maintained. The question has not come directly before the Supreme Court of the United States, nor has it been passed on in any other federal court. In the case of C., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, a Texas statute, providing that reasonable attorney's fees might be recovered against railroad companies on claims not exceeding $50 for labor, etc., was held unconstitutional. The Supreme Court used this language in disposing of the case:

"The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors,

or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection."

After the decision in the Case of Ellis, the statutes of Texas were amended; and in the case of M., K. & T. Ry. Co. v. Cade, 233 U. S. 642, 34 Sup. Ct. 678, 58 L. Ed. 1135, the court held the amended act constitutional. The amended act had application to any person or corporation, gave the attorney's fees only in case the full amount of the claim was established, confined its application to personal services rendered, for material furnished, for overcharges on freight, and for stock killed or injured, and limited the amount of the recovery of attorney's fees to $20. This act was sustained as "a police regulation, designed to promote the prompt payment of small [but well-founded] claims, and to discourage unnecessary litigation in respect to them."

In so far as the claim of the Construction Company for attorney's fees in this case is concerned, the statute of Florida would be open to every objection pointed out in the Ellis Case, and would have none of the merits indicated in the Cade Case.

The statute in question requires the allowance of attorney's fees, though the claim asserted by the suit is an excessive one. If the amount of the attorney's fees required to be allowed to the plaintiff is more than that of the difference between what he claimed and what he recovers, the result is to give him the unconscionable advantage of being able to make it cheaper for the defendant to forego his rights than to assert them. The statute not only undertakes to give to plaintiffs, in the character of suits mentioned, a right not accorded to plaintiffs in other suits, but it discriminates between plaintiffs and defendants in the suits to which it applies, in that the former may resort to litigation at the latter's expense, though only a fraction of the amount claimed is recoverable, while the latter is subjected to the expense of an attorney's fee, though he is wholly or partially successful in the suit. The result of the statute passed on in the last case cited (M., K. & T. Ry. Co. v. Cade) is to protect a class having claims small in amount from losing all or a substantial part of what is due them in doing what is required to get it. Those who claim more than is due them get no benefit from that statute. An effect of the statute now under consideration is to make defendants in only one class of suits chargeable with expenses incurred by plaintiffs who sue for more than they are entitled to recover, with the result that the defendant, though he successfully controverts the amount of the claim made against him, may be required to pay more than he owes, or than the plaintiff claimed.

Under the weight of authority in the state courts, under the reasoning of the Supreme Court of the United States, and because of the results detailed, we hold the Florida statute unconstitutional. The judgment of the Construction Company against the Warehouse Company should be reduced the amount of the attorney's fees allowed, with corresponding reduction of the preferential lien.

The judgment should be made to conform to the views herein expressed, and it is accordingly reformed and affirmed, with costs against the appellee.

NICHOLS v. CITY OF CLEVELAND.

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

No. 2933.

1. COURTS ⊜366(8)—DECISIONS OF STATE COURT—SPECIAL LEGISLATION—VALIDITY.

Act Ohio April 5, 1893 (90 Ohio Laws, p. 100, § 1), which was limited to cities of the second grade of the first class, and to a period of seven years' duration after its passage, after creating a board of park commissioners, authorized the board to appropriate, enter upon, and condemn for public use in the name of the city any property for enlarging any park owned by the city, etc. Later sections authorized the board to borrow money and issue bonds. At that time the city of Cleveland was the only municipality of the state falling within the classification "cities of the second grade of the first class." Act Ohio April 6, 1900 (94 Ohio Laws, p. 517), also limited to such cities, and providing for such a board of park commissioners, and conferring on them such powers, as well as the similar Act Ohio April 16, 1900 (94 Ohio Laws, p. 670), was declared unconstitutional by the Ohio Supreme Court, as violating Const. Ohio, art. 2, § 26, declaring that all laws of a general nature shall have a uniform operation throughout the state, and article 13, § 1, forbidding special acts conferring corporate powers. *Held*, that since the act of April 5, 1893, and that of April 6, 1900, are practically identical, the decision of the Ohio Supreme Court holding the later act unconstitutional is applicable in testing constitutionality of the earlier act.

2. COURTS ⊜366(11)—PRECEDENTS—FEDERAL COURTS.

In such case, the decision of the Ohio Supreme Court must be accepted by a federal court as decisive of the unconstitutionality of Act April 5, 1893, and the consequent invalidity of a condemnation proceeding begun under that act, since the decision, although rendered after the institution of such proceeding, was based on decisions of the same court rendered prior to the enactment of Act April 5, 1893.

3. JUDGMENT ⊜650—CONCLUSIVENESS—MATTERS DECIDED.

After reversal and remand of its judgment in condemnation proceedings brought under Act Ohio, April 5, 1893, the probate court sustained a demurrer to the city's application for condemnation and dismissed the proceeding. The court of common pleas reversed the judgment and remanded the proceeding, and its action was sustained by the Supreme Court several years after that tribunal had declared unconstitutional almost identical legislation. *Held*, that the judgment of the common pleas was not a final judgment to which error would lie, and hence, in the absence alike of any necessity for the Ohio Supreme Court to pass upon the validity of Act April 5, 1893, and of any showing that it intended to determine such a question, the judgment of the Ohio Supreme Court cannot be regarded as declaring the validity of Act April 5, 1893.

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

4. EMINENT DOMAIN ⊂⊃242—AUTHORITY—CONDEMNATION.
Condemnation by a board of municipal park commissioners created under an unconstitutional statute cannot, when questioned in ejectment, be upheld on the ground that they were de facto officers, whose acts were not subject to collateral attack.

5. EMINENT DOMAIN ⊂⊃268—CONDEMNATION—RIGHT TO POSSESSION.
Under Gen. Code Ohio, §§ 3686, 3695, authorizing municipal corporations to have assessed the value of property sought to be condemned, and, on paying the amount into court and giving bond, to take permanent possession, thus compelling the owner to look only to recovery of compensation, a city, which took possession of land, cannot, though it paid into court the amount awarded upon the condemnation of land, defeat an action by the owner to recover possession; the statute under which the condemnation proceedings were had being unconstitutional, and the judgment in condemnation having been reversed.

6. JUDGMENT ⊂⊃562—CONCLUSIVENESS—MATTERS CONCLUDED.
An Ohio city, by its board of park commissioners, applied under an unconstitutional law to condemn land, a judgment of the probate court assessing compensation was reversed by the court of common pleas, and thereafter a judgment of the probate court, sustaining a demurrer to the application and dismissing the application, was reversed by the court of common pleas, and the proceeding remanded. That tribunal's action was in turn sustained by the circuit court and the Supreme Court. Thereupon the then owner commenced in the court of common pleas a suit to enjoin the city from further proceedings in the probate court, or interfering with her possession on the ground of the invalidity of the statute. Judgment was rendered in the common pleas for the city, and an appeal to the circuit court was dismissed, on the ground the suit was one in ejectment, and that it could be reviewed on error only. *Held* that, in view of its two previous judgments remanding the cause for further proceedings, the common pleas court must have regarded the case as pending in the probate court, and plaintiff as having an adequate remedy at law in the probate court proceeding; and since in these circumstances it was not open to the common pleas to issue the injunction asked, the judgment of that court was not, under the rule that a decree does not bar a second suit between the parties, unless the controversy was decided on its merits, a bar to a subsequent action in a federal court by the owner to recover possession by reason of invalidity of Act April 5, 1893.

7. ESTOPPEL ⊂⊃93(1)—EQUITABLE ESTOPPEL.
In such case, where the validity of the statute depended on the classification, burdened as it was with the limitations placed thereon by this statute, the city could not base an estoppel on possession secured or expenditures made on the faith of any settled rule as to municipal classification, subsequently changed; for, although the rule was changed, even the former rule condemned such limitations upon classification as were contained in the act under which the condemnation proceeding was begun.

8. ESTOPPEL ⊂⊃93(1)—EQUITABLE ESTOPPEL.
In such case, as the condemnation would be a taking without due process of law, and the condemnation was actively resisted by the owner or her predecessor, save during a period of inactivity for which the city was equally responsible, no estoppel can be based on the city's expenditures, etc.

9. EMINENT DOMAIN ⊂⊃268—RECOVERY OF POSSESSION—CONDITIONS.
In such case, as the city might, under Gen. Code Ohio, §§ 3677, 4053, 4054, 4060, acquire the property by condemnation, judgment for recovery of possession should not be carried into execution, unless the city should fail within a reasonable time to institute proceedings, under presently existing statutes, to condemn the property; jurisdiction being retained to compel prompt payment of compensation.

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

Action by Viola M. Nichols against the City of Cleveland. There was a judgment of dismissal, and plaintiff brings error. Reversed and remanded, with directions.

Viola M. Nichols brought suit September 19, 1912. for recovery of specific real property, alleging that ever since March 6, 1895, the city of Cleveland had kept her out of the possession, and also excluded her from the rents, issues, and profits, and refused to account for or pay any part of them; that the rents, issues, and profits and the damages for withholding the property amount to $25,900; and praying judgment for this sum and for delivery of possession.[1] The first defense the city relies on in its answer comprises the following undisputed facts:

(1) Under a statute of Ohio enacted April 5, 1893, a condemnation proceeding was begun in the name of the city against Jesse Nichols (predecessor in title of plaintiff) in the Cuyahoga county probate court, August 17, 1894, to assess compensation for the land in question. This was in pursuance of a resolution passed on the 10th of that month by the city's board of park commissioners appropriating the land, 4.658 acres, for public park purposes. The proceeding resulted in a verdict in favor of the owner for $4,850, and judgment overruling motion for new trial was entered on the verdict, December 8, 1894. The city paid this amount into court, gave in addition an approved bond in the sum of $4,000, and took possession of the land, March 6, 1895. This judgment was reversed by the Cuyahoga court of common pleas, November 20, 1896. and the cause was remanded to the probate court for another trial. Nothing further was done in the cause until October, 1903, when the probate court of its own motion ordered the case to be set down for hearing. Nichols thereupon withdrew his answer and filed a demurrer to the city's application, upon the grounds among others (a) that the statute under which the condemnation proceeding was brought expired by its own limitation in the year 1900, and (b) that this statute was unconstitutional and void. The demurrer was sustained and the application dismissed. Upon the city's petition in error the common pleas court reversed this action of the probate court, February 21, 1905, and remanded the cause for further proceedings. The common pleas judgment was affirmed by the circuit court of Cuyahoga county, without report, January 29, 1906, and this judgment was affirmed by the Supreme Court of Ohio without report, February 18, 1908 (77 Ohio St. 641, 84 N. E. 1130); and upon error to the Ohio Supreme Court the case was dismissed by the Supreme Court of the United States for want of jurisdiction, March 13, 1911 (220 U. S. 602, 31 Sup. Ct. 716, 55 L. Ed. 604). Meanwhile, after paying the amount of the original judgment into court and taking possession of the property (March 6. 1895). and before such dismissal by the Supreme Court, the board incorporated the property into its park system and made large expenditures in improving it for park purposes. It should be added that the answer in terms presents an issue to the effect that plaintiff and her predecessor in title failed to protest against such acts of the city or to question them "in any competent tribunal" prior to March 22, 1911, and alleges that plaintiff is in consequence estopped to maintain the present action.

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[1] It should be stated that the petition contains appropriate allegations of diversity of citizenship, but these allegations are denied by the answer. Plaintiff testified that she was "a citizen of the state of New York," and no testimony appears to the contrary. We do not think jurisdiction can rightfully be denied on this state of the record. Detroit M. & T. S. L. Ry. Co. v. Kimball, 211 Fed. 633, 635, 128 C. C. A. 565 (C. C. A. 6); Hill v. Walker, 167 Fed. 241, 245, 92 C. C. A. 633 (C. C. A. 8); and see Chase v. Wetzlar, 225 U. S. 79, 85, 32 Sup. Ct. 659, 56 L. Ed. 990. The fact may be added, though it is not controlling, that counsel for the city make no contention against jurisdiction.

(2) The second defense relied on by the city in substance is: Plaintiff commenced an action against the city of Cleveland in the Cuyahoga common pleas, March 22, 1911, alleging her ownership of the property in question, the enactment of the statute, and passage by the park board of the resolution under which the appropriation proceeding mentioned in the first defense was brought; also the commencement of the proceeding and its progress down to and including the action of the Cuyahoga common pleas court in reversing the judgment entered in the probate court for $4,850 and remanding the cause to that court for another trial, and the fact that the board had taken possession of the property; alleging further that the property was on the tax duplicate at a valuation of more than $58,000, that it was worth more than $60,000, that plaintiff and her predecessor in title had "for a long time" paid the taxes thereon, and that no compensation had been paid to the plaintiff for the premises; thereupon enumerating the later proceedings taken upon the demurrer to the city's application in the probate court, the reversal thereof in the common pleas, the affirmance of such judgment of reversal in the circuit court, and the affirmance of the action of that court in the Supreme Court of Ohio; also alleging that the city was about to apply to the probate court to call a jury to assess compensation for appropriation of the land, and that it would do so unless restrained by order of court; that the statute under which the proceeding was commenced was invalid and void under specified provisions of the Constitution of Ohio; that the statute had expired by limitation in the year 1900, and that the city had no authority to carry on such appropriation; that the action of the board of park commissioners was void because of the unconstitutionality of the statute creating the board; that the action of the city in taking plaintiff's property was without due process of law and contrary to section 1 of the Fourteenth Amendment; that if the appropriation proceeding were continued it would cause plaintiff irreparable injury. The prayer was for a temporary injunction, and upon final hearing for a permanent injunction, to prevent the city from taking further proceedings in the action to appropriate the land, from interfering with plaintiff's possession of the property, and for general relief.

It is further alleged in this defense that the city filed answer joining issue; that the cause was heard and finally determined by the common pleas court, June 20, 1911, in favor of the city of Cleveland; that judgment was entered accordingly; and that it has ever since been and now is wholly unreversed, and in full force and effect.

The only matter that need be noticed in the reply is that plaintiff admits filing "a certain petition" in the common pleas, but denies that "the copy set forth in said answer is a true, full, and correct copy of the same," though it is to be noted that the answer purports to set out only the substance of plaintiff's petition and that no copy of it appears in the record.

It is stipulated that Jesse Nichols conveyed the property to plaintiff by quitclaim deed of October 31, 1904, recorded August 16, 1905, by a general warranty deed of July 19, 1907, recorded July 20, and by a corrected deed of March 21, 1911, recorded March 22d, and that by an instrument of assignment dated January 22, 1909, he sold and transferred to Gordon C. Nichols, Jesse Nichols, Jr., and Viola M. Nichols all his right, title, and interest to the judgment and the money due thereon in the case of the city against him in the Cuyahoga probate court, which assignment was on the next day filed among the papers of the case; still it is not claimed that any of the assignees mentioned in this instrument ever received any of the money. It is further stipulated that the original appropriation proceeding is "still pending" in the Cuyahoga probate court, and that "no new award of compensation has been made therein."

In disposing of the case below the trial judge made several findings, and among them that the premises continued upon the tax duplicate of Cuyahoga county, and that plaintiff and her predecessor in title had paid taxes thereon until that time, and, believing that plaintiff still had the right to pursue in the proceedings pending in the probate court "any remedy or remedies" she might have, dismissed the petition, without passing upon any of the other defenses of the city. The plaintiff prosecutes error.

Guthery & Guthery, of Cleveland, Ohio, for plaintiff in error.

Ben B. Wickham and W. S. Fitzgerald, both of Cleveland, Ohio, for defendant in error.

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

WARRINGTON, Circuit Judge (after stating the facts as above). The facts set out in the statement give rise to several difficult questions. In the first place, the proceeding begun in the Cuyahoga probate court to assess compensation for the property condemned was founded upon an Ohio statute enacted April 5, 1893, which in terms was limited (a) to "cities of the second grade of the first class," and (b) to "a period of seven years" duration from and after its passage (90 Ohio Local Laws, § 1, p. 100, and section 21, p. 106). Under the statutory classification then prevailing the city of Cleveland was the only municipality of the state to which the act was applicable, since that city, as was generally known, was the only one with the requisite population which had taken the necessary statutory proceedings to be advanced to the "second grade of the first class." 1 Bates' Ann. Stat. (2d Ed.) §§ 1547, 1549, 1619; and see State ex rel. Sheets v. Cowles, 64 Ohio St. at 178, 180, 59 N. E. 895. The statute in terms provided that in cities of this grade and class—or, practically interpreted, in the city of Cleveland—there should be a board of park commissioners, composed of two existing city officials and of three city electors, to be appointed by the sinking fund trustees, or, if no such body, by the common pleas court of the county in which the city is situated. The statute plainly conferred corporate power; the varied phases of such power need not be enumerated here. Section 7 empowered the board of park commissioners to—

"appropriate, enter upon and condemn for public use, and hold and possess on behalf of and in the name of such city any property for enlarging any park or parks now owned by such city, and for establishing such public park or parks, park entrances and park driveways, as in the opinion of such board of park commissioners it may be necessary from time to time to establish, either within or without the limits of such city."

The power so bestowed was to be exercised by resolution of the board declaring its intention and the necessity to appropriate the property. It was made the duty of the corporation counsel, upon receiving a certified copy of the resolution, to apply in the name of the city either to the court of common pleas or the probate court of the county to impanel a jury to assess compensation in the statutory mode for appropriating private property by municipal corporations. The compensation adjudged to any owner and the costs and expenses of the proceeding were to be paid out of park funds, for which special provision was made. Sections 10 and 11 empowered the board to borrow $1,000,000 and to issue therefor and sell interest-bearing bonds in the name and upon the credit of the city, and also annually to levy taxes upon the real and personal property returned on the grand duplicate to pay the interest on the bonds, and to certify the levies to the county auditor.

The board of park commissioners was appointed, and it thereupon adopted the resolution under which the appropriation proceeding was begun and heard in the Cuyahoga probate court. Later the board was empowered to secure further funds to develop the park system so authorized. A statute was passed April 27, 1896 (92 O. L. p. 639) and another on April 26, 1898 (93 O. L. p. 695), each vesting power in the board to borrow $1,000,000 for park purposes, and to issue and sell interest-bearing bonds, and to levy taxes in a manner similar to that prescribed in the first statute.

It will be recalled that the power of eminent domain vested in the board in terms extended to property "either within or without the limits" of the city. It is to be observed, also, that section 8 authorized the board—

"to take charge of, control and improve any public road, street, alleyway or grounds of any kind, * * * for the purpose of a park entrance or park driveway, with the consent of the proper municipal authorities or of the other corporation, or public officers or authorities owning or having charge thereof. * * *"

Section 9 gave the board power—

"to vacate or close up within the limits of any park or parks, any and all public roads and highways * * * which may pass through, divide or separate any lands selected or appropriated by it for parks. * * *"

Section 4 vested power in the board—

"to make arrests for misdemeanors committed within the precincts of any park, park entrance or park driveway under their management and control, whether within or without the limits of the city, or for the violation of any rules, regulations or ordinances established by said board or city council for the government of said parks."

Section 6 empowered the board to establish and uniform a park police force and to invest the force with power—

"to preserve the peace, and enforce such rules and regulations and ordinances as the board or city council may enact and it is hereby authorized to adopt for the government of said parks."

It is particularly to be noticed that the legislation for this park enterprise was not completed by the enactments before pointed out. At the expiration of the seven years' period for which the first statute mentioned (Act April 5, 1893) was enacted, another statute on the same subject was passed (April 6, 1900). That statute was also limited to "cities of the second grade of the first class," though not in point of duration, and it provided for a board of park commissioners composed of five electors of the county. The commissioners were in the first instance to be appointed by the judges of the circuit court and the probate judge of the county, for terms of one, two, three, four, and five years respectively; at the expiration of their several terms the commissioners were to be chosen by the electors, and the statute (section 1) accordingly provided that the first election should take place on the first Monday of April, 1901. The new board, like the old one, was in terms clothed with the power of eminent domain; in short, the two statutes were in all respects material here substantially alike (94 O. L. p. 517).

[1] It is urged that the first statute, the one of April 5, 1893, was violative of two distinct provisions of the Constitution of Ohio, namely, section 1, art. 13, forbidding the General Assembly to pass any "special act conferring corporate powers," and section 26, art. 2, providing that "all laws, of a general nature, shall have a uniform operation throughout the state." It was distinctly held that these provisions were violated by the other act mentioned, the one of April 6, 1900, as also by another of the same general character passed April 16, 1900 (94 O. L. p. 670), in State ex rel. Sheets v. Cowles, 64 Ohio St. 162, 59 N. E. 895) before cited; the syllabus of the decision reading:

"The act of April 6, 1900, entitled 'An act to provide a board of park commissioners and to provide for the acquisition of grounds for parks, etc., in cities of the second grade of the first class' (94 O. L. 517), and the act of April 16, 1900, supplementary thereto (94 O. L. 670), are void because repugnant to section 1 of article 13 of the Constitution and to section 26 of article 2 of the Constitution."

The suit was in quo warranto. The material parts of the act of April 6, 1900, and the substance of the supplementary act, are set out in the report. In view of the similarity of the two acts of present concern, the one of April 5, 1893, and the other of April 6, 1900, we do not see why the decision is not equally applicable to both. There can be no difference in principle between the limitation to seven years in duration of the first act, and the limitation requiring the plan of electing members to the park board under the second act to commence on the first Monday of April (1901) next succeeding the passage of the act (Cowles Case, 64 Ohio St. 180, 59 N. E. 895); and the other features of the two acts—as, for example, the provisions making them operative in Cuyahoga county, both within and without the city of Cleveland, giving to the board authority to control, improve, and vacate roads, and conferring upon the board distinct police powers and control—are to all intents and purposes identical. The Cowles decision shows plainly enough that it was the uniting of these features with the restriction of the act of April 6, 1900, to "cities of the second grade of the first class," rather than the latter provision alone, which rendered the act obnoxious to the Ohio Constitution; indeed it was said in allusion to the old doctrine of classification: "The present case is to be decided in deference to that doctrine and to the decisions upon which it rests." 64 Ohio St. 179–180, 59 N. E. 897, 898.[2] The combined effect of associating the other features mentioned with the old classifying words appears to have been the vice of the act of April 6, 1900, and this would seem to have been true also of the act of April 5, 1893; in a word, the Cowles decision alone justifies the conclu-

[2] The court did not find it necessary to determine in that case how it regarded the use of the old classifying words alone. This was done later and with reference to other and different statutes. State ex rel. Knisely v. Jones, 66 Ohio St. 453, 64 N. E. 424, 90 Am. St. Rep. 592; State ex rel. Atty. Gen. v. Beacom, 66 Ohio St. 491, 64 N. E. 427, 90 Am. St. Rep. 599. As a result of these latter decisions a new system of municipal classification was enacted October 22, 1902 (96 O. L. pp. 20, 106), and this system is still maintained (2 Ann. Ohio Gen. Code, § 3497 et seq.).

sion that such an association of limitations was opposed to any judicially recognized scheme of municipal classification. Further, the statutes so affecting Cleveland were apparently essential parts of a unitary park system; and it hardly is conceivable that the one of April 5, 1893, was valid, and that of April 6, 1900, invalid, under the same Constitution.

[2] We are therefore convinced that the Cowles decision must be accepted as decisive of the unconstitutionality of the act of April 5, 1893. If it be said that the case is not controlling here, since it was decided after the appropriation proceeding was begun, the answer is that the decision was rested on the rule of cases decided prior even to the enactment of the law on which the proceeding was based. This fact renders the Cowles decision binding upon this court. Peters v. Broward, 222 U. S. 483, 492, 493, 32 Sup. Ct. 122, 56 L. Ed. 278.

[3] In reaching this conclusion we bear in mind the contention of counsel for the city that the Supreme Court of Ohio subsequently declared the validity of the act of April 5, 1893. The basis of this is the reversal by the common pleas of the judgment rendered in the probate court in 1903 sustaining Jesse Nichols' demurrer to the city's application. It will be borne in mind that the common pleas judgment was affirmed by the circuit court, and the circuit court judgment by the state Supreme Court. There are several reasons why we cannot think the Ohio Supreme Court intended in that proceeding to pass on the validity of this statute. Its affirmance of the circuit court occurred seven years after the decision in the Cowles Case; and counsel's contention ignores the identity of the two statutes and the improbability that opposed decisions would have been rendered in respect of them. Moreover, the contention overlooks the nature of the common pleas judgment and the apparent effect of its affirmance. The common pleas reversal was not a final judgment to which error would lie. The effect of the judgment was to overrule the demurrer sustained by the probate court. This did not exhaust the remedy of either party below; it did not prevent a judgment in the probate court; and such a judgment might have been satisfactory to both parties. It is of course to be remembered both that the judgment of the common pleas was simply to remand the cause for further proceedings, and that the final judgment of the probate court upon the verdict fixing compensation for the land had been reversed long before and the case remanded for another trial. It follows that the common pleas judgment in effect overruling the demurrer might have been affirmed by the circuit court, and the action of that court affirmed by the Supreme Court, without considering, much less determining, the constitutional validity of the statute or otherwise disposing of the case finally. These views are through analogy strengthened by rulings of the Ohio Supreme Court in respect of appropriation proceedings instituted by private, as distinguished from municipal, corporations. State v. Judges, 69 Ohio St. 372, 377, 378, 69 N. E. 659; S. & I. R. R. Co. v. Patrick, 7 Ohio St. 170, 172; and see Tol. Ann Arbor & N. Mich. Ry. Co. v. Tol. & Mich. Belt Ry. Co., 6 Ohio Cir. Ct. 521. It is true that the statute involved in those cases required the common pleas, upon reversal of

the probate court, to retain the cause for trial and final judgment (Ohio Rev. St. § 6438, now section 11066, Ohio Gen. Code); but as regards the question of finality of a judgment of the common pleas, like the one involved in the instant case, we see no difference in principle between such a provision to retain the cause and a requirement to remand it to the probate court. This is fairly deducible from Bridge Co. v. Magruder, 63 Ohio St. 455, 473, 474, 59 N. E. 216, which was under consideration in State v. Judges, supra, and in which the common pleas, having entered an interlocutory judgment reversing a judgment of the probate court, was reversed for rendering a final judgment dismissing the supplemental and amended petition. The interlocutory character of the common pleas judgment now in issue is further shown by the statutory provisions then in force. They entitled either the municipality or the owner of the property to prosecute error to appropriation proceedings as in other civil actions, or likewise to appeal, after the value of the property had been assessed. 1 Bates' Stat. (6th Ed.) § 1536—114, now sections 3695, 3696, Ohio Gen. Code. It would therefore seem that, in the absence of a subsisting assessment of compensation, the common pleas could not in a municipal appropriation proceeding, any more than in one instituted by a private corporation, render a judgment, which was consistent with completing the appropriation, to which error would lie; in other words, such a judgment was to be "construed as being subject to a condition that the proper compensation be first ascertained and paid." Grays Harbor v. Coats Fordney Co., 243 U. S. 251, 255, 256, 37 Sup. Ct. 295, 61 L. Ed. 702; Southern Ry. Co. v. Postal Telegraph Co., 179 U. S. 641, 642, 643, 21 Sup. Ct. 249, 45 L. Ed. 355. Hence in the absence alike of any necessity to pass upon the validity of the statute (of April 5, 1893), and of any showing that either the Supreme Court or the circuit court intended to determine that question, we cannot assent to counsel's contention.

[4] However, it is in effect urged for the city that plaintiff cannot be heard to question the constitutional validity of the act. The theory is that the park commissioners were de facto officers, and that their acts as a board in condemning the property are not open to collateral attack. This is to assert that the owner of private property may not dispute the claimed right of a municipal board to exercise the power of eminent domain. It needs no citation of authority to show that the rightful investment of such power is essential to the taking of private property in invitum. It would be a strange, and certainly an arbitrary, rule that would forbid an owner to protect his property rights through challenge of the constitutional validity of the only statute relied on to justify the exercise of such a power as that of eminent domain. In Zanesville v. Gaslight Co., 47 Ohio St. 1, 29, 23 N. E. 55, it was held in favor of the city that:

"Whenever an incorporated company, in any action, asserts a right against another person based upon an assumed franchise or power, the person against whom the right is so asserted may, as a defense, deny the existence of such franchise or power."

Surely a municipality may not be accorded, and an individual refused, the right to deny the existence of the asserted power; and,

despite the claim of counsel to the contrary, the rule so laid down makes no such distinction. Nor is there any rational or valid distinction between the right to deny the existence of such a power in a private corporation and the right to deny it in a municipal corporation; for as respects either class of corporations it is but a delegated power, and any asserted grant of the power must be strictly construed regardless of the corporate agency seeking to exercise it (Railway Co. v. South, 78 Ohio St. 10, 12, 13, 84 N. E. 418; Society Perun v. Cleveland, 43 Ohio St. 481, 498, 3 N. E. 357; Atkinson v. M. & C. R. R. Co., 15 Ohio St. 21, 33; Currier v. Marietta & Cincinnati R. R. Co., 11 Ohio St. 228, 231); and, moreover, any rule that, in the absence of estoppel, would prevent an owner from setting up the defense of unconstitutionality of the law upon which the appropriation is based would be to deprive him of his property without due process of law (Portland Ry. Light & Power Co. v. City of Portland [C. C.] 181 Fed. 632, 633). It may be added that the only case relied on by the city in this behalf (State v. Gardner, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660) is clearly inapplicable.

[5] What is just shown furnishes an answer to another claim made in behalf of the city. It is in effect insisted that, in spite of the unconstitutionality of the statute on which alone the proceeding is rested, a municipality, unlike a private corporation, is entitled to have the value of the property assessed, pay the amount into court and, giving such additional bond as the court may require, take permanent possession and control of the property, and thus compel the owner to look only to recovery of compensation. Reliance for this contention is placed on sections 2250 and 2253, Smith & B. Rev. Stat. (now sections 3686 and 3695, Ohio Gen. Code); but it is too plain for argument that the statutory proceedings so authorized were provided in contemplation of a constitutionally valid, not invalid, statute vesting in the condemning body the power of eminent domain.

[6] In the next place the city, under the second defense of the answer, maintains that the present suit is barred by the judgment of the Cuyahoga common pleas entered in the suit commenced by plaintiff against the city, March 22, 1911. We may refer to the statement above for the facts and issues presented in that suit and the relief therein sought. The judgment recites that the cause was heard on the pleadings and evidence, finds "on the issues generally, in favor of defendant," denies the relief sought, and dismisses the petition. No report of an opinion of the common pleas is shown. The case was appealed to the circuit court, and the opinion of that court is reported in 17 Ohio Cir. Ct. (N. S.) 503. The specific relief asked in the petition was to enjoin the city from "proceeding with the application to assess compensation, and from interfering with plaintiff's peaceful possession" of the property. The circuit court held that the suit was one in ejectment and should have been brought up on proceedings in error and not on appeal; on its own motion the court dismissed the appeal for want of jurisdiction. It is not claimed that the action of the circuit court operates as a bar to the instant suit. What, then, is the true effect of the common pleas decree? It would seem that the

common pleas treated the case as an injunction suit; it dismissed the petition; and from the contentions made here it is to be inferred that counsel themselves regarded the suit as one of an equitable character. But, whether the suit be treated as one in injunction or in ejectment, it cannot on the present record be presumed that the common pleas disposed of the case on its merits. That court had prior to that time twice reversed the probate court upon its rulings in the appropriation proceeding; the first being the reversal of the judgment of the probate court upon the verdict assessing compensation for the property, when the cause was remanded for another trial, and the second when the common pleas in effect overruled the demurrer which the probate court had sustained to the city's application and remanded the case for further proceedings. While neither of these reversals amounted to a final judgment, as we have pointed out, the effect of each, at least in theory, was to leave the case pending in the probate court; and it may fairly be assumed that the common pleas court so regarded the appropriation proceeding when it rendered the decree of 1911 which is here pleaded in bar of the present suit. Upon this hypothesis it was not open to the common pleas to issue the injunction asked, for the reason that plaintiff had an adequate remedy at law in the probate court proceeding (Railroad v. Railroad, 72 Ohio St. 568, Syl. 1; C. T. & V. R. R. Co. v. City of Akron, 1 Ohio Cir. Ct. [N. S.] 174, 176; Union Ry. Co. v. Illinois Cent. Ry. Co., 207 Fed. 745, 749, 751, 125 C. C. A. 283 [C. C. A. 6]); and the same hypothesis would naturally have led the common pleas (without passing upon the constitutional validity of the statute of April 5, 1893, or the effect of its expiration according to its own terms) to deny relief which, if granted, would in practical result have allowed recovery of possession of the property. This feature of the case must therefore fall within the rule that a subsisting decree rendered in a suit between given parties will not operate to bar a second suit between them, unless the matter in controversy in the latter suit was determined on its merits in the first suit. Brown v. Fletcher, 182 Fed. 963, 966, 981, 105 C. C. A. 425, and citations (C. C. A. 6); Rempe & Son v. Ravens, 68 Ohio St. 113, 125, 67 N. E. 282; Swift v. McPherson, 232 U. S. 51, 55, 34 Sup. Ct. 239, 58 L. Ed. 499.

[7, 8] Another defense of the city is that plaintiff is estopped from asserting any claim to its "damage and detriment." The answer to this is twofold: (a) Defendant is in no position to claim the benefit of estoppel through action taken or expenditures made on the faith of any settled rule of decision as to municipal classification which was subsequently changed to its detriment. Shoemaker v. City of Cincinnati, 68 Ohio St. 603, 611, 613, 68 N. E. 1; Lewis, Auditor, v. Symmes, 61 Ohio St. 471, 487, 56 N. E. 194, 76 Am. St. Rep. 428. True, as we have seen, a change in the rule concerning such classification was made in 1902 (State ex rel. Knisely v. Jones ; State ex rel. Atty. Gen. v. Beacom), but the former rule, as we have also seen, condemned such limitations upon classification as were embodied in the act of April 5, 1893 (State ex rel. v. Cowles). And (b) the plaintiff and her predecessor in title actively contested the appropriation in one court or an-

other from the beginning of the proceedings in the probate court until the commencement of the instant case, except between 1896 and 1903, and for this intermission in active contest both the defendant and the property owner were apparently equally responsible; but the defendant pursued its course in spite of the continued pendency of the litigation, and so was legally chargeable with the peril of having its proceedings defeated because of the constitutional infirmity of the statute.

Thus, if we have rightly interpreted the complications disclosed by the record, we reach the simple question the statement of which furnishes its own answer: Can a municipal corporation, through any of its agencies and against persistent opposition of the owner, take and hold private property under an unconstitutional law? The title to the property remains in the owner though possession is in the city; the owner has received no compensation, and the only means offered in that behalf is through the old appropriation proceedings which are based solely on the unconstitutional law. Those proceedings are in effect but an effort to deprive a person of property without due process of law (Iron Mountain R. Co. v. City of Memphis, 96 Fed. 113, 121, 37 C. C. A. 410 [C. C. A. 6]); and it is needless to add that such proceedings are unavailing either to secure title to the property or enforce payment of compensation. It results, in view of the absence of facts amounting to estoppel, that plaintiff is entitled to recover possession of the property and judgment for reasonable rents, issues and profits.

[9] There is one qualifying consideration, however, which cannot be ignored. All municipal corporations are invested with "special power to appropriate, enter upon, and hold real estate within their corporate limits" "for parks, park entrances, boulevards" (2 Ann. Ohio Gen. Code, § 3677), and, since rendition of the judgments in the Jones and Beacom Cases, every "city" (according as municipalities have since been classified) has been empowered upon specified conditions to create a board of park commissioners (Id. §§ 4053, 4054), which in turn has likewise been invested with power to appropriate property for similar purposes (Id. § 4060); and although defendant has taken no step to reappropriate the property in question, the fact remains that if plaintiff were restored to possession of the property she might (and if its appropriation is still desired and necessary she would) have it taken away from her subsequently through valid appropriation proceedings. The litigation concerning the property has extended over so many years as to justify modification of the relief presently allowable in order to avoid the possibly vain result mentioned, as well as to terminate the litigation at the earliest time practicable.

In these circumstances we are disposed to direct the entry of a conditional judgment for recovery of possession of the property and of rents, issues, and profits; the condition being that unless defendant shall within a suitable time, to be fixed by the court below, adopt the necessary measures to authorize and in fact institute proper proceedings to appropriate the property, and also cause to be entered in the instant case a certificate of such action and of a declared purpose to prosecute the proceedings to judgment with all reasonable dispatch, the

judgment for possession and for rents, issues, and profits shall be carried into execution. And since municipalities are entitled to decline to take property after compensation has been assessed (O. G. C. § 3697, and see section 11091), provision will be made to retain jurisdiction of the present case for the purpose of carrying the judgment of the court below into execution in the event that such appropriation proceedings shall be had and no compensation paid.

An order will therefore be entered reversing the judgment below and remanding the cause, with direction to enter judgment in accordance with this opinion.

THE SAGAMORE.

(Circuit Court of Appeals, First Circuit. November 15, 1917.)

Nos. 1157–1159.

1. ADMIRALTY ⇐75—EVIDENCE—ADMISSIONS IN ANSWERS TO INTERROGATORIES.
   An admission as to the speed of a steamer libeled, contained in the answer to libelant's interrogatories, which answer was verified by the master of the steamer, the claimant, must be given weight.

2. COLLISION ⇐82(2)—FOG—SPEED.
   Under International Rules Act Aug. 19, 1890, c. 802, art. 16, 26 Stat. 326 (Comp. St. 1916, § 7854), declaring that every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions, a steamer, proceeding through a fog, should reduce its speed to such a rate as would enable it to stop in time to avoid a collision after an approaching vessel comes in sight, provided an approaching vessel is herself going at the moderate speed required by law, the lowest speed consistent with good steerageway being required under such condition, and the steamer being bound, if unable to reduce her speed sufficiently with the continuous action of her engines, to occasionally stop them, and so a steamer, proceeding through a dense fog at the rate of 5½ knots an hour, at a point where fishing vessels were to be expected is liable for a collision; the rate of speed being such that the steamer could not be checked after discovering a fishing vessel in time to avoid the accident.

3. COLLISION ⇐82(1)—FOG—SPEED.
   The inability of a particular vessel to go slow and maintain steerageway will not excuse it for proceeding at greater than a moderate rate of speed through a dense fog.

4. COLLISION ⇐82(2)—FOG—SPEED.
   The rules requiring moderate speed in a fog should be strictly construed in favor of fishing vessels and against steamers proceeding through known fishing grounds; the risk to the fishing vessels being great and that of steamers slight.

5. COLLISION ⇐82(1)—FOG—SPEED.
   In determining within International Rules, art. 16, what is a moderate speed in a fog having due regard to existing circumstances, the interpretation of the rule by maritime courts will control the judgment and discretion of navigators.

6. COLLISION ⇐82(1)—SPEED IN FOG—MODERATE SPEED.
   In determining whether there has been a compliance with International Rules, art. 16, requiring a moderate speed in fog and a proper exercise of the discretion of the navigator as to general speed, one of the conditions

to be taken into account is the statutory requirement of proper signals to be given by other vessels; but ordinarily a steamer's speed in a fog cannot be held moderate, where it does not admit of her coming to a full stop within her share of the distance which separated her from another vessel, after the latter's signal was audible.

7. COLLISION ⊂=S2(2)—FOG—MODERATE SPEED.
In determining the liability of a steamer for a collision in a fog, both the obligation to go so slow as to be able to avoid a vessel which can be sighted, as well as the right to maintain steerageway, should be applied, so far as possible, though the two obligations approach inconsistency.

8. COLLISION ⊂=S1—FOG—SIGNALS.
A fishing schooner run down by a steamer in a fog *held* not at fault, though the schooner's fog horn was lashed, for failing to promptly turn the horn toward the approaching steamer; sufficient signals being given.

9. COLLISION ⊂=48—STEAM VESSELS—BURDEN OF PROOF.
Where a steamer ran down a sailing schooner, the burden of showing freedom from fault is on the steamer; it being its duty to avoid the sailing vessel.

10. COLLISION ⊂=81—FOG—LOOKOUTS.
The denser the fog and the worse the weather the greater cause for vigilance, and a vessel cannot excuse the failure to maintain a lookout on the ground that the weather was so thick that another ship could not be seen until actually in collision.

11. COLLISION ⊂=81—FOG—LOOKOUTS.
As the lookout is both the eyes and ears of a ship, a steamer which ran down a sailing schooner is at fault for failure to maintain a lookout at the forecastle head, which was but 25 or 30 feet above the water, and a considerable distance in front of the crow's nest, which was at least 60 feet above the water, so that the maintenance of lookouts only from the bridge located about 200 feet aft the stem of the steamer and from the crow's nest was insufficient.

12. COLLISION ⊂=80—FOG—VESSEL AT FAULT.
A steamer which ran down a schooner in a fog *held* solely at fault, proceeding at an excessive speed without proper lookouts, the schooner not being at fault in failing to give signals and exhibit her flare-up light seasonably, so full damages should be assessed against the steamer.

13. COLLISION ⊂=44—COURSE.
A sailing vessel, closehauled or jogging within the rules of navigation should, on being approached by a steamer, hold her course.

14. ADMIRALTY ⊂=76—PROCEEDINGS—EVIDENCE—"CUMULATIVE."
The deposition of one of the crew of a sailing vessel run down by the steamer libeled as to his discovery of the presence of the steamer is not cumulative within Rule 14, par. 7 (150 Fed. xl, 79 C. C. A. xl) for Circuit Court of Appeals for First Circuit, declaring that further proof in instant causes in admiralty shall include only that which could not, with diligence, have been had at the trial below, etc., except by order of court first obtained, and that merely cumulative proof shall not be so taken, though the facts deposed appeared in the testimony of another witness.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cumulative Evidence.]

15. ADMIRALTY ⊂=21—ACTIONS—WRONGFUL DEATH.
Where a Massachusetts schooner was run down and sunk by a British steamer on the high seas, there is no right of action for the wrongful death of those of the crew of the schooner lost, Rev. Laws Mass. 1902, c. 171, as amended by St. 1907, c. 375, giving a right of action for wrongful death, having no application, for to give it application would be giving the statute extraterritorial effect.

16. ADMIRALTY ⊂=21—ACTIONS—WRONGFUL DEATH.
General admiralty law affords no recovery for death occurring on the high seas.

Bingham, Circuit Judge, dissenting.

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

Libel by Sylvanus Smith & Co., Incorporated, against the steamship Sagamore, claimed by Alexander Fenton, together with libels by Sarah J. Doggett, as administratrix of the estates of John A. Doggett and another, against the White Diamond Steamship Company, Limited, and by Guy Sullivan, administrator, against the same defendant. From decrees against the several libelants, they appeal. Reversed and remanded, with directions in each case.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me., for appellants.

Edward E. Blodgett and Albert T. Gould, both of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for appellees.

Before BINGHAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. These are appeals from the decision of the District Court that the British steamer Sagamore was not in fault for a collision, in a dense fog, with the fishing schooner Olympia, about 2:30 a. m., June 17, 1913, off the coast of Nova Scotia, between 40 and 50 miles south of Sable Island and in the vicinity of the Grand Banks.

The schooner was on the starboard tack, on a course nearly at a right angle to that of the steamer, and was struck on her port side aft the mainmast, and so deeply cut that she sank in a few minutes. Of her crew of 14 the master and 5 men were drowned. Eight men succeeded in boarding the steamer while the vessels hung together, and before the schooner sank.

The primary question is whether the Sagamore, before the collision, was going, as required by article 16 of the International Rules, "at a moderate speed having due regard to the existing circumstances and conditions."

[1] The Sagamore, length 430 feet, beam 47 feet, normal speed 12 or 13 knots, on a voyage from Liverpool to Boston, ran into a dense fog about 2 a. m., half an hour before the collision. She was then in a part of the ocean where her officers well knew that fishing vessels were usually found, and where special precautions for discovering and avoiding them were necessary. Her speed was reduced from 12 or 13 knots to slow speed, which she held until a single blast of the horn of the Olympia was heard, a few moments before the collision. The District Court found the reduced speed to be about 5 knots. The answer to libelants' interrogatories gave her speed about 5½ knots. This was sworn to October 29, 1913, by her master, Alexander Fenton, as claimant. Subsequently, on March 4, 1914, on the

witness stand, he put the speed at about 5 knots, with the explanation that his answer to interrogatories was on the assumption that the engines were making 32 turns, and that he subsequently learned that they were making but 30 turns. Upon so critical an issue of fact the admissions in pleading must be given weight. Rarely does a party defendant on such an issue make statements too favorable to the libelant. The Serapis (D. C.) 37 Fed. 436, 442; Benedict's Admiralty (3d Ed.) §§ 518, 519. Under the English practice, the "Preliminary Act," the object of which is to obtain from the parties statements of facts at a time when they are fresh in their recollection as a rule, cannot be subsequently amended. O 19, r 28, 224.

Without attributing to the master "more coloring than an upright man may insensibly give to facts in which his interest and feelings are involved" (Hutson v. Jordan, 1 Ware, 393; Fed. Cas. No. 6959), and after consideration of the other proofs, we are of the opinion that the claimant's original admission was not made inadvisedly, and that the general speed for the half hour before collision was not less than 5½ knots.

[2, 3] It was found by the District Court, and is conceded by the appellee, that the night was so dark and the fog so dense that, while going at this rate, the discovery of the lights of other ships could not be relied upon to enable the Sagamore to avoid collision by stopping and reversing. The District Court says, "Sight, as both sides agree, was of little use in avoiding collision;" and this, under the conditions, seems true if the Sagamore was going at a speed as high even as 5 knots. In the opinion of the District Court it is said:

"It is urged that the steamer was at fault whatever her actual speed may have been, because she was unable to stop within the distance over which other vessels could be seen. There are expressions in opinions entitled to great weight which support that view; there are other decisions which are inconsistent with it; and the weight of authority seems to me now to be against it."

This is assigned as error. Should we apply the rule that speed such that another vessel cannot be seen in time to avoid her is unlawful, the Sagamore must be condemned for a violation of article 16. In The Umbria, 166 U. S. 404, 417, 17 Sup. Ct. 610, 615 [41 L. Ed. 1053] it is said:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill, until the course of each was definitely ascertained," etc.

In The Chattahoochee, 173 U. S. 510, 548, 19 Sup. Ct. 491, 494 [43 L. Ed. 801]:

"It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."

In The Nacoochee, 137 U. S. 330, 339, 11 Sup. Ct. 122, 125 [34 L. Ed. 687], the statement is that the steamer—

"was bound * * * to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog."

The latest expression of an English court applying article 16 that has been brought to our attention is in The Counsellor, L. R. Prob. Div. 1913, pp. 70, 72, 73:

"I think a very fair rule to make is this, and it is one that has been suggested to me by one of the Elder Brethren: You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than 400 feet, you ought to be going at such a speed that you can pull up. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast. If you cannot retain steerageway at such a speed, then you should manage by alternately stopping and putting the engines ahead. In my opinion 4½ knots was, in the circumstances of the case, too great a speed for the Counsellor to proceed at."

See, also, Marsden's Collisions at Sea (6th Ed.) p. 374; Hayne's Rule of the Road at Sea, pp. 18, 64; The Michigan, 63 Fed. 280, 287, 11 C. C. A. 187; The Nymphæa (D. C.) 84 Fed. 711, 715; The Newport News, 105 Fed. 389, 44 C. C. A. 541; The West Brooklyn (D. C.) 106 Fed. 751, 752; The George W. Roby, 111 Fed. 601, 610, 49 C. C. A. 481; The Belgian King, 125 Fed. 869, 60 C. C. A. 451; The Georgia (D. C.) 208 Fed. 635; The Kentucky (D. C.) 148 Fed. 500, 502; The Bayonne, 213 Fed. 216, 217, 129 C. C. A. 560; The Hilton (D. C.) 213 Fed. 997, 1001; The Rosaleen, 214 Fed. 252, 254, 130 C. C. A. 622; The Port Johnson Towing Co., 232 Fed. 141, 146 C. C. A. 333; The Manchioneal, 243 Fed. 801, — C. C. A. —; The Robert M. Thompson, 244 Fed. 662, 671, — C. C. A. —; The Etruria, 147 Fed. 216, 77 C. C. A. 442; U. S. Compiled Stats. 1916, vol. 7, § 7854, note 5; section 7889, note 11; "Modern Seamanship," Knight, pp. 254–259, 304.

It appears that there is a very general tendency to apply strictly, and without qualification, the rule that was rejected by the District Court, and we think that the later cases interpret the decisions in The Chattahoochee and The Umbria as in practical agreement with the statement in The Counsellor. Nevertheless, the claimant's contention that this rule has not been fully adopted by the Supreme Court itself, and that it is unreasonable, requires consideration.

The view expressed in Hughes on Admiralty, p. 227, is that the rule does not seem to be a satisfactory or practical test, since a fog may be so thick that one can hardly see the stem of his own vessel, much less an approaching vessel, even though only a few yards off; hence the rule carried to its logical consequences would require the vessel to cease to move; and then, as was pointed out in The Colorado, 91 U. S. 692, 23 L. Ed. 379, danger still attends her, as other vessels may come upon her. "Perfect security under such circumstances is impossible."

But in The Chattahoochee, 173 U. S. at page 548, 19 Sup. Ct. 491, 43 L. Ed. 801, it seems to be recognized that what is demanded is a slackening of speed to the lowest rate consistent with good steerageway; and in The Umbria, 166 U. S. at page 412, 17 Sup. Ct. at page 614 [41 L. Ed. 1053], it was expressly decided:

"As the general speed of the Ivernia did not exceed 4 knots an hour, the lowest speed necessary to the maintenance of steerageway, it is clear that she was guilty of no violation of the thirteenth article"—i. e., article 13 of Revised International Regulations of 1885, 23 Stats. 438.

The claimant contends that the true criterion is expressed in The Zadock, 9 Prob. Div. 116:

"It is the duty of the ship, whether she be a sailing vessel or a steamer, to moderate her speed as much as she can, yet leaving herself with the capacity of being properly steered."

In The Colorado, 91 U. S. 692, 23 L. Ed. 379, and in The Martello, 153 U. S. 70, 14 Sup. Ct. 723, 38 L. Ed. 637, "the lowest rate of speed consistent with good steerageway" seems to be regarded as the "moderate speed" required under such conditions. But this formula also is subject to qualification. The inability of a particular vessel to go slow and still maintain steerageway is not an excuse. Were it to be adopted, the rule of moderate speed might be modified by shipbuilders.

In The Pennsylvania, 19 Wall. 125, 134, 22 L. Ed. 148, it was contended that a rate of 7 knots was necessary for safe steerage. The court found against this contention as matter of fact, but said:

"And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and where the probability of encountering other vessels was so great. It would rather have been her duty to lay to."

Furthermore, the lowest rate of speed resulting from a continuous operation of her engines at slow speed is not necessarily the lowest rate consistent with good steerageway. As was pointed out in the quotation from The Counsellor, supra, the alternate stopping and putting ahead of the engines will reduce speed below that of continuous operation of the engines. So in The Campania, 9 Asp. Mar. Cas. N. S. 151, 177:

"But if a vessel cannot reduce her speed sufficiently with the continuous action of her engines, and therefore cannot go at what would be a reasonable speed in a fog without occasionally stopping her engines, it is her duty to occasionally stop them. * * * They [masters] hate and abhor the very idea, but it is to my mind their duty to do so if they cannot otherwise reduce the speed sufficiently."

See, also, The Oregon (D. C.) 27 Fed. 751, 752; The Eleanora, 17 Blatchf. 88, Fed. Cas. No. 4335.

As the Sagamore's engines were operated continuously during a period of half an hour before the collision, it cannot be said that she moderated her general speed to the lowest point consistent with good steerageway, if, as has been held, the expedient of alternately stopping and putting her engines ahead is a practical expedient for maintaining control while reducing the rate of speed. If such in-

termittent operation is practical, the criticism that the rule is impractical that requires ability to stop in time to avoid a collision after the other vessel comes in sight is much lessened in force, though not entirely obviated.

"It is a common excuse that the ship was going as slowly as she could; that she would not steer, or that her engines would not turn over if she had tried to go slower;" but the answers to this are that, if so constructed that she cannot go at a moderate speed, she navigates at her own risk, and that she may occasionally stop her engines. See Marsden's Collisions at Sea (6th Ed.) pp. 377, 378.

In the late decision of the Supreme Court, Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726, it appears that the Selja's half speed was 6 knots and was reduced to slow speed, 3 knots. In The Umbria the general speed of the Iduna was 4 knots, which was approved. In The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637, the lowest speed consistent with good steerageway was found to be 3 miles an hour. See, also, cases cited in Marsden's Collisions at Sea (6th Ed.) 375.

Upon the whole we must agree with the appellants' contention that the Sagamore could have run slower than 5 or 5½ knots without loss of control. It is true that the expression, "having careful regard for the existing circumstances and conditions," gives to the navigator some discretion as to what shall be moderate speed. Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726.

The learned District Judge said:

"It seems to me that persons familiar with navigation at sea would undoubtedly hold the Sagamore free from fault with respect to her speed"

—and upon the circumstances was himself strongly of opinion that her speed was proper.

We have no doubt that among navigators many would agree with the District Court's conclusion. On the other hand, we think that the standard of caution established by the judgments of maritime courts in interpreting the international rules is higher than is acceptable to the masters, who feel justified in assuming rates of speed that have been condemned by the courts, as appears by the numerous decisions collated in United States Compiled Statutes 1916, vol. 7, § 7854, note 10; section 7889, notes 4, 11.

[4] In cases like the present the risk to the steamer is comparatively slight. The risk to the small vessel of the fishermen and to their lives is great; and, though their presence in the pathway of the commerce of the sea may impede the speed of steamers, the courts must strictly interpret the rules which afford protection to their lives and their calling. See The Hansa, 5 Ben. 501, 525, Fed. Cas. No. 6037.

[5] The discretion of the navigator in the matter of speed in a fog must be exercised not wholly as a matter of individual judgment or of individual views as to what is moderate speed, but also with due regard to the interpretation of the term "moderate speed" by the maritime courts and to the general standards of good seamanship established by those courts in applying the term "moderate speed."

"These rules or sea laws defining precautions required by good seamanship and cautious navigation are to be deduced from the decisions of courts of admiralty, and are not to be regarded as superseded except in so far as they are inconsistent with statutory regulations. The George M. Roby, 111 Fed. 610 [49 C. C. A. 481] C. C. A. 3d Cir.; The Sea Gull, 23 Wall. 165, 173 [23 L. Ed. 90]."

[6, 7] The opinion of the District Court states:

"But here it was night and black fog. Sight, as both sides agree, was of little use in avoiding collision. Both the steamer and the schooner were relying almost wholly upon sound to warn them of other vessels."

What has been termed the "rule of sight" or of "seeing-distance" as a test of proper speed, as stated in the above quotations from the opinions in The Umbria, The Chattahoochee, The Nacoochee, and The Counsellor, omits any reference to the presence or absence of sound signals as an element for consideration upon the question whether a general rate of speed was moderate or excessive. In The Umbria, The Chattahoochee and The Counsellor signals had been heard, and in The Nacoochee the presence of the schooner and the likelihood of encountering her was known.

Upon the facts in all of these cases the speed condemned was a general speed maintained after knowledge of the presence of other vessels, and not, as in the present case, a general rate of speed maintained without warning by sound of the actual presence of another vessel.

In Mr. Haynes' valuable manual, The Rule of the Road at Sea, p. 64, it is said:

"The test of moderate speed in all cases is the ability of the vessel to stop her headway in the presence of danger."

The immediate presence of danger in a dense fog should ordinarily be made known, if the vessels perform their statutory duty of giving sound signals, at a moment much earlier than the time of sighting; and article 16 recognizes that a higher degree of caution arises upon hearing a signal than before.

"The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him." Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726.

While we are unable to agree with the opinion of the District Court that the weight of authority is against the "rule of sight" as a test of moderate speed, we think that it may be said that the expressions of this rule above cited were made in cases where a rate of speed was maintained with knowledge of the presence of other vessels.

There are weighty reasons for the view that in considering whether there has been a compliance with the general rule of moderate speed in a fog as expressed in paragraph 1 of article 16, and a proper exercise of the discretion of the navigator as to general speed, one of the conditions to be taken into account is the statutory requirement that proper signals be given by other vessels. So important a requirement of law and of practical experience for the purpose of giving other ves-

sels more time for control and for maneuvering than they can have in the absence of sight should not be ignored. As a vessel's power of stopping is relevant in considering her speed in a fog (Marsden's Collisions at Sea [6th Ed.] p. 374), the time which she may reasonably expect to have for exercising this power seems a necessary element of the problem.

"The navigator is entitled to proceed in expectation of compliance on the part of others with the law in respect to fog signals as recognized in the second provision of the above-quoted rule,"—i. e., rule 15, Act Feb. 8, 1895, 28 Stats. 648 (Comp. St. 1916, § 7925); Erie & Western W. Co. v. City of Chicago, 178 Fed. 42, 49, 101 C. C. A. 170 (C. C. A. 7th Cir.), citing Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582, and The Victory v. The Plymothian, 168 U. S. 410, 426, 18 Sup. Ct. 149, 42 L. Ed. 519, cases which seem to support the general proposition that a vessel is entitled to presume that another vessel will act lawfully, though these are not fog cases.

In The Michigan (D. C.) 63 Fed. 295, the court applied the following rule:

"Moderate speed in a fog is that rate which will permit a steamer to stop, after hearing a fog signal, in time to avoid the vessel which has complied with the law in giving it."

The judgment was reversed in 63 Fed. 280, 11 C. C. A. 187, though without express comment on this rule.

In Marsden on Collisions, p. 37, it is said:

"And from the English decisions it appears that the rate must be regulated by the thickness of the fog, and the probability of falling in with other ships, rather than the supposed distance at which a horn or bell would be audible."

As a practical matter, however, there is a difference between the general probability that vessels may be in the vicinity and the special probability of meeting a vessel whose presence is known though her exact location is not; and this is recognized by article 16 in its provision for stopping the engines, etc., upon hearing a fog signal forward of the beam.

The impracticability of a rule that a steamer may go at a rate such as will enable her to stop within an assumed distance at which she may, under favorable circumstances, expect to hear a fog horn or a steam whistle if blown, is emphasized in The Hansa, 5 Ben. 501, 535, et seq., Fed. Cas. No. 6,037.

While it is apparent that the discretion of the navigator as to speed will be affected by reliance upon the performance of other vessels of their statutory duty to signal in a fog, thus giving him time to act, it seems doubtful, upon the authorities, whether it is practical to attempt to modify the rule stated in the Umbria, Chattahoochee, Nacoochee, and Counsellor (even though theoretically it is justly subject to criticism, as is pointed out in Hughes on Admiralty), except by reading it in conjunction with the requirements stated in The Colorado, 91 U. S. 692, 23 L. Ed. 379, "Very slow speed, just sufficient to subject the vessel to the command of her helm," and in The Martello, 153 U. S. 64,

14 Sup. Ct. 733, 38 L. Ed. 637, "Reduce her speed to the lowest point consistent with good steerageway."

In a fog so dense as existed in this case the right to maintain steerageway and the obligation to go so slow as to be able to avoid a vessel which can be sighted approach inconsistency; but both rules are to be applied so far as is possible. See Mason v. U. S., U. S. Supreme Court, June 4, 1917, 244 U. S. 362, 37 Sup. Ct. 621, 61 L. Ed. 1198. Each of the international rules is to be understood as forming a part of the entire body of precautionary aids to mariners, and not as though each point stood separate and alone. They must be construed in a nautical sense, and understood in a nautical sense, and applied as seamen understand and apply them. Haynes' The Rule of the Road at Sea, p. 1.

In The Lepanto (D. C.) 21 Fed. 651, it was said by Judge Addison Brown:

> "No steamer's speed can be held 'moderate' that does admit of her coming to a full stop within her share of the distance that separates her from another, after the latter's whistle is audible."

[8] In the present case the steamer heard but a single blast from the schooner's fog horn, although the evidence is that she was sounding it as required. The District Court found the schooner at fault, however, for failing promptly to turn her fog horn toward the approaching steamer.

The schooner Olympia had a proper mechanical fog horn on top of the windlass, secured by two or three turns of a rope. According to the testimony, it is usual to so secure the horn. Upon seeing the headlight of the Sagamore, Dyer, the lookout, took the lashing off and pointed the horn toward her, and blew it continuously until a few seconds before the collision, when he took to the rigging to save his life.

We are aware of no decision or authority which has imposed upon a vessel provided with a proper mechanical horn the duty of unfastening it and of turning it toward an approaching vessel, or which has condemned the practice of lashing it. See The Trave, 68 Fed. 390, 391, 392, 15 C. C. A. 485; The Niagara (D. C.) 77 Fed. 329, 332. Had there been no evidence in the case that the fog horn was unlashed, we doubt if there would have been any charge of fault for a failure to do so. Evidence of this act of special diligence, however, is met by the criticism that the vessel failed in its duty because it was not done sooner. It is found that Dyer, the lookout, did this as soon as he became aware of the presence of the steamer. Personally, therefore, he was not negligent, but diligent.

It was found by the District Court that the first signal from the steamer was heard by Verge, who was stationed aft on the schooner, nearly a minute before Dyer discovered the presence of the steamer by sight of her headlight, and that Verge was plainly negligent in not informing Dyer that he (Verge) had heard a steamer's signal dead to leeward, and that if he had done so, and Dyer had promptly turned the horn in that direction, the Sagamore would have learned of the schooner's presence in time to have avoided the collision.

Dyer, the lookout, testified, however, that he saw the headlight of the steamer after Verge spoke to him, and said he (Verge) heard a horn. We are of the opinion that the basis of fact for this finding of fault is insufficient.

It is apparent that the steamer, during her approach to the point where the courses crossed, must have been well forward of the beam of the Olympia, and that the wind tended to carry the schooner's signals toward her. The first sound heard from the Sagamore was faint, and until it was definitely located it could not be known whether a change of the direction of pointing the horn would be desirable. We do not think the evidence justified a finding, either that it became the duty of the schooner to unlash and turn her horn, or that, had this act of diligence been done earlier, it would have affected the result. While the blasts of a fog horn, as was said by Judge Addison Brown, in The Patria (D. C.) 92 Fed. 411, "unlike those of a steam whistle, are more especially operative along a particular axis, which much diminishes their penetration outside of the limited arc towards which the horn happens to be directed," and while, under some circumstances, this might call for a change of the direction in the pointing of the fog horn, for example, when signals are heard from an overtaking vessel, or to windward, yet, as we have said, we are not satisfied that, under the conditions, the Olympia can justly be found at fault for any delay, or for failure to give such signals as were required of her.

[9] The Sagamore, before sighting the schooner, had received warning of her presence by a single faint blast of a fog horn nearly ahead; but either the steamer's speed was such that she was unable to stop before crossing the schooner's course, or she did not reverse full speed astern as soon as possible.

Webb, second officer of the Sagamore, testified that directly he heard the fog horn he ordered the wheel hard aport and stopped his engines. Capt. Fenton was not then on the bridge, but ran up the stairs from the chartroom door below upon hearing the schooner's horn, and immediately knocked the lever hard astern. The lookout reported "fog horn right ahead," and rang the bell.

A question of fact arises as to the delay in reversing. It is contended that there was a delay of 20 seconds, and that this was fatal.

The fact that Webb, upon the lookout's report, immediately put the wheel hard aport shows that he did not delay in order to locate the schooner, but accepted the location as indicated by that report. There was at least the delay caused by the fact that the master was not on the bridge, but had to ascend the stairs, and there was some conversation between Webb and the master.

Jones, the engineer, estimated by looking at the clock that the time between the order to stop and the order to reverse was 20 seconds. Taylor, the first engineer, says that he got the order to stop, executed it, and then put down the time on the board by the side of the telegraph, which was about two yards from the lever; that he had just done that when the order "full astern" came; that both orders were within the same half minute. Both orders were put down at 2.29.

The testimony shows that the order to stop and to reverse full speed

astern could have been executed simultaneously. As the wheel was put hard aport at the same time with the order to stop, the delay in reversing is not explainable upon the theory that time was necessary to locate the schooner before reversing. But upon this issue, as well as others, as the steamer did not keep clear of the sailing vessel the burden is upon, and the presumption against, the steamer; and we are not satisfied that she has affirmatively shown that the steamer did all that it was possible to do to avoid the schooner. Her speed was such as to cause the navigator to port her helm and stop her engines immediately upon hearing the schooner's horn. The porting of the helm, immediately upon hearing the fog horn, shows that collision was then considered imminent, and tends to show that the general speed at this time was excessive.

[10, 11] The Sagamore is further charged with fault in not having a sufficient deck watch, and especially in not having a lookout, or lookouts, forward on the forecastle head.

The density of the fog and the likelihood of encountering fishing vessels called for the utmost diligence in respect to deck watch and lookout.

The Sagamore's upper bridge is located from 200 to 210 feet aft her stem. It is 40 feet above the water, and 46 feet in length athwartship. Both foremast and mainmast are forward of the bridge. The crow's nest is on the foremast, 70 feet aft the stem, and about 60 feet above the water. The pilot house is just aft the upper bridge, on the same level. The chartroom is on the lower bridge, 8 feet below and immediately underneath the navigating bridge.

When the Olympia's horn was first heard, a lookout, Williamson, was in the crow's nest, Webb, the navigating officer, was on the upper bridge, with Evans, an apprentice, and Capt. Fenton, the master of the Sagamore, stood inside the entrance to the chartroom on the lower bridge. Black, the wheelman, was in the pilot house.

The District Court was of the opinion that the sufficiency of the steamer's lookouts is to be tested, not by how they were posted for seeing, but by how they were posted for hearing; that upon the undisputed evidence the crow's nest was a much better place to hear sound under the conditions prevailing on the night in question; i. e., a moderate sea, a head wind and a quiet forward deck, etc. The court was further of the opinion that a man stationed in the stem could not have seen the schooner until she was so close aboard as to be practically in collision, and that he could not have heard a fog signal as well as Williamson.

We are unable to exonerate the steamer from fault in respect to lookouts. A lookout is both the "eyes and ears of the ship." A lookout at the forecastle head would have been but 25 or 30 feet above the water, and much nearer the schooner. The collision was in June, and there was no severity of weather to justify departure from ordinary practice.

In Eastern Dredging Co. v. Winnisimmet Co., 162 Fed. 860, 861, 89 C. C. A. 550, 551, this court said:

"The Supreme Court has been constantly rigid in holding vessels to maintaining lookouts as far forward and as near the water as possible."

The denser the fog and the worse the weather the greater the cause for vigilance. A ship cannot be heard to say that a lookout was of no use because the weather was so thick that another ship could not be seen until actually in collision. Marsden on Collisions at Sea (6th Ed.) 472, 474.

In Watts v. U. S. (D. C.) 123 Fed. 105, it was held the duty of the ship to maintain lookouts both as far forward and as near the water as possible, and also a lookout aloft.

In the present case, we are of the opinion that while the stationing of a lookout in the crow's nest was a proper precaution, yet this did not justify the withdrawal of the lookout or lookouts from the ordinary station on the bow. Great difficulty in seeing does not justify abandonment of efforts to see, but, on the contrary, requires the stationing of men "to see if they can see." See Watts v. U. S. (D. C.) 123 Fed. 108, Q. 35; "Modern Seamanship," Knight, pp. 252, 306.

It was in evidence that in the presence of ice it was customary for the Sagamore to double her lookouts, but this precaution for her own safety was equally required for the safety of other vessels, especially fishing vessels, in that part of the seas.

The appellant cites the following cases, which support the contention that, according to the ordinary requirements of good seamanship, a steamer should have at least one lookout in the eyes of the ship: The Colorado, 91 U. S. 692, 23 L. Ed. 379; The Oregon, 158 U. S. 186, 193, 15 Sup. Ct. 804, 39 L. Ed. 943; The Ottawa, 3 Wall. 296, 18 L. Ed. 165; The Michigan, 63 Fed. 280, 281, 288, 11 C. C. A. 187; Eastern Dredging Co. v. Winnisimmet Co., 162 Fed. 860, 861, 89 C. C. A. 550; The Tillicum (D. C.) 217 Fed. 976, 978; The George W. Childs (D. C.) 67 Fed. 267, 272; The Cambridge, 2 Lowell, 21, 22, Fed. Cas. No. 2,334; The Orizaba (D. C.) 57 Fed. 247; The Patria (D. C.) 92 Fed. 414, on appeal 107 Fed. 157, 159, 46 C. C. A. 211; The Vedamore (D. C.) 131 Fed. 154, 156, on appeal 137 Fed. 844, 845, 70 C. C. A. 342; The Prinz Oskar (D. C.) 216 Fed. 233. See, also, The Manchioneal, 243 Fed. 801, 805, —— C. C. A. ——.

The steamer had considerably more than seeing distance in which to bring herself to a full stop by reversing after hearing the schooner's horn, and failed to do so. In spite of the fact that instant porting of the wheel may have been the right maneuver, there was too little time to make it effective, and she struck the schooner with such force as to cut deeply into her and sink her within a few minutes. The steamer was bound to keep clear, and the burden rests upon her to show a sufficient reason for her failure to do so. The Nacoochee, 137 U. S. 330–338, 11 Sup. Ct. 122, 34 L. Ed. 687; Lie v. San Francisco & Portland S. S. Co., 243 U. S. page 298, 37 Sup. Ct. 270, 61 L. Ed. 726.

In our opinion she has failed to exonerate herself from fault.

[12, 13] As bearing upon the question of full or half damages, we must consider further the faults charged to the schooner. We have already said that we are unable to agree that she was at fault for failure to give sound signals. She is also charged with failure to ex-

hibit her flare-up light seasonably. Both of these charges are based upon the supposed delay of Verge, who was stationed aft, in failing to report at once the first sound from the Sagamore's whistle. We have already referred to the testimony of Dyer that he heard Verge report a signal before he (Dyer) saw the steamer's headlight, and unlashed the horn. Upon a careful examination of the entire evidence it appears that Verge, who was stationed aft, immediately upon hearing the steamer's whistle, stepped down into the cabin, a few feet away, and reported to Capt. Doggett and Bennett that he heard a steamer's signal to leeward, and turned right around and went on deck again, with Bennett "right at his heels"; that he was in the cabin but five or six seconds; that coming on deck both he and Bennett saw the steamer's headlight; that Verge shouted "all hands on deck" and ran forward to the forecastle companionway and called the men in the forecastle, while Bennett caught the wheel, threw off the becket, and put the wheel hard up, but without effect. Capt. Doggett lighted the torch in the cabin and passed it out to Bennett, who let go the wheel, took the torch from the captain, and went forward on the port side, exhibiting the torch, and was standing at the dories between the fore and main mast, when the Sagamore struck. He then went up the port rigging, still carrying the torch.

The statement in the opinion of the District Court, "Verge went below to look at the clock and see how near out the watch was," gives a color of inattention and negligence which, in our opinion, is not justified by the evidence, which shows a prompt report to the master, and prompt action in signaling by sound and torch.

The District Court found the schooner at fault only in her failure to exercise the greatest vigilance to apprise other vessels of her whereabouts. The Olympia was hove to, under her mainsail, foresail, and forestaysail, or jumbo. Her jumbo was hauled to windward and her wheel was in a becket, which could be quickly thrown off and the wheel released. She was "jogging," as it is termed, and was a vessel close-hauled, within the rules of navigation. The Ada A. Kennedy (D. C.) 33 Fed. 623; The Ontario, 2 Low. 40, Fed. Cas. No. 10,543; The Columbian, 100 Fed. 991, 992, 41 C. C. A. 150. It was her duty to hold her course, which she did until struck; and when the Sagamore was seen she could have done nothing by a change of helm or of sails to avert the collision, which was then imminent and unavoidable by the schooner. In view of the decision of this court in The Columbian, 100 Fed. 991, 41 C. C. A. 150, we need not consider this question further. We are of the opinion that the Sagamore must be held solely at fault.

[14] The objection to the deposition of Stephen Verge requires brief consideration. We are of the opinion, under the unusual circumstances of the case, and especially as the preliminary statement of Verge was apparently considered by the District Judge, that the deposition of Verge as to the facts of the collision should be received. We think also that his testimony as to the facts and circumstances of the collision is not objectionable as cumulative, but is admissible under rule 14, par. 7 (150 Fed. xl, 79 C. C. A. xl) of this court. The facts that we have stated as to Verge's conduct appear, however, principally in the testimony of Bennett.

In No. 1157, the libel in rem, therefore, we are of the opinion that the judgment of the District Court must be reversed, and that the case be remanded to that court for the entry of a decree finding the Sagamore solely at fault for the collision, and for further proceedings consistent with this opinion.

[15, 16] Cases Nos. 1158 and 1159, libels in personam against the White Diamond Steamship Company, owner of the Sagamore, raise the further question whether a state statute of Massachusetts, creating a right of action to recover for death by wrongful act, applies to the deaths resulting from this collision on the high seas between a British steamer and a vessel owned by a Massachusetts corporation.

The libels for loss of life are based upon chapter 171, Rev. Laws of Mass. 1902, as amended by chapter 375, Laws of 1907. The contention is as follows:

"The schooner Olympia, a Massachusetts vessel, while on the high seas, was a part of the territory of Massachusetts. The deceased seamen were on board the schooner when she went down; and therefore, at the time of their death as much on the territory of Massachusetts, and within the protection of the statute, as if actually upon the shore of Massachusetts."

In The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, it was decided that until Congress acts on the subject a state may legislate in regard to the duties and liabilities of its citizens and corporations while on the high seas, and not within the territory of any other sovereign.

While the statute "offers a liability" of Massachusetts owners to those injured, it does not follow that it may impose a liability upon citizens of another state who are without its territorial jurisdiction. Its authority over its own ships and citizens does not extend to the ships and citizens of another nation.

In La Bourgogne, 210 U. S. 95, 115, 116, 28 Sup. Ct. 664, 670 [52 L. Ed. 973] it was said:

"If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein, would properly furnish the rule of decision."

See The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The Belgenland, 114 U. S. 355, 369, 5 Sup. Ct. 860, 29 L. Ed. 152; The Chattahoochee, 173 U. S. 540, 550, 19 Sup. Ct. 491, 43 L. Ed. 801; The Alaska, 130 U. S. 201, 9 Sup. Ct. 461, 32 L. Ed. 923; The Brantford City (D. C.) 29 Fed. 373; Lindstrom v. International Nav. Co. (C. C.) 117 Fed. 170.

We are therefore of the opinion that the Massachusetts statute imposes no obligation upon the owners of the Sagamore to make compensation, or to pay a penalty for causing death; and, as the general maritime law affords no recovery for death thus occurring on the high seas, the libels in 1158 and 1159, so far as they seek damages for death, must be dismissed.

We are of the opinion, however, that so far as they seek recovery for personal effects lost through the disaster the libels may be maintained.

In 1157 the judgment of the District Court is reversed, and the case will be remanded to that court for further proceedings consistent with this opinion; with costs to the appellant.

In 1158 the judgment of the District Court is reversed, and the case will be remanded to that court, with direction to enter an interlocutory decree for the loss of personal property and effects of the libelant's respective intestates, and for further proceedings consistent with this opinion; neither party to recover costs of appeal.

In 1159 the judgment of the District Court is reversed, and the case will be remanded to that court, with direction to enter an interlocutory decree for the loss of personal property and effects of the libelant's intestate, and for further proceedings consistent with this opinion; neither party to recover costs of appeal.

BINGHAM, Circuit Judge (dissenting). It seems to me that the decree of the District Court should be affirmed, and for the reasons there stated.

BENEDICT v. CITY OF NEW YORK.

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

No. 207.

1. COURTS ⊜284—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
   Where a suit involves a real and substantial controversy respecting a federal question, raised in good faith, the jurisdiction of a federal court does not depend on diversity of citizenship, nor on the validity of the claim asserted.

2. MUNICIPAL CORPORATIONS ⊜371—IMPROVEMENTS—SPECIAL FUND—EXPRESS TRUSTS.
   A legislative act, appointing commissioners to make a city improvement and to pay for the same by the issuance of improvement certificates, payable only out of a special fund, to be created by the levy and collection by designated city officers of assessments on the property within the district, created a statutory trust for the benefit of the holders of the certificates, enforceable against all parties charged with its execution.

3. TRUSTS ⊜365(2)—SUIT TO ENFORCE—LIMITATION.
   Where in such case the city treasurer, charged by the statute with the duty of selling the property, the assessments against which remained unpaid after 10 years, sold certain of the property for less than the assessments against it and accrued interest, the result being the cancellation of all liens and leaving insufficient in the fund to pay outstanding certificates, such action was an open repudiation of the trust, which gave holders of certificates an immediate right of action for its breach, and a certificate holder, who, with knowledge of such action, delayed bringing suit until it was barred by limitation under the laws of the state, will not be given equitable relief in a federal court.

4. COURTS ⊜375—FEDERAL COURTS—FOLLOWING STATE STATUTE OF LIMITATIONS.
   In the absence of any statute of limitations enacted by Congress, the federal courts of equity usually follow the state statutes, even in suits which depend upon or arise under the laws of the United States.

5. TRUSTS ⊂=365(2)—STALE DEMANDS.

Where a complainant delayed for 17 years after the open repudiation of a trust before making any persistent effort to enforce it, he will be denied relief in equity on the ground that his demand is stale.

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

Suit in equity by Elias C. Benedict against the City of New York. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 235 Fed. 258.

This cause comes here on appeal from the United States District Court for the Southern District of New York. The complainant is a citizen of the state of Connecticut, and brings his bill against the defendant, a municipal corporation organized under the laws of the state of New York, and having its principal place for conducting its business in the Southern district of that state, being a resident thereof. The bill of complaint is a voluminous one, and covers 49 printed pages. The complainant sues on his own account and on behalf of all others similarly situated.

It appears that defendant is sued as the successor of Long Island City, which became annexed to and consolidated with the city of New York by chapter 466 of the Laws of 1901 of the state of New York. The city of Long Island City, being at the time a municipal corporation of the state of New York, prior to June 11, 1879, issued and delivered to Farwell, Sage & Co., through its treasurer and receiver of taxes, certain certificates amounting in the aggregate to the sum (face value) of $8,000, which certificates were payable with interest at the rate of 7 per cent. The certificates were issued to Farwell, Sage & Co. under a certain contract between that company and the city of Long Island City for the opening up of certain streets in that city. Each and every one of these certificates was assigned to the complainant prior to June 11, 1879, and he at all times since has claimed to be the lawful owner and holder thereof. These certificates, part of a total issue of $1,847,500, have never been paid, although complainant has made demand and taken various steps for their collection.

The certificates were issued under chapter 326 of the Laws of 1874 of the state of New York. The statute in question created an improvement commission, which was authorized to make certain improvements in what was then known as the First ward of Long Island City. For the purpose of paying for the improvements, the commission was authorized to issue certificates. To secure payment of these certificates, assessments were levied on certain properties in Long Island City. The statute provided that if, at the end of 10 years, the assessments were not paid, the properties could be sold by the treasurer and receiver of taxes of Long Island City.

Complainant's proposition is that the members of the commission and their employés, and those who assisted them in the performance of their duties under that legislation, were local officers of Long Island City, and that that municipality, and its successor, the present defendant, is liable for their wrongful acts. And he contends, in particular, that the defendant and its predecessor were guilty of a breach of an express statutory trust.

The trust which complainant relies upon is alleged to have been created by the act of 1874, which established an improvement fund for the payment of the improvement certificates, and which directed that it should be set apart and administered for the benefit of the certificate holders. The method by which the fund was to be provided will appear more fully in the opinion which follows. The breach of the trust which is alleged to have been committed grows out of certain acts of the treasurer of Long Island City, which had the effect of impairing the improvement fund and leaving unpaid a large number of the certificates including those held by the plaintiff. The facts relating to the breach will appear more fully hereafter.

The District Court dismissed the bill, without costs.

Reed & McCook, of New York City, for appellant.
Lamar Hardy, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The first matter to be considered is that which relates to the jurisdiction of the court. In the court below the defendant did not raise the question, and the District Judge made no reference to it in his opinion. But the defendant in his argument in this court has asserted a want of jurisdiction in the court. The claim rests upon that section of the Judicial Code (section 24), which provides that:

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made, etc." U. S. Compiled Statutes (1916) Annotated, § 991.

The argument is that, if no assignment had been made of these certificates by Farwell, Sage & Co., of the city of New York, to whom they were originally issued, no suit could have been brought, as there would not have been the requisite diversity of citizenship. Therefore it is said the complainant, as the assignee of Farwell, Sage & Co., cannot maintain the suit as the subject-matter of the suit is choses in action, and the bill contains no averment that suit could have been maintained by the assignees, if no assignment had been made. And counsel call our attention to the fact that the Supreme Court has held in a series of cases beginning with Turner v. Bank of North America, 4 Dall. 8, 1 L. Ed. 718 (1799), that the presumption is that a cause is without jurisdiction of the court, unless the facts which confer jurisdiction are set forth upon the record.

The complainant's brief, however, contains the following statement:

"The allegations in the bill of complaint, and the decree appealed from, make it clear that a federal constitutional question is raised. That such a question is raised under the pleadings appears from Penn Mutual, etc., Co. v. Austin, 168 U. S. 685, 695, 18 Sup. Ct. 223, 42 L. Ed. 626; Leonard v. City of Shreveport (C. C.) 28 Fed. 257."

It is evident that the complainant bases his right to sue, not upon diversity of citizenship, although he is a citizen of Connecticut and defendant is a citizen of New York, but upon the ground that a federal question is involved. The federal question presented is that complainant claims that he has been deprived of his property without due process of law, and that the obligation of the contract under which the certificates sued upon were issued has been impaired by certain legislation of the state of New York. Where the right claimed is founded, as it is in this case, on a federal question, diversity of citizenship of the parties is immaterial and unnecessary. Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643. The jurisdiction does not turn upon the validity of the claim set up, but upon the fact that there is a real and substantial controversy respecting a federal question. The

claim that the contract has been impaired is made in good faith, and is not frivolous, and the court has jurisdiction. Pacific Electric Ry. Co. v. Los Angeles, 194 U. S. 112, 24 Sup. Ct. 586, 48 L. Ed. 896.

This brings us to inquire as to the real merits of the controversy. The Laws of 1871 of the State of New York, chapter 765, entitled "An act to provide for the laying out of streets, avenues, roads and parks in Long Island City," named certain persons therein designated as commissioners for the purpose of performing the acts and duties prescribed by the statute, including the power to grade, sewer, and pave streets within the district described. The Laws of 1871, chapter 461, tit. 6, § 23, entitled "An act to revise the charter of Long Island City," and in force when the certificates were issued, provided that all sales for taxes in that city should be made for the shortest period for which any person would take the premises and pay the taxes or assessments, interest percentage and expenses.

The Laws of 1874, chapter 326, entitled "An act to provide for improvements in and adjoining the First ward of Long Island City," directed the commissioners to ascertain and certify to the board of assessors the expenses of the grading, sewering, paving, etc., provided for in the act. It required the estimated cost to be assessed upon the several lots within the improvement district, and declared that the assessment should be a lien on the property assessed to the extent of the amount assessed, together with the interest at the rate of 10 per cent. per annum. The interest was to commence to run three months after the filing of the assessment roll, and was to run until the assessment with interest was fully paid. Section 5 of the act provided as follows:

"No warrant shall be issued or required for the collection of any assessments under this act; nor shall any warrant be issued for any sale of lands for nonpayment of such assessments until ten years after the filing of such assessment roll; but all lots, pieces or parcels of land on which any assessment under this act shall remain unpaid on and after the day of the expiration of ten years after the filing of the assessment roll, affecting the section or subdistrict in which the lot is located, shall be advertised and sold for the payment of such unpaid assessment; and such sale or sales shall be made by the receiver of taxes or other officer then charged by law with the duty of selling lands in said city for nonpayment of city taxes and the proceedings for such sale, and such sale shall be the same and on the same notice and like terms; and said lots or parcels of land so sold may be redeemed, and in default of such redemption title thereto shall be given and perfected in the same manner, to the extent and with the same force and effect. * * *"

Section 6 of the act provided as follows:

"* * * The improvement certificates hereinafter provided for shall be receivable at all times at par and accrued interest in payment of any assessment under this act, and of the interest accrued thereon. All moneys received by said treasurer in payment of such assessments or interest shall be placed to the credit of the improvement fund, consisting of the amounts in the hands of the treasurer growing out of payments of said assessments, and interest, and shall be kept separate and apart from any other moneys in his hands, and no part of said fund shall ever be paid out by him, except for the purchase of such improvement certificates as provided in the seventh section of this act, or as is herein otherwise provided. * * *"

Section 9 of the act authorized the commissioners, in order to pay the expenses of the improvements, to issue from time to time, and as required by and under the contracts made by them, certificates of indebtedness, which certificates should be known as the "Improvement Certificates in Long Island City." It provided that such certificates should be paid out at par to contractors for payment falling due to them upon contracts for work or materials furnished. It provided that:

"They [certificates] shall be receivable at all times, at par and accrued interest in payment of any assessments laid under this act and of the accrued interest thereon and shall be payable with interest as aforesaid in the manner hereinabove provided, out of any moneys which shall come into the said treasurer's hands to the credit of said improvement fund."

It also provided that:

"On receiving any of said certificates in payment of assessments or interest, or by purchase, as hereinbefore provided, said treasurer shall cancel such certificate," etc.

Section 11 of the act provided:

"Upon the completion of the sales for the nonpayment of the assessments levied, as hereinabove provided, of the lots and parcels of land in said improvement district, after the expiration of ten years from the filing of the assessment rolls, all the certificates issued by the said commissioners shall be paid off," etc.

The laws of 1879, chapter 501, section 10, provided that at the sale of any lot for nonpayment of assessments it should be the duty of the officer making the sale to receive the improvement certificates in payment of the assessments, and that such certificates when received by him should be permanently canceled.

In 1886 an act was passed governing tax sales in Long Island City, known as chapter 656. This act authorized the city treasurer to sell lands at public auction for nonpayment of taxes or assessments and provided that such sales should be—

"for the lowest term of years for which any purchaser will take the same and pay the aggregate amount due thereon, and if no person shall so offer to purchase such property for a term of years, said treasurer or his representative shall sell such parcel in fee simple, to the highest bidder. * * * Said treasurer shall bid in, in the name of the city for the use of the proper fund or account, all parcels of real estate at such sale, and to be sold for unpaid taxes, assessments, water rates and rents, which shall not be sold to any other person." Section 4.

The act also provided, if real estate so sold was not redeemed as provided for in the act, the treasurer should execute to the purchaser a lease, or, if sold in fee, a conveyance, which conveyance should vest in the grantee an absolute estate in fee, and that the lien or liens for which the same had been sold should thereupon be canceled.

The improvements made under the act of 1874 were considerable and expensive, and converted what was a vast meadow or swamp of practically no value into a valuable property. Streets were laid out, graded, and sewered. A large proportion of these streets were curbed, guttered, flagged, and paved. The contractors who did the work were paid

in improvement certificates, which they took at par. These certificates were payable only out of an improvement fund, which we have seen the law required to be raised by assessments levied upon the property benefited, and which constituted a lien upon each lot to the amount of its assessment, with a penalty charged for delayed payments.

The law under which the certificates were issued provided for a sale of the lots assessed in case of the nonpayment of the assessments levied, and as a large portion of the assessments remained unpaid it became necessary for the treasurer of Long Island City to advertise the lots for sale. The first sale occurred in December, 1888. At that sale the amount bid for each lot was equal to or in excess of the amount of the assessment. But in 1892 and 1893 subsequent sales were made, and lots were sold for much less than that for which they were assessed. In some instances sales were made for only 5 per cent. of the assessment, and the average price at which the lots were sold was 40 per cent. of the amount of the assessment. The result, in short, was that the improvement fund which the act of 1874 provided for, and out of which the certificates alone were payable, was not produced in the amount originally contemplated, and after all the lands assessed had been sold there were certificates having a face value of $300,000 which were left unpaid, and with no fund out of which payment could be made as originally provided. It appears that the plaintiff acquired a number of these unpaid certificates. They came into his possession as a member of the banking house of Benedict, Flower & Co. He was the senior member of that house, and Mr. Flower, who was associated with him, afterwards became Governor of the state of New York. This house advanced to the contractors, Farwell, Sage & Co., the money which was used in making the improvements, and for the moneys so advanced Benedict, Flower & Co. received payment in certificates issued to the contractors by the authorities of Long Island City. The certificates sued upon, as has been heretofore mentioned, aggregate the sum (face value) of $8,000, and were received by the plaintiff as a part of his share in the assets of the firm of Benedict, Flower & Co., and on its dissolution in 1875 he has been the owner and holder of them ever since.

The plaintiff does not claim that any primary obligation to pay the certificates existed on the part of Long Island City; and this suit is not brought to enforce any such liability. He does not claim that the certificates were in the nature of promissory notes for the payment of money, given by Long Island City as promisor. The plaintiff claims:

(1) That the commissioners appointed under the act of 1874 for the purpose of making certain improvements in Long Island City, to pay for which the certificates were issued were the agents and representatives of the city, for whose acts the city was liable.

This the defendant denies, and asserts that the commissioners were independent public officers, and not servants or agents of the municipality. This question, for reasons hereinafter appearing, the court does not find it necessary to determine.

The plaintiff also claims:

(2) That the treasurer and receiver of taxes of Long Island City was a local officer and agent of the city in the performance of the acts performed by him in and about the conduct of the assessment sales herein mentioned, and that for his acts the city was in like manner liable.

This the defendant likewise denies. This question, for reasons hereinafter appearing, the court also finds is unnecessary to pass upon.

The plaintiff also claims:

(3) That the treasurer, and therefore Long Island City, was in fault because lots assessed for the improvements made were sold for less than the assessments and accrued interest, and for not preserving the lien of the assessments intact.

This the defendant likewise denies, and calls attention to the decision of the Court of Appeals of New York in Nelson v. Bleckwenn, 137 N. Y. 565, 33 N. E. 338, which affirmed without opinion the judgment of the General Term for the Second Department, reversing the action of the court below in issuing an injunction against the treasurer of Long Island City, which restrained him from selling any of the lots for less than the face value of the assessment and from receiving in payment improvement certificates instead of cash. The General Term expressly held that the treasurer might accept bids for less than the amount of the assessment and still accept the certificates in payment. This the court thought allowable under the acts of 1879 and 1886. The question as to whether these acts violated the Constitution of the United States was not discussed and does not appear to have been considered.

The plaintiff contended on the argument before us that the acts violate the federal Constitution, in that the construction placed upon them by the New York courts deprives him of property rights vested in him by virtue of the act of 1874 as the only way in which the liens of the assessments could be made secure and paid was by a sale of lots for the full amount of the assessments. Upon that question it may well be that this court is not concluded by the decisions of the state courts. But in the view we take of this case, and for reasons which will be stated in a subsequent part of this opinion, we are not called upon to determine whether the statutes referred to are void as to this plaintiff, as depriving him of his property without due process of law, or as impairing the obligation of the contract contrary to the provisions of the Constitution of the United States.

[2] The plaintiff also claims:

(4) That the act of 1874 created a statutory or express trust, in that it provided for an improvement fund out of which the certificates were to be paid; the act imposing no liability to pay the certificates except out of that fund.

We have seen that section 6 of that act, heretofore set forth, required that all moneys received by the treasurer of Long Island City in payment of the assessments or interest should be placed to the credit of the improvement fund, which was to consist of the amounts in the hands of the treasurer growing out of payments of the assessments and interest. This fund the statute required to be kept separate and apart from

other moneys in his hands, and no part of the fund could be used, except for payment of the certificates. The right of the certificate holders was therefore a right to have the fund properly collected and administered. The making of the assessments, the collection of the assessments, and the maintenance and disbursement of the fund were duties specifically imposed upon the commissioners, assessors and treasurer of Long Island City. We are not disposed to question that this created a statutory trust for the benefit of the certificate holders. The statute provided for the creation of a certain fund previously ascertained in amount to be raised by assessments upon certain property, and that the fund so established should be kept distinct and apart from any other moneys or funds, and should be applied to the sole purpose of the redemption of the certificates. There is thus provided a certain person (the treasurer of Long Island City) in whom is to be vested the legal title to a distinct and separate fund or res which is to be held for the beneficial use of certain persons (the certificate holders). There is a definite subject and an ascertained object; and, where a specific property is directed to be collected and set apart and applied to a specific purpose, equity raises by implication an express trust to effectuate the intended object. The courts have decided so often as to make unnecessary the citation of authorities that one who receives money to be paid to another, or to be applied to a particular purpose, is a trustee, and if he does not apply it he may be sued in equity for a breach of trust.

The complainant insists that, while the city treasurer was made the recipient of the fund and charged with its collection and disbursement, he took it as an officer of Long Island City, or as its agent, and that the trust was imposed upon the city in its corporate capacity. The certificates which were issued were in form as follows:

"Improvement Certificate.[1] $———.

"No. ———. State of New York, Long Island City.

"January 6, 187—.

"This is to certify that Farwell, Sage & Co., or bearer, is entitled to ——— dollars, with interest thereon at the rate of 7 per cent. per annum, from the date hereof, payable out of the improvement fund in Long Island City, established under chapter 326 of the Laws of New York, passed May 5, 1874, entitled 'An act to provide for improvements in and adjoining the First ward of Long Island City,' this certificate being issued under the provisions of said act, and the said amount and interest being payable as provided therein.

"$———. P. G. Van Alst,

"Wm. Bridge,

"H. S. Anable, Commissioners.

"Countersigned: John R. Morris, Treasurer of Long Island City.

"$———. $———."

[1] The following is a copy of the back of the certificate.

"This certificate is one of the improvement certificates in Long Island City issued under the provisions of the act within mentioned. It draws interest at the rate of 7 per cent. per annum and is receivable at par and accrued interest at any time in payment of any assessment laid under said act and of the accrued interest on such assessment. Allen & Chard."

The names signed were those of attorneys.

It will be observed that the certificate contains no promise to pay, except out of an improvement fund, and that it is not issued by Long Island City, although it is countersigned by the city treasurer. And it seems to be a matter of common knowledge that Long Island City, at the time the act of 1874 was passed, was in an unfortunate financial condition. It has been described as being at that time "an impoverished, taxridden community." And it is quite easy to understand that the Legislature intended to take the subject of these improvements out of the hands of the usual representatives of the city and lodge it in independent commissioners.

The defendant, in strenuously denying that any trust was imposed upon the city, gives as its reasons the following allegations of what it conceives to be the facts: That Long Island City, as such, was not authorized to issue the certificates involved, or to make the improvements for the payment of which the certificates were issued, or to levy the assessments, but that power was lodged in independent officers; that the city, as such, was not authorized to collect any of the assessments after they were levied, or to foreclose the liens of the assessments by selling the properties, but that power was vested in an independent officer, the city treasurer. And defendant insists that no obligation was imposed in terms upon the city either to create or to maintain the redemption fund; and it insists, further, that Long Island City could not have been a trustee, as under the terms of the statute it was not invested with title to the assessments and to the moneys which were received from the sale of the properties. The conclusion it deduces from the facts assumed is that no express trust, and no duty in the nature of a trust, and no power in trust, was imposed upon the city for the benefit of the certificate holders.

But, as we stated in an earlier part of this opinion that it was not necessary to determine whether certain officers were mere agents of the city or not, so, for reasons about to be stated, it is not necessary now to say whether the trust which we think came into existence in connection with the issuance of the certificates was one imposed upon the city in its corporate capacity, or simply upon the official whose duty it was to collect and disburse the fund.

[3] The plaintiff also claims:

(5) That in the sale of the lands for less than the amount of the assessments, with interest, and in receiving in payment therefor certificates, instead of the currency of the country, and in canceling the assessments before payment in money had been made in full a gross breach of the trust was committed, by reason of which the fund provided to be raised for the payment of the certificates under the terms of the act of 1874 was never raised. He therefore asks that the trust be recognized and enforced, and that an accounting be had of the amounts that would have been received by Long Island City and its treasurer from the sale of the lands, if the same had been sold for the full amount of the assessments, with interest, as required by the law as it stood when the certificates were issued, and that the amount due upon the certificates owned by him be ascertained and be decreed to be paid to him.

Admitting that a trust was imposed, and conceding for the purposes of the argument that the acts complained of amounted to a breach of the trust there is no escape from the conclusion that they constituted an open, definite, and final repudiation of the trust. For the result of the course taken was to make it impossible that a redemption fund should be obtained out of which payment of plaintiff's certificates could be made.

It is also apparent that this open and final repudiation of the trust was known to the plaintiff's agent in 1892. That agent testified that he had entire charge of all the plaintiff's interests in Long Island City at that time, and that he was present at the sales made in 1892, and protested verbally and in writing against the course the treasurer pursued and the specific acts now complained of, and that he was then told by that official that he should do exactly what was done. This repudiation of the trust then and there made to the agent thereby became the knowledge of the principal, the plaintiff herein; for the knowledge of the agent is the knowledge of the principal, so that the plaintiff knew of the conduct complained of 17 years before the present suit was commenced. This, in our opinion, is the crucial fact in this case. This it is which makes it impossible for him to maintain this suit at this late day. This it is which makes it immaterial whether the trust was imposed upon the city or upon the city treasurer in his individual capacity; and this it is which made it unnecessary to consider whether the various persons engaged in these transactions acted as agents of the city or as independent officers.

Statutes of limitation do not run against express trusts until openly repudiated, to the knowledge of the cestui. They do, however, begin to run at that time. Such is recognized to be the law in the courts of New York (Zebley v. Farmers' Loan & Trust Co., 139 N. Y. 461, 34 N. E. 1067), and in the courts of the United States (New Orleans v. Warner, 175 U. S. 120, 130, 20 Sup. Ct. 44, 44 L. Ed. 96). The principle is recognized generally throughout this country, as well as in England.

[4] In the absence of any statute of limitations enacted by Congress, the federal courts of equity usually follow the state statutes; and they do this even in actions which depend upon or arise under the laws of the United States. O'Sullivan v. Felix, 233 U. S. 318, 322, 34 Sup. Ct. 596, 58 L. Ed. 980. The complainant is here asserting an equitable right, and it is true that as a general rule the equity jurisdiction of the United States is not affected by state laws. That principle cannot be invoked however to deprive a federal equity court of the power to refuse relief to a suitor whose right is barred by a state statute of limitations. Such statutes are not binding upon federal courts in suits in equity, yet those courts may and generally do apply the statutes upon principles of analogy; and such statutes have been applied by these courts to claims against trustees. The Supreme Court said in Wagner v. Baird, 7 How. 233, 257, 12 L. Ed. 681 (1849), that:

"In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases;

and this rather in obedience to the statutes, than by analogy. In many other cases they act upon the analogy of the limitations at law."

Authorities to support the above statement are numerous and decisive. Godden v. Kimmell, 99 U. S. 201, 210, 25 L. Ed. 431. We think the action is barred under the New York statute; if not under the 6-year statute (Code of Civil Procedure, § 382), then under the 10-year statute (Code of Civil Procedure, § 388).

The treasurer's duty to collect the assessments by making sales of the property assessed was a duty which he was bound to perform under the act of 1874 after the expiration of 10 years from the filing of the assessment rolls. If he failed to perform it, or performed it improperly, a cause of action then accrued. In the case at bar the cause of action arose at the time the treasurer repudiated the obligation to create and maintain the improvement fund. After the sales of the assessed properties in 1892 and 1893, there was no property of any kind in the hands of the treasurer out of which payment of these certificates could be made, and no property out of which the redemption fund could be created.

[5] But if no statute of limitations existed, either state or national, there would still be a reason why this suit would fail. It is a general principle of equity that stale claims ought not to be encouraged. In Sullivan v. Portland & Co., 94 U. S. 806, 811, 24 L. Ed. 324, Mr. Justice Swayne, speaking for the Supreme Court, said:

"To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief. 'Every case is governed chiefly by its own circumstances. Sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

In the instant case the plaintiff's acquiescence appears to have been absolute from 1892 to 1905, with the exception that he commenced a suit in June, 1893, to restrain the treasurer of Long Island City (a) from receiving certificates from property owners, when redeeming their properties from the assessment sales; and (b) from marking upon the books, as paid, any assessment where the property was sold for less than the amount of the asssessment. He apparently never did anything more with the 1893 suit than to begin it. After 1905 there were negotiations with the city, not upon a claim of right, but of grace. Under the circumstances, the plaintiff has not acted with reasonable diligence. And it is a fundamental principle that nothing will call forth the aid of equity but conscience, good faith, and reasonable diligence. If during this period there had been persistent and immediate litigation, which had failed because of some misapprehension as to the remedy available, and upon the failure this suit had been commenced, there would have been some ground for the claim that the laches at least were excusable. As it is, there is none.

For the reasons stated, it is the judgment of this court that the bill was properly dismissed.

Decree affirmed.

HOUGH, Circuit Judge, concurs, on the ground that plaintiff's claim is stale.

UNITED STATES v. PORTER FUEL CO. et al.

SAME v. PORTER FUEL CO.

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

Nos. 4713, 4714.

1. APPEAL AND ERROR ⟸854(2)—REVIEW—MATTERS REVIEWABLE.
A decree of the trial court will not be reversed, if a wrong reason for the decree is assigned by the court in delivering its oral opinion, for the reason might be wrong and the decree right.

2. PUBLIC LANDS ⟸120—MINERAL LAND—VACATION OF PATENTS.
Timber and Stone Act June 3, 1878, c. 151, 20 Stat. 89, declares in section 1 (Comp. St. 1916, § 4671), that nothing shall defeat or impair any bona fide claim under any law of the United States or authorize the sale of any mining claim or the improvements of any bona fide settler, or lands containing gold, silver, etc., or coal; in section 2 (section 4672) that any person desiring to avail himself of the provisions of the act shall file with the register a written statement setting forth, among other facts, that the land does not, as the applicant verily believes, contain any valuable deposit of mineral or of coal; and in section 3 (section 4673) that the applicant shall present satisfactory evidence to the land office that the land apparently contains no valuable deposits of coal. Act June 6, 1900, c. 791, 31 Stat. 614, relating to forest lieu selections, provides that the lands to be selected shall be confined to vacant surveyed and nonmineral lands which are subject to homestead entry. The Homestead Law (Rev. St. § 2302 [Comp. St. 1916, § 4591]) declares that mineral lands shall not be liable to entry and settlement. *Held*, that patents to land issued under the two acts cannot be set aside, where at the time the patents were issued the land was not known to contain valuable minerals, but, to warrant vacation of the patents, it must appear that the known conditions at the time were plainly such as to engender the belief that the land contained mineral deposits of sufficient quality and quantity to render their extraction profitable.

3. APPEAL AND ERROR ⟸934(1)—REVIEW—DECREE—PRESUMPTIONS.
As the trial court heard the evidence, it will be presumed on appeal that the decree below was right, unless it appears that there has been an obvious error in the application of the law, or some serious mistake in consideration of the evidence.

4. PUBLIC LANDS ⟸114(6), 120—PATENTS—PRESUMPTION AS TO VALIDITY—VACATION.
The execution of a patent itself raises a presumption that all preceding steps required by law were duly observed, and in a suit to vacate a patent on the ground that fraud was practiced on the Land Department, the government has the burden of proof, and must sustain it by evidence which commands respect and produces conviction.

5. PUBLIC LANDS ⟸120—PATENTS—VACATIONS—EVIDENCE.
In a suit to set aside a patent to public lands, on the ground that the lands were coal lands and known as such at the time of the execution of

the patent, evidence *held* insufficient to sustain the government's contention.

Stone, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Colorado; Jacob Trieber, Judge.

Suit by the United States of America against the Porter Fuel Company, consolidated with a suit by the same plaintiff against the Porter Fuel Company and another. From decrees for defendants, the United States appeals. Affirmed.

Eugene B. Lacy, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., and Frank Hall, Sp. Asst. to Atty. Gen., on the brief), for the United States.

C. C. Dorsey, of Denver, Colo. (N. H. Loomis, of Omaha, Neb., on the brief), for appellees.

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

CARLAND, Circuit Judge. These are actions commenced by the United States, hereafter called plaintiffs, against the Porter Fuel Company and the Continental Trust Company, hereafter called defendants, for the purpose of vacating and setting aside for fraud certain patents issued for lands located in the state of Colorado. By stipulation the actions were consolidated for trial, and they have been argued and submitted here on one record. The trial court dismissed both actions for want of equity.

The Porter Fuel Company holds the legal title to the lands in controversy, having purchased the same from the original entry people. The Continental Trust Company is the trustee under a deed of trust given by the Fuel Company to secure the payment of its bonds and covering said lands. The defendants denied the allegations of fraud, and also pleaded that they were bona fide purchasers of the land for value without notice of the alleged fraud. The trial court did not reach the question of bona fide purchaser, as it decided there was not sufficient evidence to sustain the charge of fraud. The trial court made no special findings of fact, and no general finding of fact, except as such a finding must be inferred from the decree dismissing plaintiffs' complaint. The court, however, delivered an oral opinion at the close of the evidence stating generally the reason for its judgment. There are 19 assignments of error in one case and 8 in the other, but all taken together only amount to an assignment that the trial court erred in dismissing the complaint of the plaintiffs.

[1] When counsel for plaintiffs come to demonstrate why the court erred in dismissing the complaint they present their argument under two headings as follows: (1) The District Court erred in its ruling in respect to the burden of proof. (2) The District Court erred in holding that the government was required to show that the land in suit contained a workable vein of coal. These headings are practically new assignments of error, and are based upon what the trial court said in delivering its oral opinion. The opinion of the court was not the sub-

ject of exception or assignment of error. The reasons given in the opinion for the judgment of the court might be wrong, and still its judgment right. It is what the court did, and not what it said, which is subject to exception and review. We, therefore, in the present case, are concerned only with the question as to whether the trial court erred in dismissing plaintiffs' bill of complaint, and not with its reasons for so doing, except as those reasons may throw light upon the question to be decided.

The question presented for decision is one of fact, and in considering the same it will be helpful to ascertain just what the issues were before the trial court. The record shows that fourteen of the patents in suit were issued under the act of Congress approved June 3, 1878 (20 Stat. 89), as amended by the act of August 4, 1892 (27 Stat. 348), commonly called the "Timber and Stone Act." The other three patents were issued under the act of June 4, 1897 (30 Stat. 36), as amended by the act of June 6, 1900 (31 Stat. 614), which relate to forest lieu selections.

[2] The fraud charged in the complaint with reference to the patents issued under the Timber and Stone Act is that the entry people were mere "dummies" representing the Porter Fuel Company, for whose benefit they made the entries pursuant to prior existing agreements prohibited by law, to which they subsequently conveyed the lands, and by which all of the costs involved, including the government price, were paid, and that the affidavits of the respective entry people to the contrary were false; that the lands covered by each of said entries were at the respective dates thereof known coal lands, enterable only under the Coal Land Act, and not under the Timber and Stone Act, and so known to each of the entry people; and that the affidavits of each of the entry people to the contrary were false. The fraud charged with reference to the patents issued for forest lieu selections is that the lands covered by said patents were at the several dates of the respective selections known as coal lands enterable only under the Coal Land Act, and not enterable as forest lieu selections, and that they were at the time known to be such by the respective selectors and entry people, whose affidavits to the contrary were alleged to be false.

Section 1 of the act of June 3, 1878 (20 Stat. 89 [Comp. St. 1916, § 4671]), contains this proviso:

> "That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal."

Section 2 of the same act (section 4672) provides that any person desiring to avail himself of the provisions of the act shall "file with the register of the proper district a written statement in duplicate * * * designating by legal subdivisions the particular tract of land he desires to purchase," setting forth, among other facts, that the land does not, as the applicant "verily believes," contain "any valuable deposit of * * * or coal." Section 3 (section 4673) provides for the final proof upon which the entry is allowed. This section provides that the appli-

cant shall present satisfactory evidence to the land office, that the land "apparently contains no valuable deposits of * * * or coal."

The act approved June 6, 1900 (31 Stat. 614), relating to forest lieu selections, provides that the lands to be selected under said act "shall be confined to vacant surveyed nonmineral public lands which are subject to homestead entry." The homestead law itself contains the following provision (R. S. § 2302 [Comp. St. 1916, § 4591]): "Nor shall any mineral lands be liable to entry and settlement under its provisions." In Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936, the Supreme Court, in speaking of the annulment of homestead patents as wrongly covering mineral land, said:

"To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent 'the land was known to be valuable for mineral;' that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land officers. If the proofs were not false then, they cannot be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions. We say 'land *known* at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. * * * We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands, afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued. Deffeback v. Hawke, 115 U. S. 392, 404 [6 Sup. Ct. 95, 29 L. Ed. 423]; Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 328 [8 Sup. Ct. 131, 31 L. Ed. 182]; United States v. Iron Silver Mining Co., 128 U. S. 673, 683 [9 Sup. Ct. 195, 32 L. Ed. 571]; Davis v. Weibbold, 139 U. S. 507, 519 [11 Sup. Ct. 628, 35 L. Ed. 238]; Dower v. Richards, 151 U. S. 658, 663 [14 Sup. Ct. 452, 38 L. Ed. 305]; Shaw v. Kellogg, 170 U. S. 312, 332 [18 Sup. Ct. 632, 42 L. Ed. 1050]; United States v. Plowman, 216 U. S. 372, 374 [30 Sup. Ct. 299, 54 L. Ed. 523]."

[3] The question of fact presented by the record is, therefore, on this branch of the case, whether the entry people or any of them at the time the proceedings were pending, which resulted in the final entry of the land, knew or had good reason to know that the lands in controversy were apparently valuable as coal lands. The theory of the plaintiffs seems to be, not that at the time of the respective entries there existed upon the lands in question, or any of them, a valuable deposit of coal which was disclosed to the eye and therefore apparent, but that as a matter of geological theory the whole region was underlaid with

a geological stratum technically designated as the "Mesa Verde formation," which or a portion thereof passed under these entries, and therefore each of the entry people committed perjury in the land office and obtained a conveyance of these lands by swearing that their respective entries apparently contained no valuable deposit of coal.

The trial court heard all the evidence in open court, and the case comes here attended by the presumption that the decree below is right, unless it shall appear that there has been obvious error in the application of the law or some serious mistake in the consideration of the evidence. Thallman v. Thomas (C. C. A., 8th Cir.) 111 Fed. 277, 283, 49 C. C. A. 317; Mastin v. Noble (C. C. A., 8th Cir.) 157 Fed. 506, 508, 85 C. C. A. 98; De Laval Separator Co. v. Iowa Dairy Separator Co. (C. C. A., 8th Cir.) 194 Fed. 423, 425, 114 C. C. A. 385; United States v. Marshall (C. C. A., 8th Cir.) 210 Fed. 595, 597, 127 C. C. A. 231; Roberts v. Roberts (C. C. A., 8th Cir.) 223 Fed. 775, 138 C. C. A. 102.

[4] The only complaint made by counsel for the plaintiffs in their arguments as to any error of law or fact committed by the trial court is, as has been stated, first, that the court in its oral opinion erred in stating the law as to the burden of proof; second, that the court erred in stating in its oral opinion that the government was required to show that the lands in suit contained a workable vein of coal. The trial court was not charging a jury, and whether or not it erred in dismissing plaintiffs' complaint can only be determined by an examination of the evidence in the record and not by an examination of the court's oral opinion.

We have spent much time in carefully considering the evidence, which is necessarily voluminous, and have arrived at the conclusion that, even if the trial court in its oral opinion placed too great a burden of proof upon the United States in the respects mentioned, there is nothing to show that such error was translated into the decree which was rendered. We understand the true rule regarding the burden of proof in cases brought to set aside land patents to be as follows:

"The respect due to a patent, the presumption that all the preceding steps required by law were duly observed, and the obvious necessity for stability in titles resting upon these official instruments, require that in suits to annul them the government shall bear the burden of proof, and shall sustain it by that class of evidence which commands respect, and that amount of it which produces conviction. Maxwell Land Grant Case, 121 U. S. 325, 379–381, 30 L. Ed. 949, 958, 959, 7 Sup. Ct. 1015; United States v. Iron Silver Min. Co., 128 U. S. 673, 676, 32 L. Ed. 571, 572, 9 Sup. Ct. 195; United States v. Stinson, 197 U. S. 200, 204, 205, 49 L. Ed. 724, 725, 25 Sup. Ct. 426; United States v. Clark, 200 U. S. 601, 608, 50 L. Ed. 613, 616, 26 Sup. Ct. 340." Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936; United States v. D. C. Beaman & Colorado Realty Holding Co., 242 Fed. 876, — C. C. A. — (8th Cir.).

The investigation that we have made of the evidence contained in the record has satisfied us that no such conspiracy between the Porter Fuel Company and the several entry people was entered into as alleged in the complaint.

[5] The only other question in the case is as to whether the lands in question or lands immediately adjacent to the same contained such

evidence of a coal deposit as to make it apparent to the entry people, at the time the several entries were made, that the lands in question were valuable for coal to such an extent as to be denominated within the meaning of the law as coal lands. The evidence does not show that the land itself gave evidence of containing valuable deposits of coal. The record shows, however, that the sedimentary deposits in the region where the lands in controversy are located are cretaceous rocks; that they embrace the Dakota sandstones, the Mancos shales, the Mesa Verde formation, the Lewis shales, and the Laramie sandstones. The Mesa Verde formation is from 700 to 1,000 feet in thickness. This is the formation in which coal is found in the region where the lands are located, and it is claimed that this formation extends under said lands; but the evidence also shows that this formation does not always contain coal. It must be borne in mind in considering the evidence that the question is not whether valuable deposits of coal are now known to underlie these lands, but whether at the time the lands were entered the entry people knew, or ought to have known by such evidence as appeared upon the surface of the country where the lands lie, that the lands apparently contained valuable coal deposits. The entries were all made between March 23, 1901, and July 24, 1906, both inclusive. One of the suits was commenced in 1908; the other in 1912. The cases were tried in 1915.

It would be impossible in an opinion to review all the evidence in the record, and, if all the evidence were not reviewed, it would serve no useful purpose to refer to a portion of the same. We have carefully considered the evidence, and our conclusion is that the evidence is not convincing that, at the time the several entry people made their entries, they knew or had good reason to know that the lands in question apparently contained valuable coal deposits, and that with such knowledge they deliberately and intentionally swore to the contrary. When the question of fraud is eliminated from the controversy, then the finding of the land officers of the government that the lands were not coal lands is conclusive upon the question.

It results that the decree below must be affirmed; and it is so ordered. The cross-appeals, Nos. 4720 and 4721, are dismissed.

STONE, Circuit Judge (concurring in part, dissenting in part). A painstaking examination and consideration of the entire record and all of the evidence compels me to differ in some respects with the result reached by the majority of the court.

The evidence is very convincing to me that all except one of these entrymen (William Johnson) had at the time of the entry or selection of the tract patented by him or her but one feature of the land, its coal value, in mind. Nor is there any doubt in my mind that they were correct in their estimation of the character of the land. In judging the knowledge of these entrymen, I do not at all consider the expert testimony of those witnesses who testified as to the geological formations of the district. It is hardly to be supposed that those who made the entries had any such information, though it is very probable that the officials of the Porter Fuel Company did. But consideration should be

given to those facts which would be evident to the layman and to such matters of common neighborhood knowledge as to which one living in the community could not well be ignorant. These lands were rough, rugged, and mountainous—seamed with cañons which in many places cut through and exposed the coal veins. There were numerous croppings or blossoms of this exposed coal occurring on or near practically every one of these tracts. Several mines were being operated in the immediate vicinity. Other openings into coal had been made in various places by prospectors and residents, who used the coal for household purposes. The Porter Fuel Company was operating two mines five miles apart. Ten of these tracts lie in a body touching the larger of these mines in the direction of the vein being worked on at the time. Two of the tracts were about three-fourths of a mile south of the other mine, while four were on a direct line about half way between the two mines. The remaining tract (Johnson) had at the time of entry, on or very near its southern boundary, an exposure of coal.

Fourteen of these tracts were entered as timber and stone land; the other 3 being forest lieu selections. Only one tract (Johnson) ever had on it sufficient timber to pay the government price of the land. The only stone having any value was a sandstone which underlaid the entire country for miles, and for which there was then and has since been no market or prospect of market which could induce any one to enter the land for that purpose. I do not believe that these people, some of small means would buy this land from the government for its timber and stone value, when they must have seen and known there was little or no value of that character. While all of the tracts were not so extreme, yet some light may be thrown by noting the entries of A. C. Bagby and Nettie V. Coppinger. The Bagby entry of 160 acres actually had only 14 pine trees, which scaled 3,700 feet of lumber, and pinon trees which would cut about 57 cords of wood; yet he swore before the land office receiver in making proof that he estimated the timber at 250,000 to 300,000 feet, worth $250 to $300, and he paid the government therefor $400. Mrs. Coppinger's tract had no pine trees, but pinons which would cut 5 cords of wood and 5 feet of mine prop, and scrub oak which would cut 2,500 sprag (a small mine timber); the stone was the same as on the A. C. Bagby tract. In her examination before the register she described the land as "just a mass of rocks and hillsides," and guessed the timber worth $500 to $600. She paid $400 for the tract.

My conclusion is that all of these entries were fraudulent, except that of William Johnson.

The Porter Fuel Company claims to be a bona fide purchaser and untainted by this fraud. I am convinced that it acted with these entrymen, if in fact it did not procure the entries. At the time of making these entries twelve of the remaining sixteen tracts (now omitting the Johnson tract above disposed of) were entered or selected by persons employed by the Fuel Company, having business relations with it, or closely related or employed by such, or by persons directly solicited to do so by John A. Porter, president of the Fuel Company. Excluding the Sandford entries, which by his own admission in the evidence had been

directly procured by John A. Porter, of the remaining fourteen entries eight were pointed out by William R. Mason, who was then foreman of the Fuel Company and in charge of its lands. Ten of these entries were in a block adjoining the principal mine of the Fuel Company, which was then operating upon a profitable vein of coal in the direction of these tracts and only about a fourth of a mile away from the nearest of them. Both prior to and at that time that company was unlawfully endeavoring to acquire surrounding government lands. Jethro Sandford, who acted as attorney in fact in two of the forest lieu entries here involved, at the solicitation of and as the agent of Porter, testified:

"I laid about 900 acres of scrip on lands in the vicinity of the lands in suit prior to 1906, for John A. Porter, the title of which lands afterwards went to the Porter Fuel Company."

None of these entrymen ever made any use of his tract, except in one instance to utilize some fence posts to build a fence for the Porter Fuel Company. In most instances the transfer to the company closely followed the issue of the patent by a day or two, and in several seems to have taken place even before that time.

No attempt has been made to sum up the entire evidence, with its innumerable details and circumstances pointing, in my opinion, to a deliberate plan of the Fuel Company to unlawfully acquire these government lands, but the above are cited as indications of the general trend of the evidence. I am therefore convinced that the entries were fraudulent and that the fraud was actively participated in by the Porter Fuel Company.

The Union Pacific Coal Company has brought its cross-appeal, claiming that it was at the time of suit herein a bona fide purchaser of these lands. This claim is based upon no purchase from the Porter Fuel Company of the lands in question, but upon a purchase of all of the capital stock of the Porter Fuel Company. Its theory is that the court should look through the Porter Fuel Company corporate entity to the stockholders and regard the property of that company as being held in trust for them, and, since their personnel has completely changed, should declare the holding innocent. The entire title to these lands, legal and equitable, is in the corporation as a legal entity. The rights of shareholders, generally speaking, and within certain bounds, are a proper conduct of corporate affairs by their officials, protection of the corporate property, and sharing in dividends, and, if the corporation be dissolved, in the surplus assets after payment of all debts. No trust relation, in the sense and for the purpose here urged, is sustainable. A change in personnel of part or all of the shareholders cannot alter or affect the title of the corporation to corporate property.

The Continental Trust Company has also a cross-appeal. It claims, as to four of the tracts, application of the statute of limitations governing suits to avoid land patents for fraud. It also claims as to all of them that it is a bona fide purchaser, being trustee in a deed of trust given by the Porter Fuel Company upon all of its property to secure $250,000 in bonds, of which $100,000 have been issued and are outstanding.

As to the claim for limitation: This applies to the Annetta Herr, William Johnson, George W. Shields, and Emily Mason tracts. As the Johnson tract has already been disposed of by the finding that it was not fraudulent, only the other three will be considered in respect to this point. The Statute (Act March 3, 1891, c. 561, § 8, 26 Stat. 1095, 1099 [Comp. St. 1916, § 5114]), provides that:

"Suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The latest of the above patents was issued January 19, 1905. The complaint to annul these patents was filed January 21, 1908, but did not include the Trust Company as a party until it was made so by amendment April 18, 1911, and subpœna issued and served the following day. Clearly the statute had run as to it covering these tracts. The Trust Company is an indispensable party to this litigation. Minn. v. Nor. Sec. Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; Cal. v. S. P. Co., 157 U. S. 229, 248, 15 Sup. Ct. 191, 39 L. Ed. 683; Shields v. Barrow, 17 How. 130, 139, 15 L. Ed. 158; United States v. W. & St. P. R. R. Co., 67 Fed. 950, 15 C. C. A. 96; Chadbaurne v. Coe, 51 Fed. 479, 2 C. C. A. 327; Allen-West Co. v. Brashear (C. C.) 176 Fed. 119. Therefore the complaint must fail as to these four tracts.

As to the remaining twelve tracts there remains the contention of the Trust Company that it is an innocent purchaser. The deed of trust was executed August 1, 1905. By it the Porter Fuel Company, in order to secure the payment of $250,000 of bonds, conveyed to the Trust Company 9,763 acres of land, particularly described; including by description the William Johnson, J. D. C. Rumsey (one of the Sandford tracts), Emily Mason, and Annetta Herr tracts. A further part of the conveying clause was:

"Any and all real estate and all rights and interest therein and all franchises which the said Fuel Company now owns or may hereafter acquire. * * *"

Of the four described tracts, three (Johnson, Mason, and Herr) have been disposed of above favorably to the Trust Company. All of those not particularly described were acquired by the Fuel Company *after* the execution of the deed of trust. The controversy remains, therefore, as to the Rumsey or Sandford tract, and as to those acquired by the Fuel Company and coming within the general clause above quoted.

The Rumsey tract was a forest lieu selection, made by Jethro Sandford as attorney in fact for Rumsey. It had been approved for patent before the execution of the deed of trust, but the patent was not issued to Rumsey until afterwards, and the conveyance by the patentee to the Fuel Company was more than three years after. At the date of the deed of trust the Porter Fuel Company held no title, legal or equitable, to this land. It had nothing it could pass by present conveyance, and nothing did pass thereby. This tract, if protected by the deed of trust, must find safety in the after-acquired property clause.

Does this clause protect this entry and those others coming within its terms? In my opinion it does not. Even if the Fuel Company had

had at the date of the deed of trust an equitable title to these tracts, the Trust Company could not claim to be a bona fide purchaser. Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157. But the Fuel Company never had any character of title until the patentees or their grantees executed deeds to it. While the deed of trust would then attach, to supersede all subsequent conveyances, incumbrances, liens, or equities, it could not supersede such as came with the title to the Fuel Company. To hold that trustees under deeds of trust could claim the benefits of bona fide purchasers as to after-acquired land in cases of this character would mean that the grantors therein could engage in defrauding the government of its lands, and, if they could escape detection until the patent were issued and an immediate subsequent deed made to them, the government would be barred of all opportunity to recover its domain. After-acquired property clauses derive all of their vitality from equity. It would indeed be an anomaly to employ an equitable rule to protect and in fact to encourage fraud.

My conclusion is that the patents to William Johnson, Emily Mason, Annetta Herr, and George W. Shields should be sustained by a dismissal of the complaint as to them, but that there should be an order annulling and canceling the other patents as having been fraudulently and unlawfully secured.

HILL et al. v. HILL et al.

(Circuit Court of Appeals, Eighth Circuit. September 17, 1917.)

No. 4842.

HOMESTEAD ⊜115(2), 121—INCUMBRANCE—EFFECT OF TERMINATION OF HOMESTEAD—LAW OF ARKANSAS.

Under Const. Ark. 1868, art. 12, § 2, which provided that "hereafter the homestead of any resident of this state who is a married man or head of a family shall not be incumbered in any manner while owned by him, except for taxes, * * *" and the decisions of the Supreme Court of the state thereunder, a deed of trust on a homestead was wholly void, although the land had not then been designated and claimed as a homestead; and a sale under such a deed of trust of land, including a tract which prior to the sale had been property designated and claimed as a homestead, conveyed to the purchaser no right or interest in remainder in such tract, after the homestead right had been terminated by the death of the beneficiaries or otherwise, even though the sale was expressly made by consent subject to the grantor's homestead right under the laws of the state.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by Mary M. Hill and others against Will Hill and others. Judgment for defendant, and plaintiffs bring error. Affirmed.

For opinion below, see 231 Fed. 345.

H. R. Boyd, of Memphis, Tenn., for plaintiffs in error.

John I. Moore, of Helena, Ark. (Jacob Fink, J. M. Vineyard, and W. R. Satterfield, all of Helena, Ark., on the brief), for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. In 1873, John R. Williams, who owned in fee a large tract of Arkansas land, including that here involved, executed a deed of trust upon the entire property. In 1875 a sale was made under this deed of trust. The contest is between the heirs of Williams (defendants) and those who deraign their title from the purchaser at the above sale. The heirs claim that this property, being the homestead of Williams, the deed of trust was, as to it, void under section 2, article 12, of the Arkansas Constitution of 1868, which was in force in 1873. The plaintiffs claim: That no proper selection of the homestead was ever made; therefore the constitutional provision could not apply. That the homestead right was merely an estate during the lives of Williams and his widow and during the minority of their children; therefore, as grantees of the purchaser of the entire tract covered by the deed of trust, they are entitled to possession of this homestead portion, now that the life estates have terminated and the children reached majority.

The case is here upon error from final judgment upon overruling a demurrer to paragraph 10 of the answer, the essential statements of which are:

"* * * And further answering they say that at the time of the execution of the deed of trust by the said John R. Williams to Napoleon Hill, as trustee, on the 9th day of April, 1873, the said John R. Williams was a married man and the head of a family; that he resided upon the lands sued for herein, and said lands being his homestead, consisting of 160 acres of country lands, they allege that said deed of trust so executed to the said Napoleon Hill as trustee was under the Constitution of 1868 null and void, because the debt it secured was not for purchase money thereto, nor for taxes or laborers' or mechanics' liens; and that no title passed from the said John R. Williams to the said Napoleon Hill as trustee. They further say that, no title having passed to the said Napoleon Hill as trustee under said deed of trust, none passed to said plaintiffs by reason of the mesne conveyances arising from the foreclosure of the same; but, on the contrary, they say that the title remained vested in the said John R. Williams, and after his death in his heirs at law—these defendants—who are now the sole and absolute owners of said lands sought to be recovered by the plaintiffs in this action."

Section 2, article 12, of the 1868 Constitution is:

"Hereafter the homestead of any resident of this state who is a married man or head of a family shall not be incumbered in any manner while owned by him, except for taxes, laborers' and mechanics' liens and securities for the purchase money thereof."

The State Supreme Court has decided that a deed of trust in violation of this section is void. Harbison v. Vaughan, 31 Ark. 15; Frits v. Frits, 32 Ark. 327; Sentell v. Armor, 35 Ark. 49; Klenk v. Knoble, 37 Ark. 298, 304; Webb v. Davis, 37 Ark. 551, 555; Sims v. Thompson, 39 Ark. 301; Brown v. Watson, 41 Ark. 309, 313. There is no

dispute that at the time the deed of trust was executed Williams was entitled to claim a homestead, nor that the debt giving rise to that instrument was within none of the exceptions of the above section.

Plaintiffs contend Williams never made a definite and proper designation of the land he desired exempted as a homestead. Decisions of the state Supreme Court determine that it was unnecessary to do this prior to or at the time of executing the deed of trust. These cases go even further and hold that a direct statement in the deed itself that the lands included were not claimed as homestead will not prevent the constitution rendering such instrument void in so far as a later claim for homestead is concerned. Webb v. Davis, 37 Ark. 551; Klenk v. Knoble, 37 Ark. 298. Less than a year after executing the deed of trust, and more than a year before the sale thereunder, Williams filed in the office of the clerk of the circuit court and ex officio recorder of the county in which the land was located a schedule of the land he claimed as homestead. This schedule by legal description clearly defined this land. The state Constitution and statutes were silent as to any particular method of homestead designation, except for purposes of exemption from judicial process. The schedule filed by Williams conformed to the statutory requirements in that respect. Acts Ark. 1871, p. 285. Doubtless his purpose was to comply with that statute. Nevertheless, the schedule constituted a sufficient designation for all purposes.

The circumstances surrounding and following the sale convince that there was no question nor uncertainty at that time as to the designation of the homestead. According to a recital in the trustee's deed (an exhibit attached to the petition), Williams was present at the sale, "consenting that said lands should be sold in a body reserving to himself the benefits of the laws of the state of Arkansas as to a homestead." Following the sale the purchaser took possession of all of the land covered by the deed of trust except this portion. No attempt was made to disturb Williams, his widow, or his heirs in their residence on and possession of this land until the present suit was filed, more than 40 years after the sale. We conclude that the homestead was sufficiently designated and that the constitutional provision protected this land as homestead from the operation of the deed of trust.

The position of plaintiffs that, even if the homestead were properly selected, they are entitled to the land now that the homestead has expired, is also not well taken. Their theory on this is that, although the deed of trust could not convey the homestead, yet it could and did convey the remainder left thereafter, and that Williams at the sale consented to the sale of the land subject only to the homestead. The circumstance that Williams consented to the sale in that form cannot alter the effect of the constitutional requirement. The decisions of the state Supreme Court have settled that a deed of trust covering the land claimed as the homestead is void in toto as to the homestead. Frits v. Frits, 32 Ark. 327; Sentell v. Armor, 35 Ark. 49; Webb v. Davis, 37 Ark. 551; Brown v. Watson, 41 Ark. 309; Sims v. Thompson, 39 Ark. 301. Although the cases just cited arose during the life of the homestead, they were intended to apply also to the remainder after the homestead. In Brown v. Watson, supra, the court at page 313 (italics ours) said:

"What this court has so often asserted as to make any further assertion unnecessary of it in the reports, is: That a mortgage or a deed of trust, or any attempted incumbrance on a homestead, other than those excepted in the Constitution, is void. *The owner may abandon and sell the homestead the next day, and make good title.* It is not a question of good faith, or of sound morals. It is a matter of state policy. Whilst the owner might *sell* his homestead, and thus realize its fair value, the Constitution meant to protect him and his family from the insidious temptation to incur debts upon it, in the sanguine expectation of being able to discharge them; but which would in many cases result in having the home taken for an insignificant sum. It was easy for a creditor to take notice of the homestead, and he cannot complain if he finds that to be void in his hands, which the Constitution advised him would be so."

The scope of these decisions is further shown by others dealing with attempts to dispose of the remainder during and expressly subject to the homestead. McCloy & Trotter v. Arnett, 47 Ark. 445, 2 S. W. 71, was ejectment by minor children against grantees of purchaser at sale made by probate court to pay the debts of the father's estate. The sale was solely of the remainder, being made expressly subject to dower and homestead. After stating that "the rights of the parties are governed by the provisions of the Constitution of 1868 on the subject of homesteads," the court (47 Ark. 453, 2 S. W. 73) said:

"And it may be regarded as settled law that an execution sale of a homestead, when the debtor claims his exemption, if he is required to claim it, is void, and has no effect on the title beyond casting a cloud over it."

And (47 Ark. at page 454, 2 S. W. at page 74):

"But an order of sale of a parcel of land, as in this case, which is shown by the petition, and the order itself, to have been the residence of a deceased head of a family, is an absolute nullity."

To the same effect are Kessinger v. Wilson, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220; Harris v. Watson, 56 Ark. 574, 20 S. W. 529, and Bond v. Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119.

The case of Sansom v. Harrell was twice before the Supreme Court of Arkansas. 51 Ark. 429, 11 S. W. 683; and 55 Ark. 572, 18 S. W. 1047. A statute permitted the vesting in the widow by the probate court of the husband's estate on a showing that it did not exceed $300. The facts, which are more fully stated in the last opinion, were:

"In 1876 Thaddeus W. Sansom died intestate, leaving surviving a widow and three minor children. At the time of his death he owned and occupied 80 acres of land as a homestead. During the minority of the children the widow presented a petition to the probate court for an order vesting the land absolutely in herself. Finding that it did not exceed in value the sum of $300, the court made the desired order. Subsequently, in 1877, the widow conveyed the land to Henry Heinze, and placed him in possession; a year later he reconveyed it to her. On July 27, 1880, she conveyed and delivered possession of the land to B. F. Stephans, through whom appellee deraigns title. Two of the minor children died in 1876 or 1877; the other died in 1879. On July 11, 1887, appellants, as heirs of the last-mentioned child, brought this suit in ejectment to recover the land."

In the first opinion (51 Ark. at page 432, 11 S. W. at page 683) the court said:

"Until the children reach the age of 21 years it cannot be sold to pay the debts of the estate of the deceased owner, nor be partitioned among the heirs. The land constituting it cannot be sold to pay such debts, subject to the homestead rights of the children, during their minority. The Constitution sets it apart as a home and sanctuary for the widow and children, and for the purpose of preventing any other person invading it under a claim of right, or interfering with them in the undisturbed enjoyment of the shelter, comfort, and security of it as a home, guards and protects it against sales and transfers. The same reason which makes it unlawful to sell the land constituting it for the payment of the debts of the deceased owner, subject to the homestead rights of the children, during their minority, makes it unlawful to vest it in the widow, subject to the same rights of the children, during their minority. One endangers the quiet, security, and comfort of a home provided in the homestead as much as the other, and both equally violate the spirit and manifest intent of the Constitution."

It is true some of these decisions were on other sections of the Constitution of 1868 or of 1874, but this does not affect their applicability to the point now being considered. The plaintiffs here are basing this contention upon the limited character of a homestead estate in Arkansas, and upon a conveyance, during the existence of that estate, of the so-called remainder. The above decisions all deal with just that situation, and reveal an undeviating intention not to permit the homestead to be embarrassed in any such manner. In fact, if this be so respecting the satisfaction of debts which under the Constitutions of 1868 and 1874 could claim satisfaction from the land as soon as the homestead was terminated (Constitution of 1868, article 12, sections 3, 4, and 5), how much more would it be true when title is sought to be maintained through sale under a deed of trust made when the Constitution specifically forbade incumbrances of that character.

The judgment is affirmed.

GOUDY v. HANSEN.

(Circuit Court of Appeals, First Circuit. November 15, 1917.)

No. 1264.

1. PATENTS ⟸43—PATENTABILITY—DESIGNS.
In a valid design patent, there must be originality and novelty, as well as beauty, the test of which is the impression made on the mind, through the eye, of the ordinary observer.

2. PATENTS ⟸15—DESIGNS—PATENTABLE SUBJECT-MATTER.
A design for a font of type is not patentable subject-matter under the statute.

3. PATENTS ⟸328—VALIDITY—DESIGN FOR FONT OF TYPE.
The Goudy design patent, No. 45,108, for a design for font of type, *held* void, both because the subject-matter is not patentable and because the patent does not show such peculiar configuration or ornamentation in the type as to authorize a design patent.

Brown, District Judge, dissenting.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by Frederic W. Goudy against Henry Alfred Hansen, executor. Decree dismissing bill on motion, and complainant appeals. Affirmed.

E. W. Bradford, of Washington, D. C., for appellant.

Nathan Heard, of Boston, Mass., for appellee.

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

HALE, District Judge. The plaintiff was the patentee, and is the owner, of United States patent No. 45,108, for "design for font of type." Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), the defendant files a motion that the bill in equity be dismissed, for the reason that the patent on its face is invalid, because the disclosure thereof does not constitute patentable subject-matter, and because no such configuration or ornamentation is shown as would authorize a design patent. He alleges five other causes for dismissal.

The motion brings before us the patent itself. In it the patentee alleges that he has invented a certain new, original, and ornamental design for a font of type; that the drawing shows the face and form of each letter and character. He claims the ornamental design for a font of type, as disclosed in the drawing. That disclosure shows the 26 letters of the alphabet, and the 10 Arabic numerals, as follows:

A B C D E F G H I J K L M N O P

Q R S T U V W X Y Z

1 2 3 4 5 6 7 8 9 0

[1] The amendment of May 9, 1902, to section 4929 of the Revised Statutes of the United States (Comp. St. 1916, § 9475), provides that any person who has invented any new, original, and ornamental design for an article of manufacture may, subject to certain conditions and limitations stated in the statute, obtain a patent therefor. The original section 4929 provided that any person who, by his own industry, genius, efforts, and expense, had invented and produced any new and original design, etc., should, under certain limitations, be protected. The amended section differs from the original section in using the word "ornamental" to specify and characterize the features which every design must have, and in omitting the word "useful" from its enumeration. But the presence of usefulness did not impart patentability to a design, and the absence of usefulness did not take patentability from it. All statutes and regulations which apply to the protection of inventions and discoveries apply to designs. Revised Statutes, § 4933 (Comp. St. 1916, § 9481). In a patent for mechanical devices there must be novelty and utility. In a design patent there must be originality and novelty, as well as beauty. The same principles of

construction apply both to design patents and to mechanical or process patents. There must, therefore, be invention in a design patent, as well as in a mechanical patent. These principles are old, and have been often declared by the courts. Smith v. Whitman Saddle Company, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606; Gorham Manufacturing Co. v. White, 14 Wall. 511, 524, 20 L. Ed. 731; Tubular Rivet & Stud Co. v. Standard Finding Co., 231 Fed. 170, 172, 145 C. C. A. 358; Cahoone v. Rubber Company (C. C.) 45 Fed. 582; Northrup v. Adams, Fed. Cas. No. 10,328; Walker on Patents (4th Ed.) §§ 20, 22. In American Type Founders' Company v. Damon & Peets (C. C.) 140 Fed. 715, suit was brought upon a design patent for a font of type. Judge Holt, of the District Court of the Second Circuit, held that the patent was void, because it showed no patentable invention, and no such peculiar configuration or ornamentation in the type as would authorize a design patent.

In Charles Boldt Co. v. Turner Bros., 199 Fed. 139, 117 C. C. A. 621, in the Seventh Circuit, it was held that whether or not the device of a design patent meets the requirements of the statutes is a question to be determined from the impression it makes on the mind, through the eye of the court, or of the ordinary observer, and not upon the expert; that the provision of the Constitution was not intended to grant a monopoly merely for the purpose of stimulating manufacturers to make goods look attractive without requiring that the conception shall display a degree of originality and beauty which presupposes inventive thought. In speaking for the court for the Seventh Circuit, Judge Kohlsaat observed:

"Indeed, a glance at the decisions which have sustained design patents seems to suggest that there may be often more inventive genius displayed by the court in finding invention in design patents than the inventor disclosed in placing it there."

In Keystone Type Foundry v. Portland Publishing Co. (C. C.) 180 Fed. 301, the manufacturers of a peculiar kind of type attempted to restrain a publishing company from producing type of the same character. Invoking the law relating to unlawful competition, they sought to monopolize "the style of typography produced by the type." In the case at bar the plaintiffs are seeking the same end. We agree with the learned judge, who gave the judgment of the District Court, that design patents contemplated by the statute were never intended to serve such purpose.

In this patent the characters and imprints brought before the court appear to have no common characteristics running through the series. The types themselves, from which the imprints are taken, are not illustrated or described in the patent. The imprints are of the letters of the alphabet and the Arabic numerals. These letters and numerals have been known to the world for many generations of men.

The things attempted to be patented in this case are the metal blocks, with the letters and figures cut thereon. These blocks, either with or without the letters, are not things of beauty; they are no more patentable than the horseshoe calk. Williams Calk Co. v. Kemmerer, 145 Fed. 928, 76 C. C. A. 466. They appear to us not to present

any feature of design running through them, and appealing to the eye of the observer or of the court. They do not present sufficient novelty or beauty to constitute a design patent. They cannot be held to be the result of invention or the product of genius.

The test of patentability must be the eye of the court, or of the observer, and not the eye of some skilled engraver of type. To apply this test the court may, of course, receive expert testimony. Whether such testimony is introduced or not, the court must put itself, so far as possible, in the place of the ordinary purchaser of type; and such purchaser would be likely to have some knowledge of the goods with which he deals, although not necessarily an expert knowledge. Gorham Manufacturing Co. v. White, 14 Wall. 511, 528, 20 L. Ed. 731; Phœnix Knitting Works v. Bradley, etc., Co. (C. C.) 181 Fed. 163, 164.

[2, 3] We are constrained to sustain the objections raised by the motion that the patent is invalid, because the disclosure in it does not constitute subject-matter patentable under the patent law, and because it shows no such peculiar configuration or ornamentation in the type as would authorize a design patent.

Having come to this conclusion, it is unnecessary to consider the further objections raised by the motion.

BINGHAM, Circuit Judge (concurring). I agree with the conclusion reached by Judge HALE for the reason that a design for a font of type is not patentable subject-matter under the statutes of the United States. What the plaintiff has sought to procure a patent for is not the design when impressed by the types upon paper, but for the design as embodied in the letters and numerals and applied to the metal blocks constituting the font of type; and the question is whether the design, as thus applied, is the subject-matter of a design patent within the meaning of the statutes.

It is apparent that the design as applied to the metal blocks presents no beauty to the eye; it is only when, by the process of printing, the letters and numerals are transferred to paper, that any beauty is disclosed; but the design thus impressed upon paper is not the subject-matter which the plaintiff has claimed and procured a patent for.

In Clark v. Bousfield, 10 Wall. 133, 140, 19 L. Ed. 862, decided by the Supreme Court in 1869, this question was considered in construing a claim for an alleged design under section 11 of the act of March 2, 1861 (12 Stat. 248, c. 88), which statute, so far as the question under consideration is concerned, did not differ from section 4929 of the Revised Statutes, as amended by the Act of Congress of May 9, 1902. In that case the plaintiff had devised a machine with an elastic bed, embodying a design by which the design could be impressed upon the staves of a pail by revolving the pail over the elastic bed, and the question was whether the second claim of the patent was simply for a design, or was for a part of the mechanical device, and, if for the former, whether it was void. It was held, first, that the design was but incidental to the machine, and had no protection other than that which the patent secured to the inventor of the machine; and, second, that the claim as for a design patent, under section 11 of the act, was invalid. The court said:

"The arranged figure in the elastic bed is not the one protected by the eleventh section of the act of 1861; that is the one which is transferred to the pail or wares, where its beauty is first visible to the eye. While it remains in the elastic material, it exhibits no more beauty than if engraved on stone or metal."

The font of type here under consideration is nothing more than the elastic bed in Clark v. Bousfield. The design there, as applied to the elastic bed, was not a thing of beauty, and patentable under section 11 of the act of 1861, and no more is the design here, as applied to the metal blocks or font of type, a thing of beauty. It is the design as applied to an article of manufacture, and lending beauty thereto, that is patentable, not the design in the abstract and without reference to an article of manufacture. If the article to which it is applied is of such a character that the design would not render it pleasing to the eye, which is the case here, it is not the subject-matter of a design patent. Gorham Co. v. White, 14 Wall. 511, 525, 20 L. Ed. 731; Foster & Bro. Co. v. Tilden-Thurber Co., 200 Fed. 54, 56, 118 C. C. A. 282, and cases there cited; Rowe v. Blodgett & Clapp Co., 112 Fed. 61, 50 C. C. A. 120.

The decree of the District Court, dismissing the bill, is affirmed. The appellee recovers costs in this court.

BROWN, District Judge (dissenting). I am of the opinion that the motion to dismiss the bill on points arising on the face of the bill should have been denied, and that the plaintiff was entitled to a full hearing in usual course.

The case presents two important questions:

(1) Whether a court, upon mere inspection of this design, should undertake to pass judgment on its artistic merit and patentable novelty.

(2) Whether the practice of the Patent Office in issuing design patents for "fonts of type" should be condemned.

As to the merit of the design—the motion to dismiss requires consideration, not only of the patent itself, but of the allegations of the bill that the defendant has copied this design, has made fonts of type reproducing the design, and has sold a large quantity of said type, and derived large profits therefrom.

It thus appears that this patented design has at least such a degree of merit as to induce the defendant to adopt it as a pattern for the manufacture of his type, rather than any of the thousands of unpatented designs which are free to the copyist. If, also, it be a fact that purchasers of type for use in printing have preferred type of this design —if it has won in competition with other designs by reason of differences important enough to influence the choice of both type founders and printers—I am of the opinion that any doubt in the minds of judges as to its artistic quality should be resolved in favor of the patent. Type founders and printers are the purchasing observers of the designs for fonts of type, and their practical conduct in choosing this design affords a better test of its quality and merit than the opinion of judges, who cannot be regarded as "ordinary observers" in the arts of type founding or of printing. The fact that the design has been infringed is sufficient to establish its utility as a design, and to

indicate its possession of qualities which appeal to the classes of persons who are engaged in the manufacture or purchase of type, and who thus are the ordinary observers of this class of designs.

The contention by an infringer that the device which he infringes constituted no advance in the art is not received with favor. Lehnbeuter v. Holthaus, 105 U. S. 94, 96, 97, 26 L. Ed. 939; Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 616, 32 Sup. Ct. 691, 56 L. Ed. 1222; Aurora Mantle & Lamp Co. v. Kaufmann, 243 Fed. 911, 914, — C. C. A. —.

The question of novelty of design should properly be raised by answer and settled by proofs. New York Belting & Packing Co. v. N. J. Rubber Co., 137 U. S. 445, 450, 11 Sup. Ct. 193, 34 L. Ed. 741; Bleistein v. Donaldson Lith. Co., 188 U. S. 239, 253, 23 Sup. Ct. 298, 47 L. Ed. 460.

Gorham Mfg. Co. v. White, 14 Wall. 511, 20 L. Ed. 731, is an authority only on the question of infringement, and for the familiar rule that differences which do not destroy the substantial identity of the general appearance to the ordinary purchaser do not avoid infringement. It cannot be properly applied as establishing a rule for determining "identity of design" in point of artistic invention. The scope of Gorham v. White is considered in Robinson on Patents, § 203, note 1, and Renwick on Patentable Invention, § 76, p. 106.

Typography is well within the fine arts, and by reference to Webster's latest International Dictionary, under title "'Typography," it will be seen that each font of type has letters of similar characteristics, so that an entire font of type may be illustrated by a single word containing only a few letters of the font. The letters have both the font's characteristics and their own.

Should the practice of the Patent Office in issuing design patents for "a font of type" be condemned?

The presumption is in favor of a practice of considerable duration. It seems to me practical, sensible, and sound. At least it should not be overturned, except upon a full hearing, in which the court should have before it information as to the rulings of the Patent Office and of the courts as to design patents for a large number of articles of manufacture to which a design is applied, and which perform also the function of reproducing the design. These seem to form a distinct class of articles of manufacture whose value is due principally to the artistic character of the design that they embody, rather than to the fact that they are also mechanical means of reproduction of design. Matrices, dies for making coins, medals, and like articles, seals, stamps, stencils, molds, jewelers' rolls, and various products of the die sinker, are examples.

Manufacturers of such articles employ designers, whose artistic work is complete when they have finished a drawing or a model. In many large factories of jewelry, silverware, etc., the designing department, with its stock of designs, is practically distinct from the manufacturing department.

It seems to me that the designer's right to a design patent is complete when he has produced a drawing or model which is a complete

guide to the artificer of the article of manufacture; and, though design relates to appearance, appearance to the eye of the copying artificer satisfies the requirements of the act, even though the artificer applies the design to a die, or a type face, not intended for direct observation on account of its beauty, but for reproduction.

In a case tried before me, Byers v. F. T. Pearce Co. (D. C.) 228 Fed. 720, it appeared in evidence that stock ornaments for jewelers' use were manufactured from dies, and that the maker of the dies sold both the blanks struck from the die and the dies themselves; two different "articles of manufacture," but with the same design for each. There was but one design; but it was both for the stock ornament and for the die which was used to strike up the ornament from metal. The stock ornament was capable of application to many different articles. This is typical of a large class of manufacturers in this circuit.

"But it is the design that is patented, not the mechanism dressed in the design." R. E. Dietz Co. v. Burr & Starkweather Co., 243 Fed. 592, 594, — C. C. A. —.

As it is the embodiment of the design which gives such "articles of manufacture" and such marketable products their principal value, is there any sufficient reason for denying to the designer the right to patent his design "for an article of manufacture" of this class? Or must he claim his design for the article of manufacture which is the product of the die or similar instrument of reproduction of the design?

It is said that it is the design as applied to an article of manufacture, and lending beauty thereto, that is patentable, and that, if the article to which it is applied is of such a character that the design would not render it pleasing to the eye it is not the subject-matter of a design patent.

This is a very clear statement of the opposite view. The decision in Clark v. Bousfield, 10 Wall. 133, 140, 19 L. Ed. 862, does not seem to be conclusive, however, upon this question; for the right of an original inventor of a patented design to exclude its use upon mechanism for its reproduction, and that the patentable design is a thing apart from the instrument for reproducing it, seem to be recognized in that decision:

"The patent is simply for the design, etc., itself."

"It may be that the inventors of the machine for impressing figures or designs upon pails or other wares would not be protected from using figures or designs, the right of property in which had been secured to the original inventor under this eleventh section, but they may clearly use any and all not thus protected. The machine in question is invented for reducing to practical use these figures and designs, and will make them profitable to the original inventors or owners of them, if they choose to employ it."

The case gives no consideration to the question whether a patented design, so completely illustrated by a drawing that the copyist has only to follow it in order to make an instrument for its reproduction, is rendered invalid because the inventor has chosen to claim it "for an article of manufacture," which is not intended to exhibit it, but can reproduce it, rather than for an article which is to be looked at directly.

Having in mind the practical division between the work of designing and the work of manufacturing according to the design, and also the very important consideration that it is the appearance of the patented design which is to furnish to the manufacturer full direction as to the shape or configuration of his article of manufacture, it is quite obvious that the type founder who selects this patented design is led to do so by its appearance and artistic quality as exhibited in the patent drawing. He has received such full instruction as to enable him to manufacture an article which owes its chief value to what the patentee has exhibited to his eyes, and what he in turn exhibits to the eyes of his workmen as a guide to reproducing it in metal upon an instrument which may again reproduce it.

The designer makes his design for the use of a manufacturer of type, who pays for it as a design. Whether he makes it up into type or not is immaterial. He has the sole right to make use of that design as a guide to his manufacture of type; and if another manufacturer follows that design as exhibited in the patent, he infringes as much as if he had copied it from the face of manufactured type.

It seems to me erroneous to hold that, because a manufactured font of type is not ordinarily regarded as in itself possessing beauty, the design which was exhibited to the eye of the manufacturer, and which he chose as a pattern to exhibit to the eyes of his workmen as a guide in their work, and which he also exhibits to purchasers of type, to induce them to select his type in preference to other type, should be held unpatentable, because the article in which the design is physically embodied is not looked at to see the design which was the pattern for its construction, and which it may at any time reproduce.

If we regard the design as a thing apart from the type, as the completed work of the designer, as a thing which the type founder sees and selects, which the workman sees and follows, which the printer chooses in order to please those who like good printing, and which the infringer copies, though he may never have seen the face of his competitor's type, there should be no difficulty in concluding that the design patent relates to that appearance which is the contribution to the public which the law decrees worthy of recompense.

CENTRAL CALIFORNIA CANNERIES CO. et al. v. DUNKLEY CO.*

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

No. 2915.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—DEVICE FOR PEELING PEACHES.

The Dunkley patent, No. 1,104,175, for a device for peeling peaches and other fruit, *held* not invalid for priority of invention and use by others, but valid, and also infringed.

2. PATENTS ⟸324(5)—SUIT FOR INFRINGEMENT—REVIEW ON APPEAL.

The finding of a District Court in favor of the validity of a patent will not be reversed, where it depends on conflicting evidence or the credibility of witnesses.

Appeals from the District Court of the United States for the Second Division of the Southern Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Consolidated suits in equity by the Dunkley Company against the Central California Canneries Company, the Griffin & Skelley Company, the J. C. Ainsley Packing Company, the Anderson-Barngrover Manufacturing Company, J. F. Pyle & Son, Incorporated, the Hunt Bros. Company, and the Sunlit Fruit Company, a corporation. Decrees for complainant, and defendants appeal. Affirmed.

Certiorari denied, 38 Sup. Ct. 134, 245 U. S. 668, 62 L. Ed. —.

Suits for injunction restraining the infringement of plaintiff's patent for a device for peeling peaches and other fruit, and for a decree that plaintiff recover from defendants the profits realized by them and the damages sustained by plaintiff by reason of said infringement. Decree for plaintiff. Defendants appeal.

On August 6, 1915, appellee filed its bill of complaint against the appellant Central California Canneries Company, alleging that plaintiff is the owner of letters patent No. 1,104,175 for an invention and device for peeling peaches and other fruit, and that defendant has made and used, and is now engaged in using, infringing machines, to the great and irreparable injury of the plaintiff, and praying an injunction restraining such infringement of plaintiff's patent, and a decree that plaintiff recover from defendant the profits realized by defendant, and the damages sustained by plaintiff by reason of said infringement, together with costs.

Defendant answered, raising the issue of priority of conception or invention and use of the device in suit, the validity of the claims sued on being conceded, as was the fact that defendant's device was within those claims. The answer contains the further allegation that plaintiff is guilty of iniquitous conduct in suppressing evidence of prior usage by means of a contract with the California Fruit Canners' Association, whereby, in consideration of a license under plaintiff's letters patent for the remainder of the term thereof, the California Fruit Canners' Association agreed not to assist any one in defending any suit brought for the alleged infringement of said letters patent, nor to give or furnish to any such party any information or data relative to any prior usage thereof.

When the case came on for trial it was, by stipulation of the parties, consolidated with the seven other cases embraced in this appeal, which are instituted by the same plaintiff against various other fruit-canning companies,

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

*Rehearing denied November 5, 1917.

and involve substantially the same issues. Evidence was introduced on behalf of all parties, and thereafter the court entered an interlocutory decree in each suit, upholding the validity of plaintiff's patent, finding that the same had been infringed by the defendants' machines, and awarding plaintiff an injunction. Each decree further awarded to plaintiff the profits realized by the defendant and the damages sustained by plaintiff by reason of the infringement, and, for the purpose of ascertaining and stating the amount of such profits and damages, the matter was referred to a master. From these decrees in favor of plaintiff, the defendants bring the present appeals in the eight consolidated cases.

William K. White, of San Francisco, Cal., and Frederick S. Lyon and Kemper B. Campbell, of Los Angeles, Cal., for appellants.

John H. Miller, of San Francisco, Cal., and Fred L. Chappell, of Kalamazoo, Mich., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The question of infringement is not important in the consideration of this case. The main issue is the validity of the plaintiff's patent; that validity depending upon the priority of conception and use of the device, both questions of fact. The defendants set up three anticipating devices, the Beekhuis, the Vernon, and the Grier.

Beekhuis made application for a patent for an "apparatus for removing the skin from fruit" on May 25, 1904, and patent thereon was granted September 3, 1907. The plaintiff Dunkley applied for a patent for a "machine for peeling peaches and other fruit" on November 29, 1904. His application was amended at various times, and on July 13, 1909, the Commissioner of Patents declared an interference between his application and the patent previously issued to Beekhuis on September 3, 1907. The award of priority of invention and use was finally given to the plaintiff Dunkley by the Patent Office, and that award sustained by the Court of Appeals of the District of Columbia, and patent granted to him on July 21, 1914. It is not sought by the defendants to establish the Beekhuis patent in this suit, but that patent is relied upon as showing a device in use and patent applied for before the plaintiff made his application.

The full proofs in the interference proceedings are not in evidence, but portions thereof appear in the file wrapper and contents of plaintiff's patent introduced by the defendants; disclosing the various rulings of the Patent Office tribunals and the many amendments made in the claims to conform thereto. It appears to have been under consideration by Patent Office officials for five years after an interference was declared, and careful investigation made into each claim before patent was granted. There seemed to be no doubt in the minds of these officials, at the conclusion of the investigation, that the plaintiff was the first to conceive the idea and reduce it to successful practice; but there was some question whether he was entitled to make certain claims for "means for directing peeling jets of water upon said fruit." Although the water was used in this form from the time of the first practical

construction of a peeling machine by both Beekhuis and Dunkley, neither of them used the words "peeling jets of water" in their first specifications of claims. Beekhuis was the first to include them in an amendment to his application, and Dunkley copied them later on for the express purpose of having an interference declared. In each machine the fruit passes through a receptacle, where it is subjected to a bath in a heated solution of lye, which disintegrates the skin.

In the Dunkley device the fruit is then delivered onto an endless belt conveyor and passes between rotary brushes for about six feet, the brushes rotating the peach as it is carried along, so that every portion of its surface is subjected to the jets of water which strike the fruit tangentially from perforated pipes arranged along the passage, and driven with such force as to remove the disintegrated skin still remaining upon the peaches, and to cleanse the particles from the brushes. The peaches are advanced in single file, and are thoroughly peeled, cleansed, and cooled, and ready for the cans at the point of exit from the machine. In the Beekhuis device the peaches pass from the lye bath onto a large box screen of wire mesh so arranged as to shake the fruit as it passes over it. Above this shaking screen is arranged a water pipe with transverse slits at intervals, which deliver a broad fan spray or jet of water onto the fruit passing over the screen. A similar spray or jet of water is arranged on the under side also. The fruit is delivered onto this screen in a mass; and dependence is had upon its agitation in the box while advancing, the friction with each other and with the wire screen, and the action of the water jets or sprays during such agitation, for the removal of the disintegrated skin. It was decided that both parties were equally entitled to make the claims for "means for directing peeling water jets upon said fruit," and patent was thereupon issued to Dunkley, priority of conception of the idea and reduction to successful practice having been previously awarded him. We see no reason for reversing this decision, after a careful reading of the testimony.

The Vernon device appears to have been an adaptation of an invention of Baker, Chalker, and others, patented in 1898, for the purpose of cleaning oranges by a brushing mechanism. As early as 1902 Vernon adopted this brushing mechanism as a means for removing the skin from peaches and other fruit, first subjecting the fruit to a bath in a heated solution of caustic soda, then to another in a solution containing alum, and then immersing it in cold water. It was next subjected to a brushing process, but no mention is made of the use of water under such pressure as to form peeling jets, or in fact of any use of water for peeling purposes. Vernon applied for a patent on his device in November, 1902, which was granted in March, 1905; but at the plant in Fresno, where the machines were first used in 1902 and 1903, they appear to have been supplanted by Beekhuis machines in 1904, according to the testimony, not proving satisfactory. The essential feature of the Dunkley device, the application of peeling jets of water to the surface of the peach while in rotation, is not shown in the Vernon device, and it cannot be regarded as anticipatory in either conception or use.

The Grier device was never patented. Grier appears to have been connected with the fruit-canning business for many years, and was familiar with the process of dipping peaches in lye as early as 1891, and thereafter washing them with water. In 1902 he formed a partnership with a Mr. Taylor, and leased a canning plant in Pasadena, where they handled peaches, among other fruits, and from the testimony it would appear that he was considering how to handle a greater quantity, and attempting to devise more efficient means for peeling than the hand method; but the only real experimentation that he made in 1902 was by putting a few peaches in a wire basket and dipping them in the heated lye solution, and then using a hose by hand to wash off the peeling. He says he conceived the idea right then of building a machine to do that work, but there is no testimony to the effect that he did anything in the way of reducing the idea to a practical form, or proving his idea an operative one, until the following summer, 1903, when he built two machines, one for his own plant, and one for another company in Pasadena, not identical with the plaintiff's machine, but embodying the idea of rotation of the peaches as they progressed, and the application of peeling sprays or jets of water. The ideas of Grier and the plaintiff may have been contemporaneous; but there is no evidence of such prior use of the Grier device as to defeat the plaintiff's priority of right. Grier did not apply for a patent for his device, and discontinued the use of his machine when he received notice of Dunkley's claimed infringement.

There is in the record the testimony of one Stewart L. Campbell, who was called as a witness by the defendants in surrebuttal, and who testified that he was employed by the Dunkley Company in constructing machinery from the first of 1902 to December, 1904. According to the testimony of this witness he designed and built, in August, 1903, a peach-peeling table, for which the plaintiff obtained the patent in suit, and this he did without any ideas from Dunkley as to its construction. In other words, his testimony is to the effect that he was the designer of the invention for which Dunkley received a patent. But defendants insist that the testimony of this witness was not introduced to prove that fact, and they refer to their answer as showing that it was not so pleaded as a defense. The purpose of this testimony, they say, was to discredit the claim of Dunkley that he was the inventor, and not to offer the defense that Campbell was the inventor. But the testimony of Campbell upon that question was material and relevant to the issue before the court, and was either true or not true. If true, Dunkley was not the inventor of the device claimed as his invention, and that would end the case. If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. "Falsus in uno, falsus in omnibus."

But the defendants say they offer it only to prove that Dunkley was not the inventor. They stand on the priorities set up in their answer as defenses, namely, the priority of the Vernon patent for a process for peeling fruit and the Grier device for an apparatus used in conducting

that process. They deny the priority of the Dunkley peach-peeling machine, and offer the testimony of Campbell to prove that fact. This they cannot do. They cannot offer this testimony as true to prove a material and relevant fact for one purpose, and discredit it for another purpose. If it is true for one purpose, it is true for any purpose. And as the defendants have refused to commend the testimony of this witness to the court as true for a purpose to which it was relevant and material, we must reject it for the purpose for which it was offered, namely, to fix the date of the Dunkley constructed machine in 1903, instead of 1902. But, accepting Campbell's testimony as true in those particulars wherein he is corroborated by other witnesses, we find he worked for Dunkley on a machine of some kind in 1903; but this does not identify the machine as the one Dunkley claims to have invented in 1902, nor does it tend to prove the machine as Campbell's invention.

[2] The rule of law applicable to the evidence in this case was stated by the Supreme Court in Adamson v. Gilliland, 242 U. S. 350, 353, 37 Sup. Ct. 169, 170 (61 L. Ed. 356), where the court says:

"Considering that a patent has been granted to the plaintiff, the case is preeminently one for the application of the practical rule that, so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis v. Schwartz, 155 U. S. 631, 636 [15 Sup. Ct. 237, 39 L. Ed. 289]. The reasons for requiring the defendant to prove his case beyond a reasonable doubt are stated in the case of The Barbed Wire Patent, 143 U. S. 275, 284 [12 Sup. Ct. 443, 450, 36 L. Ed. 154]."

The judgment of the lower court is affirmed.

LEE v. MALLEABLE IRON RANGE CO.

In re BECKWITH'S ESTATE.

(District Court, E. D. Wisconsin. January 15, 1918.)

1. PATENTS ⟸318(6)—INFRINGEMENT—ACCOUNTING FOR PROFITS.
That an infringer, during the time of infringement, substituted pressed steel plates for malleable cast plates, which it had previously used in making one part of the infringing structure, thereby effecting a saving in cost and increasing its profits, does not entitle it, on an accounting for profits, to deduct the amount of such saving, but its liability is for the profits actually made.

2. PATENTS ⟸318(6)—INFRINGEMENT—ACCOUNTING FOR PROFITS.
An infringing manufacturer paid to its sales managers, in addition to their salaries, a commission on the account of their sales, including the infringing article. *Held* that such payments were essentially a division of profits, and that on an accounting for profits of the infringement no part of the amount could be deducted as a part of the cost of manufacture.

3. PATENTS ⟸318(6)—INFRINGEMENT—ACCOUNTING FOR PROFITS.
An infringer, which both manufactured and sold the infringing article, on an accounting for profits, is not entitled to a deduction, in addition to all proper allowances for cost of manufacture, of a manufacturer's profit.

4. PATENTS ⟸318(3)—INFRINGEMENT—ACCOUNTING FOR PROFITS.
Where expert accountants have accurately determined from the books of an infringer the profits actually made by the manufacture and sale of the infringing article, the court cannot safely apply the standard of comparison rule, by undertaking to estimate what profits would have been made upon some other open form of the structure, which defendant might have made, but did not.

5. PATENTS ⟸318(3)—INFRINGEMENT—ACCOUNTING FOR PROFITS—RELEVANCY OF EVIDENCE.
An established profit upon an "open" structure, which may be attributed to a variety of causes, cannot be made the basis for an inference that an equal profit on a patented structure was not attributable to the invention.

6. EVIDENCE ⟸595—INFERENTIAL FACTS.
The susceptibility of a fact to produce an inference must be denied, when the probative force or effect of that inference may be wholly frustrated at the option of the one to be affected by it.

7. PATENTS ⟸319(1)—INFRINGEMENT—RIGHT TO DAMAGES.
The law does not attempt in advance to enumerate with precision the circumstances under which a patent owner may be substantially damaged by infringement, but the right to damages, substantial or nominal, depends upon the proof in the particular case.

8. PATENTS ⟸319(1)—INFRINGEMENT—DAMAGES RECOVERABLE.
In finding a "reasonable" royalty, as a basis for computing damages for infringement, the degree to which the infringement has been profitable or unprofitable to the infringer cannot be a controlling factor, but it is to be determined on all available pertinent proofs.

9. PATENTS ⟸319(3)—DAMAGES FOR INFRINGEMENT—INCREASE BY COURT.
Evidence that defendant, on examining a new patented improvement in an article which it manufactured, at once appropriated the invention and refused to cease infringement until compelled at the end of long litigation, and that pending the suit it unsuccessfully attempted, through one of its officers, to obtain a patent for itself embodying all of the essential features of complainant's invention, with only colorable changes, *held* to render it proper for the court to increase the damages awarded for the infringement.

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10. EVIDENCE ⟸99—"RELEVANCY."

The test of "relevancy" of evidence is that an evidentiary fact can be considered as admissibly relevant only when the desired conclusion based upon it is a more probable or natural, or at least a probable or natural hypothesis, and when the other hypothesis or explanations of the fact, if any, are either less probable or natural, or at least not more probable or natural.

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

In Equity. Suit by Fred E. Lee, administrator of the estate of Arthur K. Beckwith, deceased, against the Malleable Iron Range Company. On exceptions to report of special master. Modified and confirmed.

Harry C. Howard and Fred L. Chappell, both of Kalamazoo, Mich., for plaintiff.

Banning & Banning, of Chicago, Ill., and Arthur L. Morsell, of Milwaukee, Wis., for defendant.

GEIGER, District Judge. The case is before the court upon the decision and report of the special master under the decree for an accounting in respect of gains, profits, and damages. The many years of the litigation need not be reviewed, and the questions raised upon exceptions to the report, though important, are few in number and within quite narrow compass. The record before the master, while involving much in the way of figures, now presents no matter requiring re-examination of details, nor review of calculations in which such details are essential to produce items about which there is controversy. It is therefore possible to proceed directly to a consideration of the facts presenting questions exhaustively argued by counsel on both sides. The parties are in accord upon the fundamental fact that the accounting must be concerned with the manufacture and sale by the defendant of approximately 47,290 structures embodying the patent, between April 18, 1905, and April 18, 1911. It will suffice to begin with the defendant's statement of account respecting their manufacture and sale. At the outset the gross sales are declared to aggregate $299,704.08. Against this the following credits are claimed:

(1) Cost of materials required	$152,003.06
(2) Cost of labor	37,264.87
(3) Saving in cost of manufacturing part of combinations	15.138.79
(4) Proportional amount of expenses, losses, etc	76.456.44
(5) Manufacturer's profit	20,239.97
Total	$301,103.13

On its face, the statement, therefore, shows a loss of $1,399.05.

The great prosperity of defendant's business as a whole, during the infringing period, exhibited, among other things, by dividends varying from 15 to 50 per cent. upon a capital stock of $100,000; total profits during the period of $737,374.36; commission salaries to certain officials, during the period, of $207,486.94; a great increase of net sales and an increase of average profit per range from $2.95 to $8.56, during

the same period—all these facts led the master to view with skepticism the account presented; and he was justified in this, not merely by the figures just referred to, but by the very act of the defendant, during these years, of incorporating in its structure, as an important feature of it, the patented combination which has given rise to these years of strenuous litigation involving its legal merit. As against such an array of facts, testimony of witnesses ascribing but minor importance to an invention to which the court had by its judgment accorded real merit was of necessity given, not only cautious, but rather scant, consideration by the master; and he properly proceeded at once to test the account in respect of its claim to credits upon the objections made thereto by the claimant. The consideration was addressed to these items:

First. The third credit, "Saving in cost of manufacturing part of combinations, $15,138.79."

Second. Parts of the fourth credit, $76,456.44, as relating to commission salaries, depreciation, and interest on capital invested.

Third. The fifth credit, $20,239.97 as "manufacturer's profit."

These will be considered in the order stated:

[1] The evidence discloses that initially, and in approximately 7,002 infringing combinations first made, defendant used malleable cast heating plates. In the other approximately 40,288, later manufactured, it used pressed steel plates, for whose manufacture and preparation it installed the necessary machinery and appliances. These latter, so the proofs show, could be made and used at a cost less than the malleable plates by $15,138.79. It is urged that this saving or gain should be allowed to the defendant, as due to its thrift and foresight, and not to Beckwith's invention. It may be said that the position is not at all supported by Mason v. Graham, 23 Wall. 276, 23 L. Ed. 86, and for the reasons appearing in italicized words of an excerpt from the opinion in that case:

"But the master further reported that defendant made infringing motions *after a pattern of his own devising;* that they cost, per pair, 50 cents less than the Pickerstaff mechanism which he had immediately before put upon his looms; that *they were* made *under a patent granted to him;* and that they cost about 50 cents less than the motions made by the plaintiffs, the difference in the cost *being due to his invention.* If this is so, it is clear that the 50 cents saved on each pair, equivalent to 50 cents *profit,* is not *due to the complainant's invention.* * * * Manifestly the complainants are not entitled to the savings or profits *resulting from the defendant's own invention.*"

Counsel suggests that the "principle of the matter" is not affected by the fact that "the pressed steel plate was *per se* never the subject of a patent"; that it could not affect the amount of saving, and "whatever saving was effected by the defendant in changing or improving its machinery and its methods of manufacture, at its own expense, something it was under no obligation to do for the benefit of the complainant, could in no way be attributed to, or be the result of, the patented invention, unless the patented invention itself inherently effected the saving."

Now defendant's thought of claiming a saving can be attributed to nothing other than its experience in first using the malleable cast plates; and the record suggests this query respecting defendant's at-

titude, had it always used the pressed steel plate; could it then contend that this $15,138.79 is not a part of its profit, because it or some one else might have made a more expensive plate? Or, if the evidence disclosed the converse situation—i. e., that defendant originally used pressed steel and later, at greater cost, malleable plates—could complainant urge that the former, and not the latter, cost be taken, to the end that a larger resultant profit be exacted? Or, again, suppose that, instead of using a "sheet steel metal reservoir," as an element of claim II, the defendant had used "copper"—and assuming equivalency of elements—could complainant ask that defendant account for its profits upon the basis of sheet steel, rather than upon the higher cost basis of copper, actually used?

In a sense, it may be true that a choice of pressed steel, or the saving effected thereby, is not attributable to the patent; neither is the original selection of malleable cast attributable to it. But either, if and when used for plates, embodies an element of the claim; and the query is not what was or is their relative merit or cost, but what, whichever was used, was its cost? It would be equally possible for an infringer to minimize his accountable profits by showing "savings" through reduction of high salaries to salesmen, or of expensive advertising in the later, as compared with the earlier, infringing period.

So, in Mason v. Graham, when it appeared that there was a "saving" attributable to a feature neither within the scope, nor an embodiment of, the patentee's right, he was not entitled to its benefit as a part of the profit. But, in the case before us, the use of either cast or pressed plates was in disparagement of the element of the claim and the plaintiff is entitled to recover the profit actually made on either or both, as used—unless, as above indicated, an infringer may drive the patentee to accept, not profits actually made, but such as might have resulted from manufacturing in the method most expensive and therefore productive of the minimum of profit. Of course, this may easily be carried to a point where a loss would always result. I think the master correctly ruled on this phase of the account, and exceptions thereto are overruled.

[2] The next question arises upon the so-called "commission salaries," claimed by defendant as an item of cost to be deducted. The amount is $13,376.47, and is asserted to be the proportion allotted to the infringing combinations out of an aggregate of $207,486.94 paid for the infringing period to defendant's three managers by way of compensation over and above regular salaries. The master conceived the situation to present, not a payment of salaries, but in reality a division of profits. The large amount, the terms of corporate resolutions for their contingent award, their progressive increase with increased profits, and their treatment as such dividends or division upon the books, are alone sufficient to support the master's view. The resolutions, if lawful, while authority for their ultimate payment, nevertheless placed no obligation upon the beneficiaries not already comprehended within their contracts for service at stipulated salaries. In my judgment, a good way to test out the status of these payments in respect of cost or profits is to consider whether defendant, as a man-

ufacturer, in endeavoring to make up a yearly budget upon any assumed volume of business, in any aspect of the matter, would have included these payments, or any estimate thereof, as an item of cost of manufacture. Obviously not. The arrangement or plan was but the introduction of the common co-operative idea between employer and employé, in which the former agreed to give and did give to the latter a percentage of profits, if and when earned. The exceptions to the master's ruling upon this item are overruled.

[3] The next item, which was the subject of the master's report, and his action whereon is sought to be reviewed upon exception, is a so-called "manufacturer's profit" of 10 per cent. incurred on cost of material, labor, depreciation, factory expense, and invested capital of $202,399.71. The difficulty in accepting the contention on behalf of the defendant in respect of this item arises through the practical concession that, howsoever it be termed, or upon what considerations it is attempted to be justified, it still remains a gain or a profit in the hands of one who, as the defendant in this case, was both manufacturer and seller. It may be true, as suggested, that if a patentee is not himself manufacturing the patented device, but procures another to make it, the latter must be paid an amount which will include what may be called the manufacturer's profit. There, however, arises the precise distinction which exists between manufacturer with and without right—the distinction between a licensee and an infringer. And if the case be tested in the language of counsel:

> "When, however, no contract has been made in advance, but the patentee elects to treat the manufacturer practically as his agent—as his agency, to use the words of the Supreme Court—by holding him as a trustee for the savings and profits that he may have made, due and attributable to the invention, he thus adopts or appropriates the manufacture done by the defendant, and should stand in the same position and condition in an accounting for profits as if he had hired him in advance to manufacture the goods for the market"

—there is no justification for treating the situation in any different way than by a simple ascertainment of the difference between cost and yield. It may be a common expedient, for one who both manufactures and sells, to include as an advance estimate a certain percentage covering the items referred to, largely by way of creating a safe margin beyond which the real manufacturer's profit is to be calculated. But, after the fact, there is no justification for dealing with such estimated margin as a sort of gain which is not in fact a gain. The very statement of the proposition treats it as such, and, in a case like the present, there is no reason why, if the manufacturing end is to have a margin of that character, a like margin should not be credited to the selling end. If one who makes is entitled to a gain which shall be figured as an item of cost, why should not a seller likewise insist upon a preliminary seller's profit to be figured at cost? If the defendant can say to the patentee that the real gain never arose until the article was sold, wherefore the patentee should pay this so-called manufacturer's profit, why should not the defendant as seller likewise claim that the infringed articles, if the plaintiff himself had made them, would have to be sold by somebody, therefore a customary seller's profit should be charged to the pat-

entee to reimburse the defendant as an item of selling cost, although it was really a gain?

In my judgment, the case of Providence Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566, in basing the accountable profits upon the computation of the "difference between cost and yield," and in any event "as a manufacturer calculates the profits of his business," to the end of ascertaining the gain when "both the receipts and payments are taken into the account," can and does furnish the sensible and conclusive rule on the subject. The cases of Warren v. Keep, 155 U. S. 270, 15 Sup. Ct. 83, 39 L. Ed. 144, and Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, have not disturbed this rule. This result would seem to be all the more demanded in view of the tendency, recognized by the master, to make, on behalf of the party charged to account, certain allowances proper to be taken into consideration in figuring cost. They include depreciation or other capital waste, and, as the parties agree, interest on the capital invested in producing the infringing structures. The latter is well illustrative of the good sense of the doctrine which assumes that, although interest may not have been charged upon the books, the capital was in fact appropriated, and with it the appropriation of interest as the measure of its use, which necessarily would have been required of anybody who sought through investment of a like amount to manufacture the articles. When, however, it is sought to add to this an arbitrary amount, in and of itself a gain, after every item of actual outlay has been in fact allowed, it must, as it does, if recognized, become a method of insuring, to one who was both manufacturer and seller, some gain which he made at the expense of the patentee, and which can be attributed to no source except the making of a structure which embodies the patent.

To say, in justification of this, that the patentee "makes a defendant his quasi agent" when he adopts the business done by him, by asking in equity for an accounting of the proceeds of such business, furnishes a like good justification for taking the whole of the profits, or at least putting the patentee in the position where, in any event, he must recognize his so-called agent's rightful claim for reasonable value of the service rendered in the discharge of the tortious agency. Obviously, this of itself might leave to the so-called agent sufficient recompense to have made infringement worth the while. I agree with the master in disallowing this item claimed by the defendant.

Up to this point, by eliminating from the defendant's statement the items considered, and by allowing to him credits such as depreciation, interest on capital invested, by overruling plaintiff's claims for so-called extra profits and interest in profits, the master reaches the conclusion that the defendant made a profit on infringing combinations during the period involved aggregating $47,356.18. It may be observed, before proceeding to consider other contentions in the case, that this result was accomplished with the expert aid of highly skilled accountants, whose labors extended over weeks and months of time, and whose conclusions, so far as they depended, not only upon industry, but integrity and unusual capacity, seem not to have called forth exception from either side. In other words, in the problem confronting the parties and

the master, in so far as it depended upon labors not within the competency of counsel or the master to exert, but upon real skill of able accountants, was made more readily capable of solution. It seems to have brought the case to a point where, as above indicated, the contentions have narrowed down to pure questions of law.

[4] Notwithstanding the apparent result of not only a possible, but rather a clearly rational, apportionment of profits in the aggregate named, the defendant maintains that his result should not be accepted, but that, obediently to the rule or doctrine of comparison of profits, the master, upon the evidence, should have found that the defendant made no profit attributable to the Beckwith invention. It is asserted that Beckwith did not create the reservoir, but that his advance consists in a combination embodying as an improvement a single element not found in the prior art; that the contact plate, if taken as the "soul" of Beckwith's structure, enables a comparison of the improved structure with those of the "open" art; hence it is not only possible, but it is necessary, to make a comparison of the profits made upon the new structure with those not containing the invention, and which were open to the public. If, upon such comparison, it appears that like profits could have been realized upon the latter, then the plaintiff cannot claim that the profits actually found can be attributable to the Beckwith invention.

The statement of the master that "one must confess hesitation to apply this rule," and his final declination to recognize or to follow it, are the object of severe criticism at the hands of defendant's council. But notwithstanding such criticism, and the voluminous brief in support thereof, the action of the master in rejecting the rule is confidently approved. Certainly, if through skilled endeavor of accountants a conclusion is reached that profits in the aggregate amount were made upon the infringing combination, as above indicated, the master could well feel that progress had been made to support the inference that such profits are attributable to the invention. Whatever may be the applicability of this standard of comparison rule to other situations, there ought to be at least hesitation in adopting it where profits have been figured and apportioned without its aid. The obvious danger of attempting to measure recovery, not by what the infringer as a manufacturer or seller in fact made as a manufacturer's and seller's profit on the particular combination, but by the gain, if any, as compared with what he would have made, had he manufactured something which he might, but did not, make—the obvious danger involved is this: It introduces a conjectural basis of evidence; it compels assumptions which are repugnant to the very purpose of giving relief to the patentee for the appropriation which the infringer for some reason chose. It compels comparison of what he actually did, as against a standard which he chose not to follow; it gives prominence to what, but for the invention, he might have done, thereby to get the measure or value of what, apparently, because of the invention, he did do. In other words, the realm of speculation is explored, collaterally inquired into, with the inevitable result of always finding some standard which will lead to nominal recoveries; a practical result of treating the infringement

or appropriation as a mere fortuity, a mere accident of making a selection of one out of several equally desirable courses to pursue.

In further consideration of this, let it be assumed that the very reservoirs suggested by the defendant as standards of comparison could have been made at precisely the same or at variant costs; the infirmity of the rule—the injustice, I believe, of its attempted application—rests in the added hypothesis or assumption that, had any other been chosen, it would have achieved corresponding results in respect of the number of infringing reservoirs which the defendant in fact made and sold. In this way, although the whole manufacture and resulting trade may have been bottomed upon the actual and commercial merit of the appropriated invention, an infringer may still retain his gains and go acquit, except for nominal recovery, because he can show that he gained or saved or profited no more than his competitors in their manufacture and sales of "what he would have been free to make and sell, but did not." The proof may be overwhelming that the particular infringer, in the course of his manufacture and sale, not only met competition, but distanced it, by creating a greater commercial favor for the infringing article, yet so long as he can show that he made no more money than he would have made, had he followed the course of his competitors, he may retain his gains because this enables him to say that he made nothing out of the invention. It results in denial of gains by an infringer who is fortunate enough to have actual or possible competitors in the same general line through whom and whose experience he can place before the court an hypothesis which, after all, enables him to travel in a circle on this matter of gains and profits.

The general proposition advanced by defndant was involved in Warren v. Keep, supra. There concurrent transactions by the infringer were shown, in what are termed the "Hathaway" and the "patented" grates—the former being "open" to the public and therefore offered for comparison. It disclosed profit in its sales equal to the profit made on infringing sales, wherefore nominal recovery was urged, because, so it was contended, the profit on the infringing sales, being no more than on the "open" styles, cannot be "attributed" to the patent. Of course, the moment the Hathaway grate is assumed as a standard, it will not be permissible to ask as a pertinent question, "To what is the profit made on its sale attributable?" But suppose this question, as it well might be, were susceptible of the answer:

"The profits on the sale of the Hathaway grate are attributable to the Hathaway patent as an improvement upon former grates. True, the patent has expired, but that improvement is the substantial basis of sales."

Let it further be supposed that, during the life of the Hathaway patent, its owner sued an infringer; that the latter, upon accounting, was able to force consideration of the "Jones" grate as a "standard," "open" to him, and which, had he made resort to it, would have yielded a profit equal to the profit on the Hathaway grate, wherefore he was subjected to nominal gains only. Manifestly, the question respecting the origin and "attributability" of the "Jones" profits could

in turn be asked and answered through like development, and the case itself becomes limitless in collateral expansion or involution.

It will be granted that this sort of development would never be permitted in a case, not because of the extremeness of the illustrations, but because they disclose the infirmity, legally, of nonrelevancy. Certainly, if such course could be resorted to, it leads to the practical result that, whenever it is possible to show that the patent embodied merely an "improvement," it is not only possible, but quite probable, to establish no profit attributable to it. But, whether a standard be assumed or created, no matter how, the reasoning in the present case is reduced practically to this basis:

The problem, as defendant states it, concerns, not the total profits which it made upon sales of reservoirs embodying the Beckwith invention, but only such quantum of profits as are attributable to that embodiment. It offers, as the fundamental fact, which will solve the problem, that on an unpatented reservoir, which it might have manufactured, a certain profit, equal to the whole profit which it made on the infringing reservoirs, might have been made, and, because the fact thus offered discloses equality, the asserted conclusion is in negation of *attributability* to the patent. The points of resemblance in respect both of the structural characteristics and the profit yield of the respective devices are debited and credited, to the end of justifying the inference, viz., that the point of difference—the Beckwith invention—could not be related to the points of agreement, viz., the profits.

[10] If this is a fair statement of the defendant's argument, its infirmity, in my judgment, rests in this: That the fact which is offered as the basis of the argument cannot meet the elementary and fundamental test of relevancy. Such test is, in brief, that:

"An evidentiary fact can be considered as admissibly relevant only when the desired conclusion based upon it is a more probable or natural, or at least a probable or natural hypothesis, and when the other hypothesis or explanations of the fact, if any, are either less probable or natural, or at least not more probable or natural."

The fallacy of attempting to apply the rule as urged by the defendant grows out of the assumption that, as between an unpatented and a patented structure, whether the latter be a totally new or merely an improved structure, there is in the creation of profits upon manufacture and sale of the structures, respectively, a relation such that points of agreement or points of difference may be resorted to, and, as such, exhibit, in dollars and cents, *attributability* of the whole or parts of the profits to resemblances or differences. In my judgment, common experience forbids such an assumption. Let it be granted that in a certain sense, if it be shown that a profit of $2 per reservoir would have been possible on the South Bend range, and that, because a like profit was made by the defendant upon an infringing reservoir, the conclusion contended for was warranted, what will be the conclusion when once it appears that the defendant not only chose not to make the South Bend reservoir, but made the Beckwith at a less profit, though, because of its acceptability, the volume of its business was fast tending to supersede every other "open" style of range? Does not this show the non-

relevancy of the fact offered in evidence which can with equal force be pressed to establish the rule that no profits can ever be attributed to a patent?

I believe that the matter may be stated in another way: A basic infirmity of the so-called rule of comparison resides in the effort to fasten upon the words "attributable to the invention" a meaning which, with the aid of this rule, can never be satisfied, except by showing increased profits on the individual infringing, as against the "standard," structure. Whereas, the invention and the endeavors of the inventor, not only may have been designed and exerted to increase, but actually do increase, cost and thereby reduce profits, which reduction is expected to find compensation either in increased sale price on increased volume of business, or not at all; or that they were calculated either to reduce or increase in like proportion cost of manufacture and sale price, and thereby maintain the same profit as was earned upon the unpatented or unimproved structure. In other words, the "standard" itself, its high cost of manufacture and its high price, its profit yield, to say nothing of its inferiority, may have prompted the inventor in his efforts, by mere improvement, to lessen the cost of making, the price, the yield, as well as to do something new and useful. So, too, as bearing upon this question of relevancy, these further considerations are not to be overlooked. The infringer, presumably, knows the "standard" and its yield of profit, but he also can and does fix and control, not only the cost, but the sale price, of the infringing structure, and thereby its yield. Therefore it is within his power, at all times, by contenting himself with a yield equal to or smaller than that of the "standard," to escape accounting for profits "attributable" to the invention; and though, by greatly reducing his yield upon the particular structure, he may, as stated, by a greatly increased volume of manufacture and sale, increase his aggregate yield of profits. True, while he may not create or control the "open" or "standard" structure, or its yield, yet he can by his own conduct, at will, frustrate the probative force or effect of the "standard," and hence the *result* of a "comparison." Or, as indicated, assuming that he might be quite innocent respecting the standard, his whole endeavors may have been exerted, his whole profits may have been earned, in his estimate of, and upon the public's faith in, the "improvement"; he still has the right, under this rule, to learn in an accounting suit that he in fact made his profit in spite of, not because of, the "improvement."

[5, 6] This extended discussion has been attempted by way of response to the insistence of defendant's counsel for the application of this rule leading to nominal recovery only, upon any aspect of the case; and the discussion likewise aims to justify following Warren v. Keep, which, in my judgment, denies legal relevancy to facts upon which the "rule" may be urged. The various illustrations or analogies have been suggested with a view of demonstrating that, in a case like the one before us, an attempt to apply this rule must fail, because the fundamental fact, the adoption of a so-called "standard" or "open" structure and the profit which it yields, cannot meet the elementary test of relevancy —if we are permitted to assume that such test proceeds only upon the apprehension of a natural or probable relation between the fact and

the conclusion to be deduced from it. It is believed that a consideration of the matter in this elementary light demonstrates that an established profit upon an "open" structure, which, as we have seen, may be attributed to a variety of causes, is not and cannot be made the basis for inferring that an equal profit in a patented structure was not attributable to the invention; that, in any event, the susceptibility of a fact to produce an inference must be denied, when the probative force or effect of that inference may be wholly frustrated, at the option of the one to be affected by it.

I am thus of the opinion that the master properly declined to recognize the doctrine of comparison, and that he rightly resorted to the evidence respecting profits as real evidence justifying directly the sum found; that in doing so he properly considered the infringing combinations made by defendant as unitary, not to be broken up, to the end that a necessarily arbitrary and wholly speculative apportionment or segregation of profits be allotted to each physical piece responding to the appropriate element of the combination claim, be made or attempted; and the exceptions to his findings and to the refusals to find are overruled.

[7] We are brought to the finding on the damages; and, of defendant's contentions, these will be considered: (1) Those attacking the award of any damages other than nominal, on the grounds asserted; (2) those relating to the amount actually awarded.

Counsel advances the broad proposition that a patentee can sustain "actual damages" only when "one or the other of four sets of facts or circumstances are shown to exist." They are: (a) That the owner of the patent is manufacturing and selling the patented device; (b) that the infringements "prevent the owner" from establishing the business of manufacturing and selling; (c) that the owner of the patent "is granting licenses on a royalty basis"; (d) that the infringements have "prevented" the owner of the patent "from effecting arrangements on a royalty basis to establish a license fee." In effect, the proposition is that, no matter how valuable the patent or how flagrant the infringement, the owner, until attended by one or more of the "set" of circumstances as sort of jurisdictional prerequisite, or sine qua non, does not and cannot show himself legally qualified to suffer damage for which substantial redress may be given.

I know of no rule of law which declares that trespasses upon property or property rights are nominal whenever the trespasser can show that the owner, at the time of the trespass, was not gainfully occupying his property or exercising his rights; that his house, unless he lived or pursued a gainful vocation in it, or rented or tried to rent it, or was prevented from renting or trying to rent it because occupied by a trespasser, may be burned by any one at the hazard of nominal damages only. It is a sufficient answer to the contention that the law does not attempt in advance to enumerate with precision, or categorically, the times, places, circumstances, or situations in or under which a patent owner may be substantially damaged, any more than it does with respect to owners of other property or property rights. The cases cited by plaintiff not only give abundant support to this, but point out that in patent cases, as in others, the right to damage, substantial or nom-

inal, depends upon the proof in the particular case. Obviously, quantum or quality may vary as the character of cases, in their susceptibility to quantum or quality of proof, varies. But, when it is conceded that a "reasonable royalty" can furnish a measure for damages, it must likewise be conceded that plaintiff assumed no burden other than to adduce evidence competent to establish it.

[8] Now, if the idea of a reasonable royalty as a measure of damage to a patentee is at all analogous to other situations where the law imports "reasonableness" as an element, then the degree to which the act of the wrongdoer has been profitable or unprofitable to himself cannot be a controlling test. Wherefore the fact that defendant is shown to have made $47,000 "profits," apportioned as "legally attributable" to the embodiment of the invention in the combination structures made by it, cannot limit the proofs in their legitimate tendency—as it may develop—to either a larger or smaller amount as reasonable royalty damage. True, profits actually made may be considered; but that their amount must be taken as the test of reasonableness, or that profitless infringing must negative damage by defeating the exaction of a reasonable royalty by a patentee, is no more possible in measuring damages in respect of infringement, than would be the attempt of a lessee at will or sufferance to limit or defeat reasonable recovery by proving his occupation of the tenement to have resulted in little or no profit to him.

When, therefore, the restriction contended for cannot be recognized, and the inquiry is subject to be tested, not by the infringer's "legally attributable" profits, but rather by the character and value of the patentee's property right and the damage to him by its invasion or appropriation, the master was bound to resort to the large range of testimony, pertinently bearing upon the reasonable amount to be awarded. In the discharge of that duty he rightfully considered everything disclosed in this litigation which had a tendency to establish that Beckwith's invention was a highly important and valuable contribution to the art, its creation of profits actually made by defendant upon its embodiment in infringing structures, its efficacy to contribute directly or indirectly, and its actual direct or indirect contribution to the success of the infringer's business of manufacturing and selling reservoir ranges, and, generally, its value as property, to the end of ascertaining the reasonable value of its use or the exercise of the rights growing out of it.

Certainly the defendant's conduct and actual experience during the infringing period, in so far as it disclosed its own estimate of the importance and value, and the court's adjudication respecting the merit, of the invention, have persuasive bearing upon this matter, which is at the bottom of the inquiry. Admittedly the plaintiff may not have resorted to evidence sometimes offered to prove reasonable royalty—he may not have been able to—but that did not bar resort to "other available, pertinent proofs." Frumentum v. Lauhoff, 216 Fed. 610, 132 C. C. A. 614. So, when the plaintiff offered the opinions of men qualified by experience to speak directly to the matter of reasonable royalty, when the wide range of testimony in the record is appealed to, the case in my judgment presents a great array of facts and circumstances, not only competent, but persuasive, to

support the award made by the master; and the most careful study of defendant's brief upon this phase of the case cannot avoid the conviction that the criticisms of evidence bear, not upon its competency, but its weight and credit. Therefore, even if some or all of the criticisms be granted the latter merit, the master's report is none the less unassailable. The exceptions upon this branch of the case are overruled.

[9] The final matter for consideration pertains to the exercise of the court's power to increase damages upon the facts reported by the master. The subject is treated under five heads, namely:

First. That the defendant was guilty of a deliberate and intentional appropriation of Beckwith's device. The master adopted the facts originally found by the court, viz.:

"Among other experimenters was the defendant company. About the time the complainant's range came on the market, defendant was engaged in conducting certain experiments on sheet metal reservoirs at the hardware store of one Rassman at Beaver Dam, Wis. While these experiments were going on, Rassman, who was also sales agent of the Beckwith range at Beaver Dam, had occasion to visit Dowagiac, Mich., and there saw one of the Beckwith ranges built under the patent in suit. Rassman came back and told defendant that Beckwith had solved the problem of the right-hand reservoir. Thereupon one of the new Beckwith ranges was obtained, and at the store of Rassman defendant's officers and experts made a thorough examination of the same, and extended to Beckwith the compliment of adopting and appropriating all the elements of his device. Thereupon the defendant in its catalogue gave prominence to the convex rigid back plate as a new and prominent feature. The clamping apparatus adopted by the defendant differed in form, but was clearly a mechanical equivalent of the Beckwith clamping means. In the defendant's structure introduced in evidence convexity of the back plate is five-eighths instead of three-eighths of an inch, as shown by the Beckwith structure."

Second. That the activities of the defendant in connection with the "Moylan" range constitute "a direct connecting link between the Rassman incident (referred to in I, supra) and the manufacture of the infringing type," and, as such, embodied "a deliberate attempt to imitate and use in part, in its in-standing bulged contact plate, the Beckwith invention."

Third. That the failure of the defendant to cease infringement upon receipt of a letter, June 16, 1905, from the plaintiff's attorneys, cannot be regarded as evidence of wantonness, malice, or unreasonableness, because the defendant had the right, under advice of counsel, to contest the Beckwith patent; and this was presumably done in good faith.

Fourth. That the McClure patent, dated June 27, 1909, "impresses me," says the master, "as a deliberate attempt on the part of the defendant to deprive the complainant of the benefits of its patent." It was applied for during the pendency of the litigation, but the fact was not disclosed until brought out by complainant upon the hearing before the master. The master further says:

"The file wrapper and correspondence with the Patent Office show that every effort was made to obtain a patent by which the defendant could secure to itself all possible benefits of the Beckwith patent. The Patent Office, however, cited the Beckwith patent and others, and refused to issue to Mr. McClure

a patent on the essential elements of the Beckwith patent, giving him only what may be roughly described as a combination of a convex plate, reservoir, and means of adjustably regulating the contact by tilting the reservoir; the chief feature being the adjustable clamping means. This patent was abandoned after the injunction issued in this case."

Fifth. The pending litigation. Its duration and many incidents, summarized by the master, lead him to "express his opinion thereon, which is that, so far as he can see, they do not seem, on the whole, to have been taken by the defendant vexatiously, merely for delay, unconscionably, or in a 'stubbornly litigious' spirit." He expresses the further conclusion that, in the proceedings before him, he cannot conclude that defendant has used bad faith, nor willfully delayed the same, and that the defendant's conduct in the litigation cannot be considered, upon his conclusion, as forming "ground for increasing damages."

It will be granted, I assume, that, when once facts are brought to the attention of the court which bear pertinently upon the infringer's malicious or wanton conduct, not merely in litigation, but in respect of matters pertaining to infringement, conduct which may precede or which may concur with litigation, there is created a basis upon which the court, in its discretion, may exercise the conceded power. Therefore, in considering the five matters which are brought before the court by the master's report, I have no difficulty in concluding that a mere failure to cease infringement, likewise the exhibition of a pugnacious disposition in litigation, when standing alone, cannot ordinarily furnish a sufficient basis. But the facts found by the master—not to be assailed for the want of evidence to support them—which convict the defendant of a deliberate purpose to appropriate the invention, to appropriate that which (it was one of the first to recognize) "had solved the problem of the right-hand reservoir"; its course and conduct from the outset, in attempting to fortify itself in its appropriation; the act of seeking, and persisting in its efforts to get a patent, through its chief officer, which embodied the essentials of Beckwith's construction, coupled with some colorable changes—these facts furnish, in my judgment, ground for an appeal to the exercise of the power to increase damages, which cannot be ignored. Their recognition is called for, notwithstanding the presumptive good faith in following the advice of counsel respecting cessation of infringement, or like advice respecting vigorous defense of litigation. They are facts which at once subordinate the latter facts, and the color of good faith which is derived from advice of counsel cannot lessen or impair the efficacy of the other facts to condemn the defendant's conduct as involving a deliberate and willful purpose.

Had the defendant prevailed in this litigation, it would have found, in such result, legal exculpation for the conduct referred to; but, having lost, its vigorous good-faith efforts, through counsel, to succeed, furnish neither legal nor actual exculpation for its conduct. The litigation forced it either to admit or to deny the plaintiff's rights; and therefore, at all times, like any deliberate infringer, it has been in the perilous position where the judgment upon its denial of plain-

tiff's rights might carry with it condemnation of its conduct outside of the lawsuit.

I assume that an infringer, howsoever flagrant his conduct, may stand mute and await suit; that he may have the lawsuit defended in a vigorous and perfectly lawyerlike manner; in short, that he may compel the patentee to prove his case; but he does not thereby effect a transformation of nor eliminate his conduct as a circumstance of the "case"—the latter means, not the formal legal proceeding and its incidents, but rather the subject-matter and its attendant "circumstances"—particularly the infringer's conduct as disclosing a conscious purpose or delinquency in respect of matters of common fairness.

Whether the object in granting to courts this power to increase damages be to reimburse or compensate for matters not of themselves evidencing damage legally recoverable, or whether it is punitive, or both, certainly, if the conduct of a defendant has been found to warrant its exercise, then that conduct, and the sacrifices which a patentee must make to obtain a vindication of his rights and redress for his grievances, may both bear pertinently upon the degree to which the court exert the power. I am satisfied that the circumstances justify an increase of the damages awarded by the master by 20 per cent.; and that increase will be awarded.

The exceptions to the master's report, filed by either party, not herein considered, are severally overruled; and a decree may be entered upon the report as modified.

M. B. FAHEY TOBACCO CO. v. SENIOR et al.

(District Court, E. D. Pennsylvania. December 22, 1917.)

No. 1483.

1. TRADE-MARKS AND TRADE-NAMES ⊂=10—UNFAIR COMPETITION—RIGHT TO USE TRADE-NAME.

   Every one, in the absence of self-imposed restraint, has a right to use his own name in his own business, in connection with the sale of articles manufactured and prepared or selected by him, by way of advertising the same, provided he does so without intent to perpetrate a fraud on others, or indulge in unfair competition.

2. TRADE-MARKS AND TRADE-NAMES ⊂=23—UNFAIR COMPETITION—APPROPRIATION OF NAME OF ANOTHER.

   No one can, by merely adopting and appropriating the personal name of another, without the consent of the latter, acquire as against him an exclusive right to the use of that name in connection with the sale of articles of the class to which it has been applied.

3. TRADE-MARKS AND TRADE-NAMES ⊂=68—UNFAIR COMPETITION—APPROPRIATION OF NAME OF ANOTHER.

   No one can acquire an exclusive right as against a competitor in business by appropriating his name, different from his own, to be applied in the common business, without the consent of the business competitor, and the use of a fanciful design, peculiar style of lettering or ornamentation, or other distinguishing marks on the label bearing the name, is immaterial; and hence, though one may adopt and apply his own portrait as a trade-mark for goods manufactured, prepared, or selected and

sold by him, he is not to be permitted to apply the portrait of a competitor in business to similar goods without the consent of the latter, and in case of consent only to the extent assented to.

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃21—EXCLUSIVE RIGHT TO TRADE-MARKS—ACQUISITION.

It is the use and not the invention of a trade-mark that creates the exclusive right, but a trade-mark actually applied for the first time by a manufacturer to articles made and sold by him to a dealer is not necessarily the property of the manufacturer; for, if it be applied at the request and with the authority of the dealer, to be used in connection with his sales, the manufacturer may be treated as the agent of the dealer.

5. TRADE-MARKS AND TRADE-NAMES ⊂⊃72—USE—RIGHT TO USE.

A cigar dealer, enjoying much popularity in the county in which he did business, by arrangement with the defendant, who was a manufacturer of cigars doing business elsewhere, used on boxes of cigars manufactured for him by the defendant, a label bearing a cut of his head and face, together with his name. The preparation and printing of the labels was paid for by the manufacturer. After the death of the cigar dealer the business and good will were transferred by his personal representatives to complainant's predecessors, and by them transferred to complainant. During the interval between the death of the cigar dealer and the acquisition of the business and good will by the complainant, defendant manufactured cigars for complainant's predecessors bearing such labels. *Held* that, though the dealer allowed the defendant to prepare such labels and affix them to cigars manufactured for the former, it cannot be assumed that he gave defendant an absolute and unqualified right to use such labels in selling cigars, and, as the right to use such labels passed to the complainant, defendant is not entitled, after the expiration of the arrangement between himself and complainant and its predecessors, without the complainant's consent, to use them on cigars not manufactured for it.

6. TRADE-MARKS AND TRADE-NAMES ⊂⊃35—TRANSFER—EFFECT.

In such case, as the business, with its good will, was transferred to complainant's predecessors, and complainant used the labels, defendant manufacturing cigars for complainant and attaching thereto such labels, complainant, who succeeded to the business of the original dealer using the labels, acquired the same right to use the labels.

7. COPYRIGHTS ⊂⊃29—PROTECTION.

Where labels applied to cigars did not bear the word "Copyright," or any abbreviation or letters suggestive of that idea, the labels are not entitled to protection on the theory that they had been copyrighted.

8. COPYRIGHTS ⊂⊃4—PROPERTY SUBJECT TO COPYRIGHT—PHOTOGRAPHS—"WRITING."

Cigar labels, containing the name and a cut of the face of a dealer, together with scroll work as disclosed in this case, are not "writings," subject to copyright within Const. art. 1, § 8, authorizing Congress to secure rights of authors in their "writings," and so are not entitled to protection under the copyright law.

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

9. TRADE-MARKS AND TRADE-NAMES ⊂⊃93(3)—UNFAIR COMPETITION—RIGHT TO TRADE-MARKS.

The fact that complainant's officers approved of the bringing of suit by the defendant to restrain the unauthorized use by third persons of such labels does not constitute an admission by the complainant of a right on the part of the defendant, as against the consent of the complainant, to use such labels on cigars not manufactured for it; the complainant and

defendant, by reason of their trade relations, having a common interest in restraining the unauthorized use of such labels by third persons.

10. JUDGMENT ⊂⊃707—CONCLUSIVENESS—"PRIVITY."

Thereafter the parties severed business relations, and the defendant manufacturer sued other manufacturers in a state court to restrain them from manufacturing and selling or disposing of cigars under the labels involved. Such manufacturers in their answer set out that they were manufacturing and labeling cigars for complainant, and for it exclusively, and were using the labels under complainant's direction as owner. A preliminary injunction was awarded, and, an appeal having been dismissed by the state Supreme Court, the parties entered into a stipulation that defendant should waive any claim for damages, and a permanent injunction should be awarded. It appeared that defendant's attorney received some compensation from complainant. *Held* that, as a judgment or decree binds parties and privies only, and as "privity" denotes mutual or successive relationship to the same rights of property, complainant, though naturally interested in the outcome of the decree in the action in the state court, not being an actual party, either originally or by way of intervention, and having no right to participate therein, was not bound by the decree in the state court.

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

11. TRADE-MARKS AND TRADE-NAMES ⊂⊃85(1)—UNFAIR COMPETITION—RELIEF —FRAUD.

In such case, where the labels contained the statement "Havana Filler," and the evidence as to the presence or absence of Havana filler in the cigars manufactured for and sold by complainant was conflicting, complainant cannot be denied relief on the ground that it did not come into court with clean hands because of fraud in connection with the labels, for fraud must be particularly alleged and strictly proved.

12. TRADE-MARKS AND TRADE-NAMES ⊂⊃85(2)—UNFAIR COMPETITION.

As the legislation relating to copyrights and the registration of trademarks and labels is of such a character as to create much uncertainty and confusion, both within and outside the Patent Office, complainant, who was entitled to use a label, cannot be denied protection in that right on the ground of bad faith, because it first printed on its labels a statement that they had been copyrighted, and later the copyright notice was removed, and the legend "Reg. U. S. Pat. Off." substituted; it not appearing that complainant was in any way attempting to make a false claim as to the labels.

13. COURTS ⊂⊃376—STATE PRACTICE CONTROLLING IN FEDERAL COURT—COMPETENCY OF WITNESSES—TRANSACTIONS WITH PERSONS SINCE DECEASED.

Under Rev. St. § 858, as amended (Comp. St. 1916, § 1464), declaring that the competency of a witness to testify in any civil action or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held, a witness testifying in the federal court for Pennsylvania is incompetent to testify as to transactions had with, or statements made by, one dead at the time of the trial; that being the rule of the state practice.

In Equity. Bill by the M. B. Fahey Tobacco Company against Joseph Senior and H. N. Heusner, who claimed affirmative relief. Decree for complainant.

Trevor T. Matthews, of Philadelphia, Pa., for plaintiff.

John J. Bollinger, of York, Pa., and George H. Stein, of Philadelphia, Pa., for defendants.

BRADFORD, District Judge. The M. B. Fahey Tobacco Company, hereinafter referred to as the Fahey company, a corporation of Delaware, has brought its bill against Joseph Senior and H. N. Heusner, charging them with trade-mark violation and unfair competition. It appears from the evidence that the complainant was incorporated August 23, 1910, with power, among other things, to manufacture, sell and deal in cigars and other forms of tobacco. It was organized September 2, 1910, and was duly registered September 10, 1910, in the proper office in Pennsylvania as a foreign corporation doing business in Chester. M. B. Fahey, whose name appears in the title of the complainant, for a number of years and until his death carried on business at No. 705 Edgemont Avenue, in Chester, Pennsylvania, as a wholesale and retail dealer in cigars and other forms of tobacco. He died February 18, 1910, leaving a will whereby he appointed his wife, Rebecca F. Fahey, and his brother Edward H. Fahey, his executrix and executor; and on or about August 11, 1910, they entered into a contract in writing with George B. Ditchfield and Oliver H. Perry for the sale to them of the stock, good will, and fixtures of the business theretofore carried on by the testator, and certain articles used in connection with that business. After Fahey's death and until the execution of the above contract the business theretofore conducted by the testator was continued by his personal representatives at the same place. Ditchfield and Perry on the organization of the complainant, which was created for the purpose of continuing the above mentioned business, transferred to it the right and interest acquired by them from Fahey's estate under the above mentioned contract of sale.

The defendant Heusner is a manufacturer of cigars in Hanover, Pennsylvania, and has there carried on such manufacture since May, 1895. Fahey from 1881 to 1886 or 1887 was a retail dealer in cigars and other forms of tobacco, and thereafter carried on a wholesale as well as retail business in the same. In the spring of 1899 Heusner was manufacturing or negotiating for the manufacture of a certain brand of cigars for Fahey, and certain labels were prepared for use on boxes containing that brand so to be furnished by Heusner. These labels contained a cut or printed reproduction of a photograph showing Fahey's head and shoulders with the words "Fahey's Special" above and the words "Havana Filler" below the cut. The right as between the complainant and the defendants to the use of these or substantially similar labels in connection with the sale of cigars is the principal bone of contention in this suit.

[1-3] From the spring of 1899 until the death of Fahey, nearly eleven years later, Heusner continued to use the above described or substantially similar labels on the boxes of cigars manufactured by him for Fahey, and, after the death of the latter, on boxes of cigars manufactured by him for those succeeding to Fahey's business. There is much and conflicting evidence as to the nature and extent of the right acquired by Heusner to the use of the labels. The complainant contends that it was and is entitled to their exclusive use, except so far as applied by Heusner to boxes of cigars manufactured for it, and

that, business dealings between the complainant, as successor to Fahey's business, and Heusner having been terminated, and he no longer manufacturing cigars for it, he has no right to use the labels on boxes of cigars manufactured for third persons, whether considered as trade-marks or merely trade-names or designations. On the other hand, the defendants urge that Heusner acquired a right to the use of the labels in connection with the sale of cigars to persons other than Fahey or his successors in business, should he or they not order of Heusner enough cigars to justify a restriction of the use of the labels to cigars manufactured for him or them. Everyone, in the absence of self-imposed restraint, has a right to use his own name in his own business in connection with the sale of articles manufactured and prepared or selected by him, by way of advertising the same, provided he does so without intent to perpetuate a fraud upon others or indulge in unfair competition. He is not to be debarred from the exercise of that right unless by his own consent and this only to the extent to which he has bound himself to abstain from its exercise. No one can by merely adopting and appropriating the personal name of another without the consent of the latter acquire as against him an exclusive right to the use of that name in connection with the sale of articles of the class to which it has been applied. And on stronger grounds no one can acquire an exclusive right as against a competitor in business by appropriating his name, different from his own, to be applied in the common business, without the consent of the business competitor; and the use of a fanciful design, peculiar style of lettering or ornamentation or other distinguishing marks on the label bearing the name is immaterial. So, while one may adopt and apply his own portrait as a trade-mark for goods manufactured or prepared or selected and sold by him, he is not to be permitted, if at all, to apply the portrait of a competitor in business to similar goods without the consent of the latter and, in case of consent, only to the extent assented to. To hold the contrary would lend judicial sanction to the grossest kind of unfair competition in trade prejudicial at once to the innocent competitor and to the purchasing public.

[4-6] The evidence bearing upon the relative rights of the respective parties to the use of the labels is in some respects so contradictory as to make it necessary to rely in large measure upon the inherent probabilities or improbabilities disclosed in the case. The uncontradicted proofs show that Fahey possessed in high degree personal popularity in Delaware county, where Chester is located; but they do not show that he enjoyed such popularity in York county where Hanover is located and Heusner carried on the manufacture of cigars, or in places other than Delaware county. It also appears that when the use of a label containing a cut of his head and face, and his name, was suggested to Fahey he was loath to adopt the suggestion; but did so only after viewing his popularity as an element in the successful advertising of the cigars to be sold by him. The fact that he was engaged in the business of selling cigars in boxes to which labels bearing his picture and name were by reason of his popularity to be affixed raises a strong presumption that, in permitting

Heusner to use such labels, he did not intend absolutely and for all time to deprive himself of the right to place them upon the cigars sold by him, though not manufactured by Heusner. Some stress is laid upon the fact that Heusner paid for the preparation and printing of the labels after negotiating with Fahey for their use as tending to show that he was acting principally, if not solely, for his own benefit. Under the circumstances, however, such payment is entitled to but little, if any, weight on the question of exclusive right to the use of the labels. Heusner was interested in manufacturing for and selling to Fahey such cigars as the latter should desire to sell and was further interested that the quantity of cigars so to be furnished to Fahey should be increased through the use by the latter in his wholesale and retail business of labels bearing his picture and name. So Fahey, with a view to success in his business, was interested that sales should be increased from the affixing of the labels to the boxes containing the cigars manufactured for him by Heusner, and to be sold by the former especially in Delaware county. It was reasonable that Heusner, so long as he continued to manufacture for Fahey or his successors the brand of cigars desired by him or them, should have a right to use on the boxes the above mentioned labels; but it would be extremely unreasonable, in the absence of a clear contract in that behalf, that after Heusner should cease to furnish cigars to Fahey or his successors the former should have as against the latter any exclusive right to such labels, or a right to use them in competition with the latter. So, while it would be but natural that Fahey should permit the use by Heusner of the labels so long as they should be applied to cigars of the required brand furnished by the latter to the former; it would be the height of unreason to impute to Fahey any intention that after Heusner should cease to manufacture cigars for him, he, Fahey, should be precluded from using in his own legitimate business labels bearing his picture and name, or be subjected to competition in their use by Heusner. And these remarks have application to Fahey's successors in business equally with Fahey.

There has been considerable testimony on the question who designed or selected the labels. This is unimportant; for even if the labels be viewed as trade-marks in contradistinction to mere trade-names or advertisements, the material inquiry is, not who invented the labels, but by whom and by whose authority they were first applied to boxes of cigars. It is the use, and not the invention, of a trade-mark that creates the exclusive right. A trade-mark actually applied for the first time by a manufacturer to articles made and sold by him to a dealer is not necessarily the property of the former; for if it be applied at the request and by the authority of the latter, to be used in connection with his sales, the former may or may not according to the circumstances of the particular case be treated as the agent of the dealer who through such application of the trade-mark acquires the exclusive right. If, however, the labels be viewed, not as trade-marks, but mere trade-names or advertisements, the question of unfair competition in trade through their use must be determined, not with reference to any exclusive right in or to the mark—for none exists—

but upon the particular facts disclosed. It is, I think, clearly to be gathered from the evidence that the arrangement between Fahey and Heusner for the use of the above mentioned labels contemplated the continuance of the relation between them of vendor and purchaser of cigars of the required brand, and that Heusner's right to use such labels was conditioned upon the continued existence of such relationship between them or their successors. Fahey and Heusner had a common and mutual pecuniary interest in the use of the labels on the cigars manufactured by the latter for the former, and neither of them had as against the other any exclusive right to the use of the labels. Their use was equally advantageous to both of them. After the death of Fahey, Heusner continued to supply those succeeding to and carrying on his wholesale and retail business in Chester, including the complainant, with cigars of the required brand in boxes bearing the above mentioned labels. And this continued from the organization of the complainant until February, 1914, and during that period practically all cigars bearing those labels were furnished by Heusner to the complainant. By virtue of the sale and transfer of the good will and business by Fahey's personal representatives to Ditchfield and Perry, and subsequently by the latter to the complainant, and of Heusner continuing to manufacture cigars for Fahey's successors in business, the complainant undoubtedly acquired the right to use the labels in question. Some friction having occurred between them, Heusner in February, 1914, ceased to furnish the complainant with cigars of the required brand, and began supplying them under the above mentioned labels, and a slip label adopted in 1913, and containing the words "Fahey's Special," to the defendant Senior, a tobacco salesman, who continues to sell the same so labeled to persons other than the complainant. This conduct of the defendants, after the only legitimate reason for the use of the labels by Heusner or anybody under him ceased to exist, involves, unless there be some clear justification or excuse, such unfair competition on their part as should be enjoined by this court. The right of the complainant to relief does not depend upon trade-mark ownership. The labels in question have been used and enjoyed by the complainant in the conduct of its legitimate business. The defendants cannot be permitted to use them, bearing Fahey's name and cut, on cigars not manufactured for the complainant by Heusner for the reason that such use would deceive, or be directly calculated to deceive, the purchasing public into the belief that cigars so labeled similar to those sold under the same labels by the complainant were made or selected and sold by the latter.

[7, 8] The complainant claims that the labels were registered in the patent office, and in fact each of them bears the letters and abbreviations "Reg. U. S. Pat. Off." Its right to relief in this suit, however, cannot be supported by any proceedings in that office. There was and could be no compliance with the provisions of law touching the registration of trade-marks. Nor do the laws of the United States secure to the complainant the benefit of copyright in the labels. Aside from other reasons, in the first place the labels which are and have been applied do not bear the word "copyright," or any abbreviation or

letters suggestive of that idea. And, secondly, a mere copy of a photograph does not come within the domain of legislation under the constitutional power of Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Const. art. 1, § 8. The word "writings" as here used has been liberally construed by the courts, but not broadly enough to include a mere mechanical reproduction of the likeness disclosed in a photograph. In the Trade-Mark Cases, 100 U. S. 82, 94 (25 L. Ed. 550), the court said:

"The ordinary trade-mark has no necessary relation to invention or discovery. * * * It is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that act. If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, originality is required. And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like."

And in Higgins v. Keuffel, 140 U. S. 428, 431, 11 Sup. Ct. 731, 732 (35 L. Ed. 470), the court said with reference to the constitutional grant of power:

"This provision evidently has reference only to such writings and discoveries as are the result of intellectual labor. * * * It does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles; and no possible influence upon science or the useful arts. * * * To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

The scroll work on the labels is palpably insufficient to justify their registration under any act of Congress. In Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349, the court recognized a vital distinction so far as securing copyright was concerned between a photograph as a mere mechanical reproduction, and a photograph as an original work of art involving originality of thought and conception in its production; the photograph in the former case not being the subject of copyright. In the case in hand the question is not how far a photograph may be the subject of copyright, but whether a mere mechanical copy of a photograph comes within the copyright law. This question must be answered in the negative.

[9] Much stress is laid by the defendants upon the fact that Heusner in August, 1911, with the knowledge and approval of the officers of the complainant, brought suit in the court of common pleas of Delaware county against William F. Fahey and Edward H. Fahey, trading as Fahey Brothers, to restrain them from selling and disposing of cigars under the labels in question. I do not attach much importance to this circumstance, for the reason that at the time the suit was brought business dealings continued between Heusner and

the complainant, and they had a common interest that the labels should not be used by others in unfair competition with them or either of them; and whether the defendants in that suit should be restrained from such wrongful use at the instance of Heusner, on the one hand, or of the Fahey company, on the other, was a matter of indifference. In either case a favorable result would enure to the benefit of both Heusner and the complainant here.

[10] It appears from the evidence that a suit was brought by Heusner in April, 1914, in the court of common pleas of York county against Baugher & Kohler to restrain them from manufacturing and selling or disposing of cigars under the labels in question. The defendants set forth in their answer, among other things, that they were manufacturing and labeling cigars for the Fahey company and for it exclusively, and were using the labels in question under its direction as owner thereof. A preliminary injunction was awarded in accordance with the prayer of the bill, and an appeal was taken to and dismissed by the supreme court of Pennsylvania. Subsequently an agreement was entered into between counsel for the respective parties which, after providing for the use at final hearing of testimony theretofore taken in the suit, stipulated, among other things, that the final hearing should be dispensed with; that a decree should be entered enjoining the defendants as prayed in the bill; and that Huesner "hereby waives any claim which he may have for damages against the defendants by reason of the facts stated in his bill of complaint filed in said action and the entry of a final decree by the court as herein agreed upon." A permanent injunction was awarded in accordance with the above agreement, and this was the end of the case. It appears that J. S. Black, Esq., who appeared and acted as attorney for the defendants received some compensation for or on account of his services from the Fahey company through its president, and it is now insisted that the complainant is precluded from denying in this suit that Huesner or Senior acting by his authority has a right to use the labels in question. I do not think the decision in the case against Baugher & Kohler has the effect claimed for it. A judgment or decree binds parties and privies, but, while the complainant here had an interest in the subject matter of that suit, to be indirectly affected to a certain extent by its decision, and in view of that fact paid some compensation to the counsel for the defendants, the complainant was not technically or substantially a party to that suit either originally or by way of intervention. It had no power to examine or cross-examine witnesses in nor to control the suit. The decision, therefore, could not bind the complainant here, unless it was in privity with Baugher & Kohler. Stryker v. Goodnow, 123 U. S. 527, 8 Sup. Ct. 203, 31 L. Ed. 194; Litchfield v. Goodnow, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199. In Stryker v. Goodnow the court said:

"We have not overlooked the fact that a brief was filed at the hearing in this court on behalf of the railroad company to support the claim of Wolcott that the title of that company was the best. Such a proceeding did not make the railroad company a party to the suit, or bind it by the decree. Being interested in the question to be decided, the company was anxious to secure a judgment that could not be used as a precedent against its own

claims in any litigation that might thereafter arise in respect to its own property. It is not an uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided, and it has never been supposed that a judgment in such a case would estop the intervenor in a suit of his own which presented the same questions."

The Fahey company was not in privity with Baugher & Kohler within the meaning of the rule that a judgment or decree binds parties and privies. Privity "denotes mutual or successive relationship to the same rights of property" (Litchfield v. Goodnow, supra), and the rule is inapplicable where the person against whom an estoppel is urged acquired his interest in the subject matter of the suit before its institution. Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733. The doctrine of estoppel by record must, therefore, be held to have no application as against the complainant.

[11, 12] The defendants contend that relief should be denied the complainant because, as asserted, it has not come into court with clean hands. This charge is based on two grounds. The first is, that the labels contain a false and deceptive statement in the use of the words "Havana Filler." Fraud must be particularly alleged and strictly proved, and in view of the conflict of evidence as to the presence of Havana filler in the cigars manufactured for and sold by the complainant I am unable to find fraud or bad faith in the use of those words. The second ground on which bad faith is charged against the complainant is that, while the Fahey labels for which registration purports to have been first granted by the patent office, have printed on them the words "Copyright, M. B. Fahey Tobacco Co. 1914," this copyright notice was shortly thereafter removed from the labels and "Reg. U. S. Pat. Off." substituted. Counsel for the defendants in their brief stated that the complainant "was not satisfied with the copyright notice which appeared on the label and forthwith took it off and put on in its place the words 'Reg. U. S. Pat. Off.' which is the notice of registration to be affixed to a registered trade-mark," etc., and further, that the label "was not registered as a trade-mark and there is some difficulty in determining from the copyright act and the trade-mark act the procedure followed by the patent office in registering labels which are to be affixed to articles of manufacture." The legislation relating to copyright and the registration of trade-marks and labels is of such character as to create much uncertainty and confusion both within and outside the patent office with respect to its administration. And the truth of this remark has been exemplified in connection with the treatment by the patent office of the labels in question. Under the circumstances I am unable to perceive any ground on which a charge of bad faith may be sustained against the complainant on account of the change from a copyright notice to a mere statement of registration in the patent office. For reasons already given neither of them was of any avail. The making of a false statement by one using a process or making and selling apparatus that the same has been patented with intent to deter others, having an equal right, from using such process, or making and selling such apparatus, is a fraud upon the public. But nothing of that kind, nor anything savoring of a fraudulent purpose in

connection with the use by the complainant of the labels in question or with any action on its part in the patent office relating to them appears in the case.

[13] Under the laws of the United States "the competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held." (Rev. St. § 858, as amended [Comp. St. 1916, § 1464].) Heusner was a witness in this case and testified as to transactions and statements with and by Fahey and to other matters connected with him as to which he was under the laws of Pennsylvania an incompetent witness. While I have examined all of his testimony and have disregarded such portions of it as, under the decisions in Pennsylvania he was incompetent to give, I have no hesitation in saying that, had he been competent to give all of his testimony, the conclusion reached by the court would not have been affected, in view of the direct and circumstantial evidence and the probabilities of the case supporting the contention of the complainant.

For reasons already expressed in this opinion the complainant is entitled to the enjoyment of the labels as against these defendants; and consequently to an injunction and an accounting. For the same reasons the relief prayed by the defendants in their answer must be denied.

A decree in accordance with this opinion may be prepared and submitted.

MITCHELL v. SOUTHERN RY. CO.

(District Court, N. D. Georgia. October 12, 1917.)

No. 246.

REMOVAL OF CAUSES ⊜3, 17—ACTIONS UNDER EMPLOYERS' LIABILITY ACT—CONSTRUCTION OF STATUTE.

The provision of Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1916, § 1010), that no case arising under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), "brought in any state court of competent jurisdiction, shall be removed to any court of the United States," does not merely confer a personal privilege or exemption, which may be waived by the plaintiff, but is a limitation upon the jurisdiction of the federal District Courts as a class, and where, in such a case, the declaration counts upon the federal statute, although it may also count upon a state statute, the case is not removable, and no action taken in a federal court after its attempted removal can give that court jurisdiction, or deprive the plaintiff of the right to have the cause remanded at any stage of the proceedings.

At Law. Action by R. D. Mitchell against the Southern Railway Company. On motion to remand to state court. Motion granted.

Colquitt & Conyers, of Atlanta, Ga., for plaintiff.
McDaniel & Black, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This case was removed to this court from the state court on the ground of diversity of citizenship; the de-

fendant being a corporation, citizen, and resident of the state of Virginia, and the plaintiff a citizen of the state of Georgia and a resident of this district. The case has been tried in this court in June, 1917, and there was a mistrial on June 14, 1914.

The declaration contains four counts, two counts for liability under the Employers' Liability Act and two for liability under the state laws. The case was tried without the determination by the court as to which counts were controlling as the case went to the jury, or the counts under which the case should be submitted; but the instructions of the court appear to have been such that the case was treated as submitted under the law of the state controlling liability for damages to railroad employés.

A motion is now made to remand the case to the state court from which it was removed, on the ground that, under the decisions heretofore made by this court and other courts, it was a nonremovable case. In Jones v. Southern Ry. Co. (D. C.) 236 Fed. 584, I think what was determined can be gathered from the headnote of the case, which is as follows:

"Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (Comp. Stat. 1913, §§ 8657–8665), providing that no cause of action arising under this act and brought in a state court shall be removed to a federal court, applies where, under the facts alleged, such act must control in the case, though in addition to the count in terms under such act is one concluding that the cause of action is based on and brought under the laws of the state."

This case is recognized now, I think, by all concerned, as the law controlling in this matter, certainly in this district. The real question here is whether what has occurred in this case since its removal prohibits its remand to the state court. It is contended by the plaintiff that, although on the trial here in June the case seems to have gone to the jury under the state law, and not under the Employers' Liability Act, that should not control on a question of removal, but instead what is stated in the plaintiff's declaration.

In the case of Patton v. Cincinnati, N. O. & T. P. Ry. (D. C.) 208 Fed. 29, a case in the Eastern district of Tennessee, Judge Sanford, District Judge there, determined that the right to remove was, under the Employers' Liability Act, jurisdictional, and that the right of removal could not be waived by the plaintiff. Judge Sanford determined in that case:

"(1) A case arising under the Employers' Liability Act and brought in a state court of competent jurisdiction is not removable to a federal District Court, even although the case would be otherwise removable by reason of diversity of citizenship or other independent ground of removal. Teel v. Railway Co. (U. S. Circ. Ct. App., 6th Circ., May 6, 1913) 204 Fed. 918 [123 C. C. A. 210]; Symonds v. Railway Co. (C. C.) 192 Fed. 353; Strauser v. Railroad Co. (D. C.) 193 Fed. 293; Lee v. Railway Co. (D. C.) 193 Fed. 685; Ullrich v. Railroad Co. (D. C.) 193 Fed. 768; Hulac v. Railway Co. (D. C.) 194 Fed. 747; McChesney v. Railroad Co. (D. C.) 197 Fed. 85; De Atley v. Railway Co. (D. C.) 201 Fed. 591, 596; Kelly v. Railway Co. (D. C.) 201 Fed. 602, 605.

"(2) The provision in the amendatory act of April 5, 1910, that no case arising under the Employers' Liability Act shall be removed from any state court of competent jurisdiction to any federal court, and re-enacted in section 28 of

the Judicial Code, is not merely a personal privilege or exemption in favor of the plaintiff in respect to the jurisdiction of the particular District Court to which the case has been removed, which he may waive after the removal by appearance or consent (In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164), but is a provision limiting the jurisdiction of the federal courts as a class, and entirely withholding from them jurisdiction through removal proceedings, of cases arising under the Employers' Liability Act which have been previously commenced in state courts of competent jurisdiction. This distinction is emphasized by the contrast between the language of the first sentence in section 6 of the Employers' Liability Act, as amended by the Act of 1910, in reference to the particular district in which a suit 'may' be brought under that act, and that in the second sentence of the same section, which provides that 'no case' arising under the act and brought in any state court of competent jurisdiction 'shall be removed to any court of the United States.' It is also the necessary result of the proviso, framed in substantially the same language, contained in section 28 of the Judicial Code."

Then Judge Sanford proceeds:

"Applying this rule of construction, I think it clear that the effect of the proviso in section 28 of the Code is to except cases arising under the Employers' Liability Act and pending in state courts from the class of cases whose removal to the federal courts is authorized under the preceding provisos of the section, and to so qualify the broad language used in the preceding portions of this section as to exclude from its provisions any and all cases of this character. In other words, in my opinion, the effect of this proviso is the same as if the preceding enacting provisions of the section had expressly excepted from each class of cases which might be removed to the federal courts all cases arising under the Employers' Liability Act and pending in the state courts."

He then quotes a number of authorities. Other questions arose in this Patton Case, which would be controlled by the Tennessee practice in such cases, which are not important here.

The defense in the case before Judge Sanford apparently relied on the case of In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; but Judge Sanford held that that case was dealing with the waiver by the plaintiff of the jurisdiction of a particular court, or rather of a court of a particular district, and not the waiver of jurisdiction of a court as a class, as was the question in the case then under consideration. The Moore Case was a decision as to the effect of a former decision of the Supreme Court in Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, in which it had been held that:

"Under sections 1, 2, and 3 of the act of March 3, 1875 (19 Stat. 470), as amended by the act of March 1, 1887 (24 Stat. 552), corrected by the act of August 13, 1888 (25 Stat. 433), an action commenced in a state court, by a citizen of another state, against a nonresident defendant, who is a citizen of a state other than that of the plaintiff, cannot be removed by the defendant into the Circuit Court of the United States."

And the court then was considering the question as to whether the plaintiff could waive the jurisdiction of a particular court to which that case was removed, and whether what had transpired amounted to a waiver. It was held in the Moore Case that:

"While consent cannot confer on a federal court jurisdiction of a case of which no federal court would have jurisdiction, either party may waive the

objection that the case was not brought in, or removed to, the particular federal court provided by the statute."

It does not, as Judge Sanford held, as I understand, have anything to do with the question here, which is as to whether the United States District Courts, as a class, have jurisdiction of cases brought in a state court of competent jurisdiction under the Employers' Liability Act, and removed, or attempted to be removed, from the state court to the United States District Court. The question is one of the jurisdiction of the District Courts, as a class, of cases brought in the state courts under the Employers' Liability Act, and removed or attempted to be removed to the District Courts of the United States. The Patton Case was cited by the Supreme Court of the United States in Kansas City Southern Rwy. Co. v. Leslie, Adm'r, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. Ed. 1478, and cited with apparent approval in the opinion in that case.

The question here must, I think, be determined by what is alleged in the plaintiff's declaration, and, as I have stated, he has two counts in his declaration under the Employers' Lability Act. This gives him the right to have the case remanded to the state court, and I do not think anything that has occurred in this court affects in any way that right or was a waiver by him of such right under the decisions to which I have referred, and under my opinion as to the law controlling the case.

The case will be remanded to the state court from which it was removed.

KENNERLEY v. SIMONDS et al.

(District Court, S. D. New York. December 28, 1917.)

No. 177.

1. COPYRIGHTS ⇐55—INFRINGEMENT—WHAT CONSTITUTES.

S., having composed a book entitled "The Great War," in two volumes, "The First Phase" and "The Second Phase," contracted with complainant for publication of the work. The contract declared that S. assigned to complainant the work, and that complainant should have the first refusal of any continuation thereof. Thereafter S. contributed to a four-volume history of the world war published by his codefendants. Defendants advertised that S. was the author of their history and lauded him as a military critic. In writing of the causes of the war, S. treated of the same historical events in each work; but his treatment and comments on various military operations dealt with in both works differed. *Held* that, though there was some similarity in the treatment of historical events in the two works, the subsequent book was not a violation of complainant's copyright, for it is impossible for a historian, writing twice on the same subject, to ignore important historical events, though treated in the first work, and an author, though a prior work be his own, is entitled to the use of information or material which may have been obtained from common sources, either published or unpublished, the test being whether the latter work was new and original, and furthermore that an author, after writing for one publisher concerning recent historical events, accords them a different treatment in a subsequent work, does not show an invasion of the first publisher's copyright.

2. INJUNCTION ⟸58—NEGATIVE COVENANTS—"REFUSAL."
Where the contract between S. and complainant provided for payment to S. on a royalty basis, and at the time he entered into such contract he had not acquired great reputation as a war writer, the provision in the contract that complainant should have the refusal of any continuation of the history, which must be treated as an option, the word "refusal" being so defined, that provision cannot be construed as amounting to a negative covenant, warranting the issuance of an injunction restraining S. from writing for any other publisher on the theory that his services were unique and extraordinary, for such a covenant must be clearly understood by the parties.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Refusal.]

3. INJUNCTION ⟸58—CONSTRUCTION—NEGATIVE COVENANT.
A court of equity will infer a negative covenant in a contract of employment, where equity and justice require; but such covenant must be clearly implied and understood by all the parties, and should not be implied unless indispensable to carry out their intention.

4. SPECIFIC PERFORMANCE ⟸73—NEGATIVE COVENANT.
A negative covenant in a contract of employment will be enforced only where the services are especially unique or extraordinary, as in the case of singers, artists, authors, and the like, and a clear contract is shown.

5. SPECIFIC PERFORMANCE ⟸57—OPTION CONTRACTS—MUTUALITY.
Where a contract between a publisher and an author merely gave the publisher an option to acquire the author's later work, and did not bind the publisher to purchase it, the option contract cannot be enforced as a negative covenant in a contract of employment, because not mutual.

6. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—UNFAIR COMPETITION—WHAT CONSTITUTES.
A former newspaper man wrote a history of the world war for complainant, which was advertised and greatly enhanced the writer's reputation. Thereafter he contributed to a history of the world war published by defendants, which included contributions from many other celebrities. Defendants' history, the title of which was similar to that of complainant, was different in appearance and was in a greater number of volumes. *Held* that, though defendants' advertisement falsely represented that it was the only history of the war written by the newspaper man, complainant's assertion of the unfair competition was not established; it not appearing that there was any fraud or deceit whereby defendants' history was held out to the public as that of complainant and the name of the book never being a trade-mark.

In Equity. Suit by Mitchell Kennerley against Frank H. Simonds and others. On motion for preliminary injunction. Injunction denied.

Rosenberg & Ball, of New York City (James N. Rosenberg, of New York City, of counsel), for complainant.

Kellogg, Emery & Cuthell, of New York City (Dean Emery, of New York City, of counsel), for defendants.

MANTON, District Judge. Complainant moves for a preliminary injunction, seeking to enjoin an alleged infringement of copyright. The prayer asks for equitable relief, based upon contracts made between the complainant and the defendant Simonds.

Simonds is a writer, and has made considerable reputation, first

writing for daily newspapers, the Sun and the Tribune, of the city of New York, and later composing a book entitled "The Great War" in two volumes—"The First Phase" and "The Second Phase." He contracted for the publication of these books with the complainant, a publisher, under date of September 21, 1914, and December 16, 1914. He later wrote, for the defendant Doubleday, Page & Co., in a book series to be published in four volumes, called "History of the World War." It is this latter effort that the complainant complains of, claiming it violates the plaintiff's copyright and contract obligations of Simonds. A provision of the contract of September 21st provides:

"The author hereby grants and assigns to the publisher the work or book the subject or title of which is 'The European War,' including all serial rights," etc.

And the further provision:

"The publisher shall have the first refusal of any continuation of this history of 'The European War.'"

The contract of December 16, 1914, provides:

"The author hereby grants and assigns to the publisher a work or book, the subject or title of which is 'The Great War—Volume 2.'"

And it is further provided that:

"From time to time the publisher shall have the first refusal of any continuation of this history of 'The Great War' on the same terms."

It is said that the publication of books by Simonds' codefendants is a violation, not only of complainant's copyright, but of the terms of the contract above referred to, and therefore complainant presents three questions:

(1) Does defendants' publication invade complainant's copyrights?

(2) Are the clauses in the contract giving the complainant the first refusal on any continuation of Mr. Simonds' history of "The Great War" negative covenants, with the consequent right to complainant to an injunction against Mr. Simonds writing for others any continuation of "The Great War," and an injunction against any others from publishing any such continuation?

(3) Is the advertising by the defendants of their publication, in which they say that theirs is the only "History of the Great War" written by Mr. Simonds, such evidence of unfair competition as to entitle complainant to an injunction against further acts along these lines by the defendants?

[1] Complainant copyrighted the first book published, "The Great War—The First Phase," and later copyrighted the book, "The Great War—The Second Phase." The book has been placed upon the market at considerable expense for advertising. The defendants have advertised their book, "History of the World War," placing in conspicuous type the name of Frank Simonds as its author, and stating that:

"He is the man who prophesied this war," etc. "He is the newspaper man who studied military strategy for eighteen years. * * * He has a style that made him famous. He is the man who spoke to America, but whom Europe heard. He is the editor of the New York Tribune, who is read by

European general staffs. * * * He is the one great historian whom this war has produced."

It is this advertisement, and the language employed, that constitutes the claim of unfair competition, as well as the violation of copyright. The ninth paragraph of the bill of complaint alleges that some portions of the book have been published in the New York Evening Sun; that the Sun's copyright in and to such portions was duly acquired by and is owned by the complainant.

The defendants raise the objection that nothing is said in the moving papers to show how the publishers of the Evening Sun took the necessary steps to secure statutory copyright, but there is a letter, addressed to the complainant from the editor's office of the Sun, stating:

"The Sun will at any time execute formal assignment in the matter of copyright on Mr. Simonds' editorials. If you will have the article prepared, I will attend to it at once."

However, passing the question of the complainant's title, I will consider the claim of violation of the copyright.

The complainant alleged, in his moving papers, that the defendants' book "is closely similar in substance, content, plan of arrangement, and method of treating this subject, and it is another version or revision of complainant's volumes, and is a rewriting thereof, which deals with the subject-matter, uses the same general arrangement, and contains the same points of review," etc., and as illustrative of this attention is called to volume 1, pages 9 to 15, chapter 1, of complainant's book, entitled "Assassination of the Archduke," beginning chapter 2 of the European Crisis, which described the immediate causes which led to the war, the theory of causes being the cumulative force of conflicting interests as typified in the European crisis preceding the war, to wit, the annexation of Bosnia and Agadir and the conference that followed the defeat of Turkey and Tripoli by Italy, the two Balkan wars resulting in the thwarting of Servian aspiration for a window on the sea, and the creation of irredemption in Servia.

The author nowhere takes the common stand that Germany willed the war and that it was her desire for alliance and expansion. In defendants' book, the same theory of cause is written in chapter 2, entitled "From Tangier to Armageddon." The consequences and causes in complainant's book are Bosnia, Agadir, the conference following Agadir, Tripoli, and the first and second Balkan wars. This is written of in the defendants' book under the title "Bosnia: The Second Gesture," and in somewhat similar phrase. The occupation of Bosnia by Austria, as thus described, is given as one of the leading causes for the present war, and it is clear in each book that at the critical moment Germany made a military threat, that this threat was directed at Russia, rather than the other Allies, and that this had the direct result of promoting Russian intrigue in the Balkans. There is similarity of reason and writing in the description of the Agadir incident, following the Bosnia affair. The reference to the German disaster, and Germany's turn to yield, and Germany's prestige being terribly shaken, is similar in reason, although couched in different language, and there is a paral-

lelism in dealing with the first Balkan war and the second Balkan war, all of which is in analyzation of the events which led to the present war, stretching over a period of years preceding the war. The 27 pages in defendants' book which are devoted to an analysis and explanation of the earliest movements in European history are more than an amplification of the subject as given in the complainant's book. I consider it new matter.

The author, in each case, makes a statement of historical facts as to the objection made by France, Great Britain, and Russia to the annexation of Bosnia by Austria, and reference to the interposition of Germany at the critical moment on the side of Austria. It cannot be perceived how a historian can deal with this matter differently, if he is attempting to state historical facts; and the same use of a metaphor would, indeed, argue against the contention that the author was attempting to cover an obvious copying. The reference to the memorable speech of Lloyd George, with the corresponding statement in defendants' book, is but a repetition of historical material, now common to all the world. The same is true of the treatment of the first and second of the Balkan wars, and unless the writer, a historian, may never write twice on the same subject, I fail to see how he might avoid similarity of expression in recitation of historical material.

Reference to the story of the drive of the Germans under Kluck against the English, under Sir John French, in connection with the German advance in northern France, in the early period of the war and before the battle of the Marne, are not similarly described in both books, and the author's comments and criticisms of each general are not similarly described; and this is quite natural, in view of the lapse of time between the two writings. The reference to the comment and effect upon the European situation after the battle of the Marne, and the importance of the battle of Ypres, and the particular stress placed upon each battle by the writer, was to be expected, for each is now considered a turning point in the history of this war. If, as a result of study and observation, after writing for complainant about these battles, he wrote differently, as he seems to have done, in the defendants' book, the author has not violated complainant's copyright.

Under the authorities, I do not think that a showing of copyright violation has been made out. There are 80 chapters in the complainant's book. Of these, 18 are selected for comparison, and their chapter headings are referred to as similar; but this was necessary, as descriptive of the occurrences. The test laid down in Rooney v. Kelly, 14 Irish Common Law, New Series, 158, is whether such other book may, in some respects, be similar to the author's former book, and the question would be whether such other book should, under all the circumstances, be fairly considered as a new and original work, or merely as a reproduction, in whole or in part, of the former book.

Drone on Copyright says (page 417):

"An author is entitled to the use of information or materials which may be obtained from common sources, either published or unpublished. * * * But there is nothing in the law of copyright to prevent any person who has obtained common materials from the original sources from using them in substantially the same manner and for the same purpose as they have been

previously used, provided the arrangement is his own and is not servilely copied from the work of another."

Judge Story, in Emerson v. Davies, 3 Story, 768, Fed. Cas. No. 4,436, said:

"It may be laid down as the clear result of the authorities, in cases of this nature, that the true test of piracy or not is to ascertain whether the defendant has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colorable alterations and variations only to disguise the use thereof, or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject; in other words, whether the defendant's book is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources."

There is no reason why there should be a different rule, where the same author writes on the same subject, than the rule where two different authors, working from sources available to all, write on the same subject, in the absence of some provision in the contract of employment which forbids it. In either case, the latter book must not represent unfair appropriation of the labors that went into the first book.

[2-4] The provision of the contract of employment above referred to is claimed by the complainant to amount to a negative covenant, and it is said that Simonds has become a unique character by reason of his reputation, and that the services thus to be rendered by him are of such unique character as would warrant the injunctive relief for breach of this negative covenant.

The defendants' claim that the contract grants an option on the services of Simonds to the complainant seems to be concurred in by the complainant. A refusal is an option (English Law Dictionary); is often used to indicate an option (Bouvier's Law Dictionary). The defendants have published one volume, and signified their intention of publishing other volumes, of the History of the World War, and it is advertised that Mr. Simonds will contribute to succeeding volumes. A court of equity will infer a negative covenant in a contract where equity and justice require. Harper v. Klaw (D. C.) 232 Fed. 609. But such covenant must be clearly implied and understood by all the parties. It should not be employed, unless it is indispensable to carry the intention of the parties into effect. D. & H. Canal Co. v. Coal Co., 8 Wall. (75 U. S.) 276, 19 L. Ed. 349. Implied promises are to be cautiously, not hastily, raised. Genet v. D. & H. Canal Co., 136 N. Y. 608, 32 N. E. 1078, 19 L. R. A. 127. It should be founded upon clear contract, and the court should not interfere by injunction, unless a clear contract is shown. Warne v. Rauledge, L. R. 18 Equity, 497. It is only in a case where the services are especially unique and extraordinary, as in the case of singers, actors, artists, and the like, that equity will interfere to restrain, by injunction, a violation of the restrictive covenant. Strobridge Litho. Co. v. Crane, 58 Hun, 611, 12 N. Y. Supp. 898; Pomeroy's Equity Jurisprudence, vol. 4, § 1344.

The moving affidavit shows that Mr. Simonds was an editorial writer on The Sun, not known to the general public when he published

"The Great War—The First Phase.", It is claimed that after the publication of this book, through the efforts of the complainant, he became the leading writer on the war. It was prior to the publication of "The First Phase" that the contract of September 21, 1914, was made. At the time of the making of the contract of December 16, 1914, he had only acquired such fame as the publicity of the book "The Great War—The First Phase" gave him from October 24th to December 16th. From this it cannot be said that the parties, at the time they entered into the contract, had in mind the unique and extraordinary character of Simonds' services, so that they must be presumed to have intended to make his services subject to a negative covenant. While he may have reached fame, indicating special ability as a historical writer, at the time of this decision, that is not the test. There is not sufficient showing, at least now, which would warrant inferring a negative covenant. Hammerstein v. Mann, 137 App. Div. 580, 122 N. Y. Supp. 276; Star Co. v. Press Pub. Co., 162 App. Div. 486, 147 N. Y. Supp. 579. The contracts provided that the author should receive 10 per cent. of the published retail prices on the first 2,500 copies sold, 12½ per cent. on the next 2,500, and 15 per cent. thereafter. Contracts which contemplate service of a unique character are usually fixed in lump sums, and in the absence of some express covenant one should not be inferred here.

[5] There is also a lack of mutuality which forbids the enforcement of a contract by injunction. If the claim of complainant is correct, Simonds is bound to sell any continued service to complainant; but it is not pretended that Kennerley is bound to buy it.

[6] So far as appearances are concerned, there is nothing which would indicate a just claim of unfair competition. The titles are different; the appearance of each book is different. As counsel for the defendants claims, there will be, if there are not already, a number of books written as history of this war, which will be derived from the same common sources dealing with the same subject-matter. Similarity of such histories and references therein must be expected, and cannot rise to the degree that will sustain a charge of unfair competition.

The advertising matter recites that the proposed history is to be made up of at least five volumes, contributed to by Viscount Bryce, Ex-President William H. Taft, Orville Wright, Hudson Maxim, Ian Hay, Winston Churchill, McConnell, the American aviator, and Stephane Lauzanna. The statement in the advertising that defendants' book is the only history of the war written by Simonds is not truthful; but this, standing alone, is not sufficient. There is no such physical resemblance of the two articles' imitation of advertising and sales resulting from such advertising as to constitute words or acts which either deceive, or which are well calculated to deceive, the public. The fraud necessary to sustain a claim of this character must be proven. It cannot be inferred from similarities not calculated to mislead the purchaser. The action may be maintained where it appears that the defendant is destroying or attempting to destroy an honest business by dishonest means. Kipling v. Putnam, 120 Fed. 631, 57 C.

C. A. 295, 65 L. R. A. 873. The name of a book is never a trademark and cannot be. Deceit is an indispensable element of unfair competition. There must be shown an intention to palm off defendants' book for the plaintiff's book. The burden is on the complainant to make clear and satisfactory proof of fraudulent intent and deceit. Similarity of chapter headings, or what would be the same thing, alone would not support the charge of unfair competition.

Upon the showing at this time, where a preliminary injunction is sought, I am satisfied that the complainant has not made out a case which warrants a court in equity interfering with the defendant Simonds' personal liberty, or with the defendants' publication and sale of the work.

The motion will therefore be denied.

In re FUETL.

(District Court, D. Connecticut. November 30, 1917.)

No. 4036.

1. ATTACHMENT ⊂=49—EFFECT OF AMENDMENT OF STATUTE—PENDING CAUSES.
Gen. St. Conn. 1902, § 2734, providing that liquor licenses should be subject to attachment and execution, was amended by chapter 36, Pub. Acts 1915, so as to provide that such attached license "and all renewals thereof" should be held to respond to execution for the same period of time as in attachment of personal property; the words quoted being added by the amendment. *Held*, that the amendment applied only to attachments made after it went into effect, and that the lien of an attachment made prior to that date expired with the license attached.

2. STATUTES ⊂=270—AMENDMENT—SETTING FORTH PROVISION AS AMENDED.
Where a statute is amended to "read as follows," the amended section being set out in full, the provisions of the original statute that are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions from the time the amendment takes effect.

In Bankruptcy. In the matter of Rudolph Fuetl, bankrupt. On review of order of special master denying claim of Philip Weinemann to a lien. Order confirmed.

B. E. Spencer, of Middletown, Conn., for claimant.

Patrick T. O'Brien, of Meriden, Conn., for Connecticut Breweries Co.

THOMAS, District Judge. This matter is now before the court upon the petition of Philip Weinemann, a creditor, for a review of the special master's decision denying Weinemann's claim of a lien upon and first preference of payment out of the proceeds of the sale of a certain liquor license, which was issued to the bankrupt by the county commissioners for Middlesex county on November 1, 1915.

Under the statutes of Connecticut, the license issued was the renewal of a former license, and was sold by order of the referee in bankruptcy free from the petitioner's claimed attachment lien, as well as

the claimed attachment lien of the Connecticut Breweries Company, a Connecticut corporation located at Bridgeport, in Fairfield county.

The facts disclosed by the record and admitted by all parties show that in April, 1915, the bankrupt executed and delivered to Weinemann two promissory notes, one for $1,000, made payable on demand, and the other for $2,000, made payable on May 1, 1915; both bearing interest. No part of the principal and interest due on the first note was paid, and only $300 on the principal of the second note, leaving due to the claimant on the two notes the sum of $2,700, with interest.

In order to recover the balance due on said notes, the petitioner, by mesne process duly issued on the 27th of July, 1915, brought an action at law, returnable to the superior court for Middlesex county, on the first Tuesday of September, 1915; and on the 29th day of July, 1915, the officer serving the process duly made attachment of the original license under which the bankrupt was then conducting a saloon business. No judgment was ever obtained, and the case was pending at the time of bankruptcy on the docket of the superior court.

By process dated and issued September 25, 1915, the Connecticut Breweries Company brought an action at law against the bankrupt, returnable to the superior court for Fairfield county on the first Tuesday of November, 1915, to recover the balance due on a certain promissory note which he had executed in its favor under date of March 12, 1915, and on said September 25, 1915, caused an attachment of the original liquor license to be made to secure payment of any judgment which might be rendered in its favor in said action.

On June 9, 1916, the company obtained a judgment in said cause for $2,936.36 damages and $34.47 costs; and on June 12, 1916, execution thereon was duly issued and placed in the hands of an officer authorized to make service, who forthwith levied upon the stock and fixtures of the bankrupt's business, and retained control and possession thereof until directed by the referee in bankruptcy to surrender the same to the bankrupt's trustee. On July 7, 1916, Fuetl, on his own petition, was duly adjudicated a bankrupt in this court, and subsequent thereto one James J. Fitzpatrick was appointed trustee of his estate.

Upon the order of the referee in bankruptcy, the said license, together with the stock and fixtures of Fuetl's store, were sold by the trustee, free and clear of all liens or claims of lien of both the petitioner and of the said the Connecticut Breweries Company, at public auction for $3,900, which was more than sufficient to pay the judgment of the Connecticut Breweries Company, with interest.

After the sale of said license, stock, and fixtures, the company brought its petition to this court, wherein it prayed that the court order all parties having any interest in the matter to appear at some suitable time and place, then and there to show cause why an order should not be issued by this court directing the trustee to turn over to it, in satisfaction of its judgment, the amount of said judgment, with interest and the costs of execution, on the ground that its attachment lien on said license had existed for a longer period than four months prior to Fuetl's adjudication in bankruptcy, and because it was the first valid lien on said license.

The referee in bankruptcy for Middlesex county feeling himself disqualified in the premises, this court appointed Edward M. Yeomans, Esq., referee in bankruptcy for Hartford county, special master to hear and determine the questions presented by said petitioner, and, after due notice and hearing, the special master reported in favor of the allowance of the claim of the Connecticut Breweries Company and against the claimed right of lien of Weinemann.

[1] The controlling question here relates wholly to the purpose and effect of section 2734 of the General Statutes of Connecticut, as finally amended by chapter 36 of the Public Acts of 1915, which amendment took effect on August 1, 1915. The answer to this question will dispose of the incidental question as to whether Weinemann's attachment of the license carried with it a valid attachment of the renewal license.

As the law stood before this amendment, all attached liquor licenses were held to respond to execution for the same period of time as was provided in cases of attachment of personal property, and the attachment lien was continued after execution had issued, without the certificate of license being removed from the premises in which it was when attached, until the time the attached license was sold under the execution. All licenses thus sold were also equally valid in the hands of a purchaser at such a sale for the whole of the unexpired term for which the license was originally granted, in the same way as if in the hands of the original licensee, though before such a purchaser could avail himself of the benefit of such a license he must have first complied with all the requirements of law relative to the procuring of an original license from the county commissioners.

The amendment of 1915 is as follows:

"Section 2734 of the General Statutes as amended by chapter 106 of the Public Acts of 1905 and by chapter 83 of the Public Acts of 1907 is hereby amended to read as follows: The license, and all right and interest therein, of any person licensed by the county commissioners to sell intoxicating liquors may be attached and taken on execution. Such attachment shall be made by leaving a true and attested copy of the process and accompanying complaint with the proper indorsements thereon of the officer serving the same, as in other civil cases, with the defendant, or at his usual place of abode if within this state, and a like true and attested copy shall be left at or forwarded by registered mail to the office of the county commissioners who granted such license. Constables of the town in which the business under such license is conducted may, in the attachment of such license, commence service of process by leaving such copy at the office of the county commissioners. Such attached license, *and all renewals thereof*, shall be holden to respond to execution for the same period of time as in attachments of personal property, and the lien of such attachment shall continue after execution has issued without removal of such certificate of license from the premises in which the same is exhibited, until the time when such license is sold by virtue of such execution. Such license shall, for the unexpired term for which it was granted, be equally valid in the hands of the purchaser thereof as in the hands of the original licensee, provided before such purchaser may avail himself of the benefit of such license, he shall comply with all the requirements of law relative to the procuring of an original license, for the sale of intoxicating liquors, from county commissioners."

An examination of the amendment of 1915 shows that, in substance, the only amendment made by the act of 1915 was the insertion of the

underscored words "and all renewals thereof." It will be noticed that all renewals of such license were likewise made holden to respond to execution for the same period of time and in the same manner as theretofore had been provided in relation to original licenses.

Prior to 1895 a license issued to sell spirituous and intoxicating liquors was not property in any constitutional sense (La Croix v. County Commissioners, 49 Conn. 591), and it was not until chapter 128 of the Public Acts of 1895, which created the right to attach liquor licenses, became law, that the privilege granted by such a license certificate was made subject to attachment and permitted to be taken on execution in satisfaction of a judgment against the licensee. Since that time, however, such a license has been held to be property, which may be sold by the licensee, and also attached, replevied, or sold on execution, though the purchaser of such license must take it subject to the burden of satisfying the county commissioners as to his being a suitable person, and his place a suitable one for the sale of liquors. Where this burden is satisfactorily borne, the purchaser acquires all the rights of the licensee for the unexpired term of the license. Sayers Appeals, 89 Conn. 315, 94 Atl. 358.

In none of the previous legislative acts of Connecticut, relative to the making of attachments and taking on execution liquor licenses, is reference made to the attachment and execution liens continuing against such a license for a longer period of time than the term covered by the attached license, though in the act of 1915 special reference is made to such liens holding to renewals of such a license. This fact alone would seem to indicate that the Legislature intended that only attachments made and executions issued after the act went into effect should be held to apply to renewals of such a license, for, had the Legislature wished the amendment to apply to cases brought before and pending at the time the act went into effect, it could very easily have so stated in the amendment. Such a provision would have removed any doubt as to its intention. Not having done this, I must hold that no such effect or application was intended.

[2] Were the court to construe the act in the spirit contended for by the petitioner, it would have the effect of negativing the words "and all renewals thereof," contained in the amendment, in so far as they might be held as applying to the original license attached by Weinemann, and this would seem to be against a proposition, universally understood, that where a statute or a portion thereof is amended, by declaring that "as amended it should read as follows," and then sets forth the amended section in full, the provisions of the original statute that are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amendment takes effect.

In view of this, I feel satisfied that the special master committed no error in his finding and report, and the same is therefore accepted and confirmed. Ordered accordingly.

COLUMBIA-KNICKERBOCKER TRUST CO. v. ABBOT.

(Circuit Court of Appeals, First Circuit. December 20, 1917. On Petitions for Rehearing, March 7, 1918.)

Nos. 1210–1222.

1. TRIAL ⊂=2—CONSOLIDATION OF CAUSES—DISCRETION OF COURT.
A number of actions at law were brought by the same plaintiff to recover from the defendant in each case a balance due on a subscription to the stock of a corporation. Defendants brought cross-actions to recover in each case the sum paid on the same subscription. The ground of defense in the former actions and the basis of the cross-actions was that the subscriptions were obtained by fraudulent representations, and the alleged misrepresentations to the several subscribers, although made at different times and to different persons, were in substance the same. *Held*, that it was within the discretion of the court, under Rev. St. § 921 (Comp. St. 1916, § 1547), to order the cases tried together to the same jury.

2. CORPORATIONS ⊂=90(1)—EQUITABLE DEFENSES IN ACTION AT LAW.
In an action at law on a contract of subscription to the stock of a corporation, the defense that the subscription was obtained by fraud is open to defendant.

3. CORPORATIONS ⊂=90(6)—ACTION ON STOCK SUBSCRIPTION CONTRACTS—EVIDENCE.
In actions by a trust company to enforce subscriptions to the stock of a Cuban railroad company, to which plaintiff had lent money, taking the subscription contracts as security, a map prospectus used to induce the subscriptions *held* admissible in support of the defense that they were obtained by fraudulent representations, where it was shown that the railroad company was organized largely by plaintiffs' officers, who were officers and directors therein and the controlling force in its management, that plaintiff itself was a stockholder in the promotion company which made the subscription contracts, and that the prospectus was prepared with the knowledge and approval of its officers for use generally in the soliciting of subscriptions.

4. EVIDENCE ⊂=129(4)—SIMILAR FACTS—ACTION ON STOCK SUBSCRIPTION.
Where actions against a number of the subscribers were tried together, the testimony of each defendant as to representations made to him, which were substantially the same as made to all the others, was admissible as to the other subscriptions, as tending to show uniformity and such general use of such representations that plaintiff could not assert its ignorance of it as to any particular subscriber.

5. EVIDENCE ⊂=244(1)—ADMISSIONS—ACTION ON STOCK SUBSCRIPTION.
Statements, orally and in letters, made to defendants and others by officers of plaintiff and by one to whom they had given charge of their Cuban interests, and tending to show, not only that they had knowledge of the prospectus and its use in obtaining subscriptions, but also that the railroad was in fact an enterprise of plaintiff and controlled by it, *held* material and admissible in evidence.

6. EVIDENCE ⊂=81—FOREIGN LAW—PRESUMPTION.
The law of Cuba, where the mortgaged property was situated, being the law of a foreign country and having to be proved as a fact, there can be no presumption that it was the same as the law of the United States, which would justify false representations as to the standing of the mortgage, necessarily governed by the Cuban law.

7. JUDGMENT ⊂=707—CONCLUSIVENESS—PERSONS NOT PARTIES OR PRIVIES.
Subscribers to the bonds of a railroad company secured by a mortgage on property in Cuba, having repudiated their subscriptions and not being parties, are not concluded by decree of the federal court of the

Southern District of New York in foreclosure proceedings, which declared the mortgage to be a first lien as represented, for, as the court did not have jurisdiction of the property, its decree was conclusive only on parties to the suit, notwithstanding the court had jurisdiction of the then trustee, representing the bondholders, and also of the guarantor railroad's creditors and stockholders.

8. CORPORATIONS ⊜472—BONDS—MISREPRESENTATIONS.
In actions involving subscriptions for bonds secured by a mortgage of Cuban property, a representation that the mortgage was a first lien necessarily meant it would outrank adverse claims; so, where the subscribers relied on the falsity of the representation, evidence that no adverse claim had been asserted offered in rebuttal was properly excluded.

9. DEPOSITIONS ⊜111(3)—SECONDARY EVIDENCE—WAIVER OF OBJECTION.
Where, on the taking of the deposition of an expert accountant, he produced the books of a corporation which were then in his custody, testified as to matters found therein, and made a tabulation therefrom, which was attached to his deposition, all without objection, the court properly overruled a motion, made at the trial, to exclude the deposition and tabulation, on the ground the books were the best evidence and were not produced.

10. TRIAL ⊜29(2)—COMMENTS BY JUDGE ON EVIDENCE.
Comments made by the court on evidence introduced on the trial of a case *held* not prejudicial.

11. CORPORATIONS ⊜90(7)—INSTRUCTIONS—ACTION TO ENFORCE STOCK SUBSCRIPTIONS.
Instructions given in actions by the transferee of stock subscription contracts to enforce such contracts, in which the defense was that the subscriptions were obtained by fraud, with knowledge of which plaintiff was chargeable, considered and approved.

On Petitions for Rehearing.

12. DEPOSITIONS ⊜111(3)—WAIVER OF OBJECTION—STIPULATION.
Where an expert accountant, on the taking of his deposition, produced corporate books then in his custody, testified as to matters found therein, and made a tabulation therefrom, which was attached to his deposition, all without objection, a stipulation as to the reservation of objections does not warrant the exclusion of the deposition on trial, upon the ground that the books were not produced.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Separate actions by the Columbia-Knickerbocker Trust Company against Edwin H. Abbot, against Preston B. Keith, against John S. Ames, against Maria A. Evans, executrix, against George E. Keith, against Mary O. Cordingley, and against F. Lothrop Ames. Judgment for defendant in each case, and plaintiff brings error. Affirmed.

Actions by Edwin H. Abbot, by John S. Ames, by Preston B. Keith, by George E. Keith, by Mary O. Cordingley, and by F. Lothrop Ames against the Columbia-Knickerbocker Trust Company. Judgment for plaintiff in each case, and defendant brings error. Affirmed.

Robert M. Morse, of Boston, Mass., and Julien T. Davies, of New York City (John R. Lazenby, of Boston, Mass., and Harold C. McCollom, of New York City, on the brief), for plaintiff in error.

Moorfield Storey and R. G. Dodge, both of Boston, Mass. (E. H. Abbot, Jr., of Boston, Mass., on the brief), for defendants in error.

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

DODGE, Circuit Judge. Of the thirteen cases brought before us by these writs of error, seven are suits at law brought in the District Court by the Trust Company, here plaintiff in error, a New York corporation, against various defendants, Massachusetts citizens, here defendants in error. The remaining six cases are suits at law brought in the District Court by all but one of the defendants above referred to, against said company, in which it is here also plaintiff in error and they defendants in error.

All the above suits are based on written subscription agreements further described below. In each suit brought by the Trust Company it seeks to recover from the defendant, a subscriber, the amount of an unpaid subscription. In each suit brought as above against said company, the subscriber seeks to recover back from it an amount paid to it on account of a subscription made. Under one of the subscription agreements referred to no partial payment was made, and therefore no suit brought to recover back such payment. This was the subscription by Evans, upon which his estate is sued in No. 1213. The seven subscription agreements were signed by the various subscribers, here defendants in error, upon various dates in 1906 and 1907.

The parties to each said agreement were the subscriber and the Northeastern Cuba Development Company, a Maine corporation, hereinafter called Development Company.

In each, the subscriber agreed with said Development Company to buy bonds and stock to a specified amount, of the Northeastern Cuba Railroad Company, another Maine corporation, to pay at once a certain part of the stipulated price, and to pay the balance in installments to be called for as in the agreement provided.

In each, the subscriber agreed to make said payments to the Knickerbocker Trust Company, the name at the time of the company here plaintiff or defendant in error (hereinafter called Trust Company), to the credit of said Development Company.

In each it was agreed that said Development Company might, instead of calling for said balance, borrow the same for a year or more upon pledge of the agreement and all rights thereunder to the securities subscribed for; the subscriber guaranteeing, in that event, to the lender, payment to the amount of said unpaid balance with interest.

It is undisputed, in each suit, that the Development Company had borrowed from the Trust Company the unpaid balance of the subscription. The suits brought by said Trust Company are based upon the subscribers' above guaranties of payment to the lender.

The defense asserted against each suit brought by the Trust Company was, that the subscription had been obtained—

"by false and fraudulent representations made by the plaintiff (and by one H. W. Bennett to the knowledge of the plaintiff)."

And, after specifying said representations, that—

"the plaintiff was aware when said agreement is alleged to have been signed * * * that each such representation had been made and was false, and that if the defendant entered into said agreement he had been induced to do

so by said representations, and all the acts of the plaintiff alleged were performed with such knowledge."

The subscribers' suits against said Trust Company to recover back what they had paid to it under said agreements were based upon the same grounds.

[1] 1. Upon the subscribers' motion, the District Court ordered the thirteen cases tried together, to the same jury. This was done against objection on the Trust Company's part, which contends here that the order was erroneous. It was made, according to a memorandum accompanying it—

"in view of the extensive identity in issues and evidence between these cases, of the statement of counsel for the [subscribers] that the misrepresentations relied on are the same in all the cases, of the fact that the cases have been tried together before the auditor, and of the large saving in the time of the court which will be effected by trying the cases together before the jury."

Whether to make such an order or not was within the court's discretion. Rev. Stats. § 921 (Comp. St. 1916, § 1547); Mutual, etc., Co. v. Hillmon, 145 U. S. 285, 292, 12 Sup. Ct. 909, 36 L. Ed. 706. Although, as stated below, the seven subscription agreements were not identical in their terms, the differences between them appear to have been in matters of entirely subordinate importance upon the main issues to be determined. Although the alleged representations relied on by the subscribers, whether written or oral, did not appear by the evidence to have been made at the same time or place to all the subscribers, or to have been identical in their terms as made to each subscriber, the Trust Company fails to satisfy us that the differences between the several cases in these respects were such as made the order an abuse of discretion; and we are unable to hold that the District Court erred in making it. No case is found wherein a judgment has been reversed merely because issues so nearly alike as those presented in these cases were submitted to the same jury in one trial. The record shows that the trial lasted from November 19 to December 30, 1914. It is clear that seven separate trials, the evidence in each of which would have been so largely a repetition of that given by the same witnesses in the other cases, were to be avoided, in the public interest, if this could be done without unduly prejudicing the company's rights. We are unable to believe that it has suffered any material injustice merely in having to try the cases together, as had been done without objection before the auditor, instead of separately. Each of the six cross-actions by a subscriber would of course be properly tried together with the action brought against such subscriber.

[2] 2. At the trial, due execution of all the subscription agreements having been admitted, the Trust Company offered proof of the respective amounts loaned by it to the Development Company in accordance with the terms of said agreements. The amounts paid to the Trust Company on account of each subscription and the amounts due upon each said loan made by it thereon having then been agreed, the Company rested. In opening the subscribers' cases it was then stated that they proposed to show all the agreements to have been obtained upon the fraudulent representations set forth in the pleadings.

The Trust Company then moved for directed verdicts in its favor, on the ground that the subscribers' allegations regarding false and fraudulent representations presented equitable defenses not available to them because the court had no jurisdiction thereof. This motion was denied.

The Trust Company then moved to strike out that portion of the auditor's reports dealing with said alleged equitable defenses, which motion was also denied. The auditor's reports in each case had been filed July 21, 1914, and on September 16, 1914, the company had moved to recommit them with instructions to exclude all evidence on the issues of false and fraudulent representations. These motions had been overruled by the court October 19, 1914, on the ground that said representations were admissible in evidence.

The subscribers thereupon read the auditor's reports in all the thirteen cases, from which it appeared that he had found for the defendant in each suit brought by the Trust Company, and for the plaintiff in each suit brought against it to recover back what a subscriber had paid it; having found on the evidence that each subscriber had been induced to sign the agreement sued on by false and fraudulent representations as to the material facts made with the knowledge and acquiescence of the Trust Company, which was aware that they were not true.

In each of the seven cases wherein the Trust Company was plaintiff, its assignment of error 2 complains of the denial of its above motion to recommit said reports; its assignment 3, of the above refusal to direct verdicts in its favor; and its assignment 4, of the above refusal to strike out so much of said reports as dealt with said alleged equitable defenses. It is contended here that said defenses could be availed of by the subscribers only in suits in equity seeking cancellation of their agreements, and that the court had no jurisdiction to entertain them in suits at law upon said agreements—no fraud touching the execution of the instruments themselves being asserted.

Had said agreements been under seal, these contentions must have prevailed, at the time the above rulings were made, according to the rule then undoubtedly established as to sealed written agreements. George v. Tate, 102 U. S. 564, 26 L. Ed. 232. But none of the agreements were under seal, and although, upon the question whether or not the above rule applies in suits at law upon unsealed agreements, there has been conflict in the decisions of the inferior federal courts, we hold, in view of Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501, and Cable v. U. S. Light, etc., Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188, that said equitable defenses were open to the subscribers in these cases. No decision by the Supreme Court requiring a contrary conclusion is found. Since these verdicts were rendered (December 30, 1914), but before the final judgments thereon were entered (March 20, 1916), which the Trust Company seeks to reverse by the writs of error now before us, an amendment to section 274 of the Judicial Code, enacted March 3, 1915 (38 Stats. 956, Comp. St. 1916, §§ 1251a, 1251b, 1251c), has expressly authorized the interposition of equitable defenses in all suits at law, and has thus abrogated the above-established rule, even in the case of suits at law upon sealed agreements. Whether or not this enactment can have direct application in these cases, we find

no error in the rulings complained of by the above assignments 2, 3 and 4 in the seven suits brought by the Trust Company.

In each of the six cases brought by subscribers against the Trust Company it has made no assignments of error corresponding to 2 and 3 above, but in assignments numbered 2 it complains of the refusal to strike out the part of the auditor's report dealing with the alleged equitable defenses. Strictly speaking, there were no equitable defenses in these cases; nor did the auditor's reports filed in them purport to deal with any. The declarations were on accounts annexed, under which evidence was, of course, admissible that the defendant had obtained from the plaintiffs the amount claimed by means of false and fraudulent representations; and the auditor's finding that it had been so obtained required him to find, as he did, for the plaintiffs. We find no error, therefore, in the rulings complained of by the assignments numbered 2 in these six cases.

Further assignments of error relating to the auditor's reports complain of the admission of reports supplementary thereto, filed October 14, 1914, in each of the seven suits against subscribers. No reference to these alleged errors is found in the briefs submitted for the Trust Company, and we regard the assignments referred to as waived. They seem to us obviously without merit.

[3] 3. The remaining assignments of error relate to matters of subsequent occurrence at the trial.

Following the introduction of the auditor's reports (including said supplementary reports), the subscribers offered certain "map prospectuses" referred to in and made part of said reports by reference thereto as Exhibit B in each report in the seven cases wherein the Trust Company was plaintiff, as further explained below. They were admitted against objection, and their admission is assigned as error in all the cases.

Each subscriber thereafter testified as a witness, except that Evans, the subscriber in No. 1213, having deceased, one Paine, his confidential secretary at the time of his subscription, testified to representations made to him in connection therewith, and that instead of Mrs. Cordingley, the subscriber in Nos. 1215 and 1221, her husband, who conducted on her behalf the negotiations regarding her subscription, testified as to representations made in said negotiations.

Testimony by ten other witnesses was also introduced on the subscribers' behalf, among whom was De Lanoie, assistant trust officer of the Trust Company, whose deposition had been taken by them.

The Trust Company introduced in rebuttal testimony by Eldridge, its first vice president, Randall, its trust officer, and said De Lanoie. There were 30 directors in all, of whom Eldridge was one. Randall and De Lanoie, who managed its "trust department," were not directors.

4. Before considering the assignments relating to evidence at the trial, the following particulars regarding the various subscription agreements sued on may be stated. Copies of them were made part of the Trust Company's declarations, and the original agreement in each case was produced at the trial.

The agreements subscribed to by Abbot (Nos. 1210, 1217), Evans (No. 1213), Mrs. Cordingley (Nos. 1215, 1221), and Preston B. Keith (Nos. 1211, 1219) were in printed form, each agreement forming part of a printed pamphlet, wherein it was preceded by a prospectus purporting to be signed by the Development Company and to state facts regarding the Northeastern Cuba Railroad Company, whose bonds were therein offered for subscription.

Each prospectus set forth that said Railroad Company was organized to construct, acquire, and operate a railroad in northeastern Cuba, and that $900,000 of its first mortgage bonds were offered for subscription by said Development Company, with a bonus of 50 per cent. in its stock.

Each said prospectus stated that payments by subscribers were to be made to the Trust Company for said Development Company's account and subject to its order; also that said Development Company might borrow unpaid balances of subscriptions for account of subscribers upon the terms and conditions set forth in the following subscription agreement.

Each stated that accepted subscriptions would entitle the subscriber to bonds and stock, that payment of 25 per cent. was to be made upon acceptance, and that the right to reject any subscription was reserved.

The stipulation in the subscription agreement following each said prospectus was that subscriptions thereunder or money borrowed thereon should be paid to the Development Company for the purpose of carrying out "the undertaking."

The subscription agreement signed by Mrs. Cordingley bore date September 15, 1905. The prefixed prospectus bore no date. This prospectus and agreement differed in terms, in certain immaterial particulars, from the similar documents signed by Abbot, Evans, and Preston B. Keith, which were in identical terms; and in all these three cases both prospectus and agreement bore date November 15, 1905. The respective actual dates of subscription did not appear in any of the agreements, but were, according to the evidence, as follows: Mrs. Cordingley's, early in May, 1906; Evans', in November, 1906; Abbot's, in February, 1907; Preston B. Keith's, late in March, 1907.

The agreements signed by George E. Keith (Nos. 1214, 1220), John S. Ames (Nos. 1212, 1218), and F. Lothrop Ames (Nos. 1216, 1222) were also in print, but in a different form. They had no prospectus prefixed. That signed by Keith bore date November 15, 1906, and was signed about January 24, 1907. It stated that the subscription was limited to $700,000 of the bonds, but its terms did not differ materially in other respects from those signed by John S. Ames in May, 1907, and F. Lothrop Ames in June, 1907, which were in terms identical with each other and stated the total subscriptions to be limited to not exceeding $900,000, as did the four agreements above mentioned, dated in 1905. Neither of said three agreements contained the express stipulation, found in the other four, that the amounts subscribed or borrowed were to be paid (i. e., by the Trust Company) to the Development Company, to carry out the "undertaking." In other respects, their provisions were, for all material purposes, substantially like said other four agreements. They provided that the payments they called

for were to be made to the Trust Company, to the Development Company's credit.

5. Returning to the matter of the "map prospectuses" above mentioned in paragraph 3: Not only had the auditor made them part of his reports as above, and found the Trust Company chargeable with knowledge of their general use as inducements offered to subscribe for said bonds, but, as will appear, there was evidence at the trial, independent of the auditor's report, tending to show such use with each subscriber here a party and to charge the Trust Company with knowledge of such use.

There were four of them, all bearing date December, 1905. There were slight differences between them in the maps and also in the text, but none of substantial importance. The statements made in them purported to relate to the Northeastern Cuba Railroad Company, and to an offer made by or in the name of the Cuba Eastern Railroad Company, H. W. Bennett, president, of an issue of $900,000 first mortgage bonds of the Railroad Company first named, for subscription. Said bonds were stated to be guaranteed by the Railroad Company last named. Each of them bore at the top, "H. W. Bennett & Co., Bankers, 20 Broad St., New York." Each set forth the names of the officers and directors of said Northeastern Cuba Railroad Company, among whom appeared H. W. Bennett as president, Randall as vice president, De Lanoie as secretary and treasurer, and Eldridge as director. The respective positions held by the last three, as above, in the Trust Company, were also stated. Each set forth that the Trust Company was trustee under the mortgage securing said bonds. A map of part of the Island of Cuba, purporting to show the locations of the railroads mentioned, the constructed portions of each, and those not constructed, also their connections with other existing railroads, occupied two of the four pages of each prospectus.

It appeared without dispute that H. W. Bennett, mentioned as above in said prospectus, was in fact president of the Northeastern Cuba Railroad Company, and engaged in soliciting and obtaining subscriptions to its said bonds during the period within which these subscriptions were made (May, 1906–June, 1907; see paragraph 4 above).

6. The auditor found that said Bennett solicited each of the subscriptions here involved, describing in each case conditions in Cuba and explaining in detail the subscription agreement afterward signed, and one of said map prospectuses.

The auditor also found as to each said subscriber that he signed the agreement in suit "induced by the statements made in the circulars and confirmed orally by Bennett."

Evidence in support of these findings was also before the jury.

In each prospectus annexed to a subscription agreement, and in each map prospectus, there appeared in substance, though the terms used were not the same in all, the representations principally relied on by the subscribers, viz. that the mortgage securing the bonds was a first mortgage constituting a first lien, and that the earnings of the Cuba Eastern, which was to guarantee the bonds, exceeded its own interest requirements.

The further testimony at the trial by or on behalf of each respective subscriber (see paragraph 3 above) tended to show what Bennett said in conversations relating to their respective subscriptions, and to support the auditor's above finding as to their effect. Bennett was not called as a witness, and there was no contradiction of the subscribers' testimony as to the statements or representations made by him as above, or as to his use of the various printed documents above described, in soliciting and obtaining their respective subscriptions.

Said testimony at the trial tended further to show that certain letters from Bennett, confirming statements previously made by him to them in conversation, had been received by Abbot, Cordingley, John S. Ames, and Preston B. Keith before they subscribed; also that his letter to John S. Ames had been shown to F. Lothrop Ames before the latter subscribed.

7. Bennett's above statements and letters to subscribers were admitted in evidence at the trial, as were the map prospectuses referred to in paragraph 3, against the Trust Company's objections, made not only when they were offered, but also at the close of the evidence. Said statements or letters were admitted, in those cases respectively, involving the particular subscription claimed to have been induced by each said statement or letter, reserving the question of their admissibility in all the cases generally.

The ground of all said objections and the assignments of error based upon them was that there was no proof that the Trust Company knew, when accepting any one of said subscriptions, that Bennett had had said interviews with the subscriber or had sent him said letters, or knew what had been said at said interviews by Bennett, or what he had written in said letters, or knew that he had shown the subscriber the map prospectus, as set forth in the auditor's report or according to the subscriber's evidence in each case.

No direct evidence, it is true, appears to have been introduced with regard to any of the subscriptions, showing specific knowledge by the Trust Company, before acceptance of either subscription, of the fact that Bennett had had with the particular subscriber the particular interview or interviews testified to, or had written him the particular letter or letters, or had shown him the particular map prospectus.

8. The Trust Company contends that there was nothing showing it to have had any other relation to or connection with the subscriptions or with Bennett's activities in obtaining them, than as trustee under the mortgage securing the bonds offered, or as the designated payee for account of the Development Company of such amounts as might be subscribed, or as a lender from whom the latter company elected to borrow, according to the subscription agreements, upon the subscribers' guaranties.

If this is true, the Trust Company's contention might well prevail, that only upon direct evidence to the effect stated in the last preceding paragraph, could it be charged with any responsibility for representations or statements made either in said map prospectuses or by Bennett in confirmation thereof. If it was without any other interest in the success of his efforts to procure said subscriptions than belonged

to it in virtue of one or the other of its above capacities, and if it was participating in said efforts only by permitting its name to be used as above, such direct proof only would have been competent upon the question whether it was aware or not that any false and fraudulent representations had been made in procuring any given subscription, either by him or in said prospectuses. See Wiser v. Lawler, 189 U. S. 260, 23 Sup. Ct. 624, 47 L. Ed. 802, cited on the Trust Company's behalf.

But we are satisfied that, as the subscribers contend, there was evidence from which it might well have been found that the Trust Company had been directly interested on its own account in the success of Bennett's efforts to get subscriptions to said bonds, from the time said efforts were begun; also that in his undertaking to get such subscriptions, and in his subsequent efforts to that end, the Trust Company had all the time participated, in furtherance of said interest of its own, in such manner and to such an extent as made it responsible for the truth of representations used by him as inducements to subscribe for the bonds, if it knew or ought to have known that he was making them generally, to such persons as he from time to time approached for subscriptions, for the purpose of inducing them to subscribe. Some of the leading features of the evidence here referred to are indicated in the next following paragraph. We find no error in the admission of such portions thereof as were objected to by the Trust Company, and consider separate discussion of each assignment of error relating thereto unnecessary. We think the subscribers had the right to bring out all the facts regarding the Trust Company's relations with Bennett, and with the railroad and other enterprises in Cuba further referred to below, in connection with these bonds or his doings while seeking subscriptions for them.

9. In each case the auditor found that the Trust Company's three officials, witnesses on its behalf as above (paragraph 3), and mentioned in the map prospectuses above (paragraph 5), had constituted "the controlling force in the management" of certain Cuban enterprises wherein each said official and also the Trust Company's president, Charles T. Barney, had invested personally; that said enterprises had not been successful up to 1905, and in aid thereof the above-named officials had organized in that year both the Development Company and the Northeastern Cuba Railroad Company; also that Bennett had undertaken, with the knowledge and assent of all said officials, to obtain capital for the above-named company, and had solicited the subscriptions here involved in pursuance of his said undertaking. The Cuba Eastern Railroad Company, guarantor, according to the subscription agreements, of the bonds offered, was one of said earlier Cuban enterprises referred to.

From the testimony of the three officials of the Trust Company who were witnesses at the trial, it appeared that said Company became itself a stockholder or underwriter in the Development Company to the amount of $17,000, that its president became also a stockholder to the amount of $19,000, and that, while neither Eldridge, Randall, nor De Lanoie invested personally in the stock, though becoming officers

of the Development Company as above, each was a stockholder in the Northeastern Cuba Railroad Company, and also in the earlier Cuba Eastern Railroad Company, and each was also a director and officer of both said railroad companies. Randall testified that "all this Cuban business" was "considered desirable for the Trust Company," that its officers gave their time to the Development Company and the earlier Cuban enterprises partly for that reason, and that he became an officer in them partly to increase the Trust Company's business, and to safeguard the Trust Company's interests. A direct and immediate benefit to the Trust Company might therefore have been found involved in the success of Bennett's efforts, instead of a benefit merely contingent or remote.

Bennett's connection with the Trust Company appeared, from the testimony of its same three officials, to have been as follows: He was a stockholder in the company. He had brought said earlier Cuban enterprises to its attention in 1903, and had since actively participated in their management in co-operation with it. He was president, and, with Randall, a member of the executive committee of the Cuba Eastern Railroad Company. He was one of three trustees, Eldridge and Randall being the other two, who held a controlling part of its stock in a voting trust. He became, not only president of the Northeastern Cuba Railroad Company, the capacity in which he appeared on the prospectuses (paragraph 5 above), but also, with Eldridge and Randall, one of three trustees holding nearly all its stock under a similar voting trust. While not shown to have been an official or stockholder in the Development Company, it was that company, according to Randall, which employed him to get subscriptions for the bonds to which the agreements in suit related (paragraph 4 above). He was, as would be expected under such circumstances, often in the Trust Company's offices, consulting about all the above Cuban enterprises with its officials, not with the three above named alone, but with others as well. Each Trust Company official who testified made it clear that he knew at the time that Bennett was soliciting subscriptions for said bonds and receiving therefor a commission out of all cash payments made upon such subscriptions as he procured.

Correspondence in evidence between the Trust Company and the several subscribers here concerned, immediately following their respective subscriptions, afforded further ground for inferring active participation by said company in Bennett's efforts to procure these subscriptions, and therefore in his general efforts to procure like subscriptions.

Although the terms of all said subscribers' agreements made them agreements with the Development Company as the party offering the bonds and by whom the subscriptions were to be "accepted" before becoming binding—nothing in regard to said acceptance appeared to have been ever received from the Development Company by any of said subscribers. It was the Trust Company instead which, in each successive instance, wrote to the subscriber upon that matter soon after the subscription had been made, without further reference, so far as appears, to the Development Company for any acceptance by it. Letters

in the Trust Company's name, addressed by it to each subscriber, indicated that Bennett had in each case taken the signed agreement directly to the Trust Company. In no instance did any submission to or action by the Development Company regarding rejection or acceptance appear. The arrangement indicated in the prospectuses and agreements, according to which the Development Company was the party to be dealt with, thus appeared to have been set aside by the Trust Company itself, as to each of these agreements as soon as it was signed; the Development Company appearing thereafter as the borrower from the Trust Company of the amounts loaned upon said agreements, but no use of its name for any other purpose being afterward made in connection with any subscription.

If, as all the foregoing tended to show, Bennett was in each case under employment to find subscriptions to these bonds, by a concern organized as above to serve the Trust Company's purposes, officered by officials of its own, under its control, and in which it had largely invested; if he had constantly consulted as above with said officials regarding his efforts to get such subscriptions; and if, after obtaining the successive subscriptions here involved, his dealings regarding them had been directly with the Trust Company through its said officials—representations in each instance made by him in order to induce the subscriptions, in whatever form made, are not, in our opinion, to be regarded as representations for which the Trust Company could disclaim responsibility, even if its representatives in the matter had not actually known in each instance, at the time, what they were. By each subscription he obtained the Trust Company would, under such circumstances, be accepting a benefit such as called upon it to know the representations whereby the subscription had been induced, and to refuse any subscription induced by representations which it knew or ought to have known to be false. We are therefore unable to agree with the Trust Company's contention that "nothing short of actual knowledge" of Bennett's representations to each subscriber separately, and of the fact that the map prospectuses used in each case had been shown to the subscriber by him, could charge it with liability for statements therein contained or for what Bennett said or wrote in confirmation thereof. It could not say, in view of such connection on its part therewith, that the means of knowing what representations Bennett was using, whether on paper or orally, were not readily available to it.

But there was also evidence which tended to show that the Trust Company's representatives in the matter had actual knowledge of the substance of said representations and of said map prospectuses.

In the four cases wherein the subscriber's agreement had a printed prospectus bound with it (paragraph 4 above), the Trust Company must obviously be taken to have known that Bennett had induced each of those subscriptions by the representations set forth in the prospectus, as soon as he handed in the agreement itself. Mrs. Cordingley's, in May, 1906, was the earliest in date of these four, and of all the seven subscriptions here in question. Knowing, as it must then have known, by what representations her subscription had been induced, and knowing also, as it must later have known, in November,

1906, February, 1907, and March, 1907, that Evans', Abbot's, and Preston B. Keith's had been successively induced by representations not differing in substance, the Trust Company could not have supposed, in the cases of the other three agreements signed in January, May, and June, 1907, that either of them had been procured otherwise than by means of representations to the same effect, although no printed prospectus was bound with them.

As to the map prospectuses, one of which, according to the evidence, Bennett had shown and explained to each of the seven subscribers, there was evidence to the effect that they were prepared under Bennett's directions, by one De Zayas, at the time in charge, under De Lanoie, of the offices and books of the Cuba Eastern Railroad, and in frequent daily consultation at the Trust Company's offices, directly across the street, with Randall and De Lanoie; that Bennett and De Lanoie approved the bills for printing and lithographing them; that De Zayas left 40 or 50 copies of them in the Trust Company's office; that one of these copies was afterward seen by him on Randall's desk therein; and that Randall talked with De Zayas about it. Randall testified and the auditor found that he and Eldridge had instructed Bennett to submit all such prospectuses to them before giving them to the public. Evidence of this character, although all the Trust Company's said officials attempted to deny knowledge of the contents of these prospectuses, or at least of the maps included in them, would clearly have justified a finding that they nevertheless possessed it at the time Bennett began their use.

That the map prospectuses were prepared for use as above, before any of the subscriptions in question were made, appeared from the dates which they bore. Knowledge of their contents implied knowledge of the purpose for which they were to be used. The conclusion, therefore, that when it received each subscription agreement, or payment on account thereof, the Trust Company knew that Bennett had used one of the prospectuses in obtaining it, was a conclusion that might properly have been drawn in each of the cases. And, if it had such knowledge, the Trust Company could not assert its ignorance that Bennett, with whom it was co-operating as above, had confirmed, orally or by letter, representations found in the map prospectuses themselves. His oral or written representations testified to were relied on by the subscribers, only to the extent that they tended to confirm those contained in the map prospectuses. That he would so confirm them the Trust Company must have anticipated; its representatives cannot reasonably be supposed to have expected anything else.

[4] 10. Finding no error, therefore, in the admission of Bennett's statements or letters to these subscribers, or of the copies of the map prospectuses given them by him, we cannot sustain any of the assignments of error relating to their admission. We think there was evidence sufficiently connecting them all with the Trust Company.

As stated in paragraph 7, those testified to by each subscriber were originally admitted only in the case or cases involving his particular subscription. The Trust Company, in our opinion, could not, in any event, complain of such admission. And the testimony of each sub-

scriber as to these matters was admissible, so far as we can see, in the cases relating to all the other subscriptions. It tended to show uniformity in substance and character of the representations whereby Bennett was seeking to attract all prospective subscribers with whom he dealt; and we think it thus bore, sufficiently to make it so admissible, upon the question whether the fact that such general use of such representations was being made was a fact within the Trust Company's knowledge. If so, it could not assert its ignorance of their use with any one of the particular subscribers here concerned.

[5] 11. Testimony from various witnesses called by the subscribers, to statements, oral or in letters, made to them by various officers or officials of the Trust Company at various times during the above period from May, 1906, to June, 1907, was admitted against the Trust Company's objection that they were immaterial to the issues before the jury.

Barney, Eldridge, and Randall were the officers or officials said to have made the statements here referred to. The first two, as has appeared, were directors and executive officers of said company. It is said that because Randall was neither, and that his position as head of the trust department did not appear to be such as would make statements by him binding upon the company, those statements should have been excluded. But there was evidence that the Trust Company's officers had intrusted to him the immediate charge of its interests in the Cuban enterprises referred to by the auditor, including the two Railroad Companies mentioned in the subscription agreements and the Development Company (see paragraph 9); that Eldridge relied on him for information on all matters relating thereto, and was accustomed to refer persons to him in matters involving them; also that many of his statements testified to were made in Eldridge's presence. Unless his statements or letters here in question were inadmissible on other grounds, the above objection did not require their exclusion. See Attleboro, etc., Co. v. Frankfort, etc., Co., 240 Fed. 573, 581, 582, 153 C. C. A. 377.

Two of the witnesses, testifying to conversations or letters in which said statements were made, were subscribers and parties in these cases. F. L. Ames testified to statements by Eldridge in a conversation with him at the Trust Company's New York office, in August, 1906, at which Randall, De Lanoie, and Bennett were present, and to statements by Barney in the autumn of 1906 to him at the latter's house; all these statements being prior to the witness' subscription. Abbot testified to statements by Eldridge, Randall, or both, in conversation at the Trust Company's New York office soon after his subscription, made in February, 1907, had been received. Bennett, according to his testimony, accompanied him there, introduced him, and was present.

The statements to Ames were to the effect that the Trust Company was then loaning money on the securities of "the various Cuban enterprises," and "keeping close watch of them," or that Barney was himself interested in them, or that they "promised to be very profitable." The statements to Abbot were to the effect that the Northeastern Railroad Company was prosperous; that the Eastern Com-

pany was an entirely solvent and prosperous guarantor; that the first-mentioned concern kept its accounts, papers, and records there and was "substantially in the Trust Company."

We see no reason requiring the exclusion of such statements in any of the cases. They tended to show, in connection with the auditor's reports and the evidence referred to in paragraph 9, the true relations existing between the Trust Company, said Railroad Companies, and Bennett, during the period of his efforts to get these bonds subscribed for.

Five other witnesses, not parties, testified to statements by Barney, Eldridge, or Randall to them during the same period. To their testimony what has just been said seems to us applicable, in some instances with even greater force; and against its exclusion further grounds appear.

One of them, John W. Herbert, testified to conversations with Randall in the spring of 1906, at some of which Bennett was present, and to conversations with Eldridge and Barney, to whom Randall thereafter introduced him, at the Trust Company's New York office, in May or June, 1906. According to him these conversations began with a recommendation by Randall that he join them in the Cuban enterprises, wherein the company had large interests, which recommendation Randall supported by attractive statements regarding the merits and prospects of both Railroad Companies, including statements that the Cuba Eastern Company's guaranty was absolutely good, and that the enterprise was "right under the roof" of the Trust Company, "all under our supervision and done right here." Randall gave this witness a map prospectus, like those referred to in paragraph 9, showing to him at the time on the map where the Northeastern Cuba Railroad was to be built up to a connection with the existing Van Horne system. Eldridge's subsequent statements to him were, in part, that he would like very much to have Herbert take an interest in that enterprise. Barney's statements were, in part, that he thought very well of that enterprise and had himself subscribed for the bonds. Among them were the following:

"It is one of our schemes; we have charge of it; Mr. Randall has been delegated to represent us; the management and control of the company is under the Trust Company's control, and all managed in its New York office."

Statements like these, though not made to any subscriber here a party, tended to show that in point of fact the Trust Company, besides being in close connection, for purposes of its own, with the management of said railroads, was also itself endeavoring, and at Bennett's suggestion, to promote subscriptions for the bonds by representations of the same character as those being made by Bennett, acting, as above, under its supervision. They further tended to contradict any denial on the part of the Trust Company that the contents of the map prospectuses were unknown to it.

We do not find it necessary to recite the substance of the statements testified to by Weld as made to him by Randall, in conversations or letters, between December, 1906, and May, 1907, to whom also Bennett had given a map prospectus and to whom Randall inclosed in

one of the letters copies of letters to Bennett from De Lanoie, and from Perrin, consulting engineer of the Cuba Eastern Railroad, regarding its prospects and condition; nor of those testified to in a deposition by Colvin as made to him by Eldridge or Randall in Barney's presence, in the spring of 1906, at the Trust Company's New York office, in connection wherewith Randall gave him a map prospectus; nor of those testified to by Baker as made to him by Eldridge or Randall in 1905 or 1906, in conversations at the same office, where he had gone at Bennett's suggestion, and where a map prospectus given him by Bennett was discussed with and statements made in it confirmed by Randall; nor of those testified to by Dewey (a subscription from whom Bennett, introduced to him for the purpose by letter from Barney, had obtained after showing him the map prospectus) as made to him afterward by Barney in March, 1907. For one or the other of the reasons above stated we are unable to hold that there was error in the admission of any of these statements or letters.

12. All the subscribers' agreements, except George E. Keith's, provided (as stated in paragraph 4) that "the subscriptions hereunder shall be limited to $900,000," or "to not exceeding $900,000," par value of the bonds offered. In George E. Keith's agreement $700,000, instead of $900,000, was the amount stated.

By amendments to their respective answers, filed October 31, 1914, each subscriber alleged in substance that, notwithstanding the above provisions, subscriptions were received and the Trust Company had certified and delivered bonds to an amount exceeding $900,000, when the agreement sued on was signed; also, that with intent to aid the sale of the bonds by means of the false representations described in the answer, the Trust Company had knowingly certified and delivered said bonds in violation of conditions prescribed by the mortgage securing them, held by it as trustee, and that by reason of said acts the defendant was not liable upon the agreement.

The issues raised by these amendments were not before the auditor, whose report had been filed before said amendments were made.

Evidence introduced by the subscribers, from the Trust Company's own books, would have warranted findings that on May 26, 1906, the Trust Company had certified and delivered such bonds to the amount in all of $983,000; on December 8, 1906, to the amount in all of $2,011,000; and on June 11, 1907, to the amount in all of $2,500,000. This evidence was admitted, in connection with other evidence set forth in the next following paragraph, against objection by the Trust Company that it was immaterial to any issue in the case; that the language of the subscription agreements did not import any agreement with the subscribers that the total issue should be limited to $900,000; that if there was such an agreement the fact had not been made the basis of any false representations; and that if available at all to the subscribers it could be so only in an action of contract.

The court instructed the jury that the language of the subscription agreements must be understood as confining the limitation of $900,000 to the particular offer of bonds made in them, and that no defense upon the ground that the limitation had been exceeded and the con-

tracts broken by the Development Company "at the very start of the transaction" had been made out. The court, however, in order that the question might be finally settled by this court, had the jury answer, among other questions submitted to it, questions No. 5, whether at the time of making the subscription agreements sued on more than $900,000 of bonds previously certified and delivered by the Trust Company were outstanding; No. 5a, whether, if so, the fact was known to said Company when it made the loans upon the agreeements; and No. 5b, were the defendant subscribers ignorant thereof? To each of the above questions the jury answered in the affirmative.

No exception to the court's instructions construing the language of the subscription agreements as above is before us; the subscribers, although excepting thereto when given, having brought no writs of error to review them. The subscribers nevertheless contend that, although the jury's answers to the above questions were immaterial in view of the construction adopted by the court, said answers must stand, and that they afford ground for affirming the judgments below, because not affected by any of the Trust Company's assignments of error, and because based on evidence from the Trust Company's own books, that said Company participated in a material breach of the subscription agreements, and thereby forfeited the right to insist upon their performance.

But this would require us to declare the court's construction erroneous, in the absence of any assignment to that effect. If, under the circumstances, it would be within our power so to deal with it—and the subscribers fail to satisfy us that it would—they also fail to convince us that it was in fact erroneous, and that the construction contended for by them was correct. We therefore regard the above answers of the jury as having now become immaterial.

This leaves to be disposed of the Trust Company's contention that the admission of the evidence from its books, and the submission of said questions to the jury was error requiring reversal. The evidence referred to we regard as properly admitted in view of the further evidence above referred to, which we consider below. The Trust Company fails to satisfy us that it was unduly prejudiced by the above submission to the jury. It could not dispute what its own books showed as above, and it did not attempt to show that the subscribers had any knowledge when they signed as to the facts so shown.

13. The above evidence from the Trust Company's own books showed also successive dates in 1905, 1906, and 1907, whereon the successive amounts making up the total amounts of bonds certified and delivered on or before the above dates specified in paragraph 12 were certified for delivery. The following were also put in evidence against the Trust Company's objection:

(1) The mortgage of all the Cuba Northeastern Railroad Company's property held by the Trust Company as trustee to secure the bonds subscribed for. In this were provisions that no bonds should be valid until certified by said trustee, and the purposes for which and the conditions under which the necessary certification and delivery might be made were prescribed. In the case of bonds issued for construction

and equipment, resolutions of the Railroad Company's directors, affidavits by its president as to the complete construction were required; and a specified amount per mile of actually completed track was not to be exceeded. In the case of bonds issued for working capital, resolutions by the directors were required, and neither the specified total amount nor a specified annual amount was to be exceeded.

(2) Successive resolutions adopted by said directors, among whom, as above, were Eldridge, Randall, De Lanoie and Bennett, and who met usually, if not always, at the Trust Company's New York office. The resolutions appeared from the directors' records there kept. Each recited that according to certificates by Sims, chief engineer in charge of the construction in Cuba, various lengths of track had been constructed and were in operation, and each requested the Trust Company to certify and deliver certain amounts of bonds accordingly.

(3) The successive certificates by Sims as actually received by said directors.

(4) Also, from the Trust Company's books, the dates and amounts of deliveries made by it of certified bonds.

Randall, called in rebuttal by the Trust Company, was cross-examined, against its objection, as to the dates upon which the various certificates from Sims were actually received, and their correspondence with the dates of the above resolutions.

From all the above, and from what had also appeared from the Trust Company's books, as stated in paragraph 12, it might have been found that bonds had been certified and delivered as above upon directors' resolutions, adopted November 14, 1905, and January 23, 1906, both purporting to be based upon the necessary certificates of construction, although such certificates had not, as the Trust Company knew, or should have known, been in fact received, in violation of the above mortgage conditions and as alleged in the amendments to the subscribers' answers referred to in paragraph 12.

We find no error requiring reversal in the admission of this evidence. Its consideration was proper, at least in connection with the evidence considered in paragraphs 9 and 11, upon the extent to which the Trust Company had been an active participant with Bennett in promoting sales of the bonds. Whether or not there had been such violation of the mortgage conditions by said certifications as would of itself operate to release the subscribers from their agreements, was not a question submitted to the jury for answer.

14. Three only of the various false representations whereby the subscribers alleged their subscriptions to have been induced were specifically mentioned, in the instructions given, as calling for findings by the jury whether or not they were, as the auditor had found (paragraph 2 above), in fact false and fraudulent, and, if so, whether or not, as he had also found, they were made with knowledge and acquiescence on the part of the Trust Company, though aware that they were untrue.

These were: That the bonds were first mortgage bonds; that the mortgage was a first lien on all property of the Cuba Northeastern Railroad; that the earnings of the guarantor company (Cuba Eastern Railroad) were in excess of its interest charges, or that said company was "on an interest-paying basis."

With these three of the alleged false representations only, the auditor had specifically dealt as above in his report. All three were in substance made in the printed prospectus annexed to each of the four subscription agreements specified in paragraph 4, and also in the map prospectus given each subscriber by Bennett. That he had also made them in his negotiations with the subscribers might also have been found from the evidence at the trial.

[6-8] 15. The mortgage in question, in evidence as has been stated, was dated March 1 and executed August 30, 1905; and there is no question that it purported to be a first mortgage upon said property or that it was duly executed on the grantor railroad's behalf. It had, however, as is also not disputed, never been recorded in Cuba where the property was situated.

The auditor's findings were, that the grantor railroad had never been registered in Cuba; that under Cuban law, being a foreign corporation, such registration was necessary before it could own property or do business in Cuba; and that, in order to make an otherwise valid mortgage a lien upon real estate in Cuba, recording according to the requirements of Cuban law was necessary. Notwithstanding a record before him of proceedings for foreclosure of said mortgage, begun in the United States Circuit Court for the New York Southern District in April, 1909, after the present suits had been begun (to which further reference is made below), he further found and ruled that the mortgage never constituted a valid lien within the meaning of the representations made as above.

Uncontradicted evidence before the jury was to the effect that the mortgaged property belonged, when the mortgage was executed, to the Cuba Eastern Railroad, which had never transferred it to the mortgagor. From an expert in Cuban law there was uncontradicted testimony that a mortgage not recorded under that law was of no effect against third parties, and that between the parties it constituted at most a personal obligation.

In the court's instructions that, if the testimony regarding the Cuban law was believed, no first lien upon the property was created by the mortgage, we find no error. Whatever its effect between the parties under Cuban law, unless it established rights under that law against third parties in respect to the property, corresponding to those generally secured by first lien mortgages, the contention that it might be a first mortgage constituting "a first lien," within the meaning of the representations, seems to us deserving of no serious consideration. The law of Cuba, where the property was situated, being the law of a foreign country, and having to be proved as a fact, there could be no presumption that it was the same as the law of this country which would justify false representations as to the standing of a mortgage necessarily governed by the Cuban law. The court rightly declined to give instructions involving a different assumption, and we find no error in the instructions given regarding the matter.

The representation regarding the mortgage necessarily meant that it secured rights in the property which would outrank adverse claims. We find no error, therefore, in the exclusion of evidence offered by

the Trust Company to the effect that no adverse claim upon the property mortgaged had in fact been asserted.

As to the record in the New York foreclosure proceedings, although the court wherein such proceedings were conducted may have had jurisdiction of the then trustee under the mortgage, as representing holders of the grantor railroad's bonds, and also of the guarantor railroad's creditors and stockholders, these subscribers for bonds were never parties subject to such jurisdiction, and they had repudiated their agreements to become bondholders before said proceedings were begun, so far as this could be accomplished by notice to the Trust Company. At no time during their continuance were these subscribers asserting any interest under the mortgage or in any privity with any party to the proceedings regarding it, and the decree therein in no way bound them. It purported to declare the mortgage a first lien upon the mortgaged property; but, said property not being within the court's jurisdiction at any time, such a declaration could have no further operation than as it may have estopped the parties to the suit. Rendered as it was in a suit begun in 1909, it could not have established such a lien, valid under Cuban law, as would satisfy the representation made in 1905–07. We find no error in any refusal to instruct otherwise.

Having admitted said record, the court also admitted, for the jurors' consideration as bearing upon the question whether the representations that the mortgage was a first lien were material and fraudulently untrue, evidence that, under and by virtue of said decree, the property mortgaged was ultimately applied for the benefit of holders of the bonds secured thereby. Of such admission, the Trust Company, in our opinion, can have no right to complain.

16. As to the representations that the Cuba Eastern Railroad was earning more than its interest charges, the auditor found that they were untrue, and that, on the contrary, the railroad never reached an interest-paying basis, but the interest on its bonds, which it had regularly met, was in fact paid out of funds other than what could be properly called railroad earnings. There was also evidence before the jury from which the same findings might properly have been made. Parts of such evidence, admitted against the Trust Company's objection, are claimed to have been erroneously admitted.

(1) De Zayas, in charge, under De Lanoie, as stated in paragraph 9 above, of the railroad's bookkeeping, gave testimony contained in a deposition taken by the subscribers in New York, in 1910. According to his testimony, monthly statements from Cuba were received during the period covered by these subscriptions, purporting to show the railroad's earnings and expenses; its first mortgage bond interest amounting in all to $60,000 each year. Asked whether, as its earnings were so reported, month by month, it earned in 1905–07 said bond interest, he answered, "No." The question and answer were admitted on the understanding that the question amounted only to asking how much said earnings, as reported, were. We find no error in the admission.

[9] (2) Another deposition, taken on the subscribers' behalf in 1910, was that of Hatch, an expert accountant, who, under an employment in 1906 to "straighten out" the books and accounts of the Cuba Eastern Railroad, had worked on them in Cuba during the greater part of the

year, September, 1906, to September, 1907, and had thereafter brought said books and accounts with him to New York, where he completed his work on them in 1908. He produced and identified said books in connection with his deposition, and offered as part thereof a tabulation made by him from the entries he found therein, purporting to show, among other things, the railroad's earnings, gross and net, its operating expenses, and its fixed charges for each six months period from January, 1904, to June, 1908. This tabulation, so far as it covered the above period to June, 1907, had been before the auditor with the deposition, had in part formed the basis for his findings, and would have warranted like findings by the jury. It is undisputed that, neither when Hatch's deposition was taken, nor at any time before the auditor, did the Trust Company object on the grounds that the books themselves were not produced. This objection, however, it raised for the first time at the trial, seeking by means of it to exclude both the tabulation and Hatch's testimony as to what he had found on the books.

Though in Hatch's custody when he gave his deposition, at the time of the trial the books were neither in his custody, nor in that of the Trust Company, nor in that of the railroad company, whose books they were, nor were they within the jurisdiction of the court. It appeared that after the completion of the deposition they had been until 1912 in the Trust Company's vaults for safe-keeping, under control of the committee representing the first mortgage bondholders, and had in that year been surrendered to another corporation, having its offices in New York, which had become, under a reorganization, successor to both the Cuba Eastern and the Cuba Northeastern Railroad. This company had not complied with a request by the subscribers to have them brought to Boston for use at the trial.

In declining to exclude Hatch's tabulation, and his other testimony relating thereto, as given in his deposition, because not accompanied by the books themselves, we think the court committed no error. Their production by Hatch when he gave his deposition afforded the Trust Company due opportunity for proper examination, of which opportunity it did not avail itself. It had never reserved any objection to his testimony regarding the contents of the books as inadmissible without the books themselves. The assertion of that objection for the first time at the trial could not justly be permitted to deprive the subscribers of the benefit of said testimony. Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299. Drumm-Flato, etc., Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606, relied on by the Trust Company does not require a different conclusion. There a party seeking to make the contents of its books evidence in its own favor, offered the deposition of its bookkeeper, accompanied by copies of the books annexed thereto, against objection taken at the time that the books themselves were the best evidence and must accompany the deposition.

Objections based upon the contention that Hatch's discretion in selection from the books had entered into his tabulation were insisted on at the trial, though not made when his deposition was taken. The appellants fail to satisfy us that any of these objections required the exclusion of any of his testimony. According to it, in his work upon the books, though it consisted partly in transcribing and rearranging them,

or in completing them from the papers and accounts before him, he had made no change in original entries appearing during the period prior to May, 1907. Not only was he cross-examined at length regarding his dealings with the books in connection with his tabulation, but a previous report on the same books, from the beginning of 1904 to November 30, 1905, was before the jury, as was also De Zayas' deposition regarding them. Both said reports had been before the auditor with Hatch's and De Zayas' depositions, and referred to in his report. We think the tabulation and testimony were properly admitted, as tending to show what the books disclosed as to the earnings in question, and that it was for the jury to say how far they could be relied on for that purpose. None of the objections raised to specific items of the tabulation, that they were irrelevant upon the question as to net earnings during the period covered, seem to us valid. These items, in connection with Hatch's testimony regarding them, were proper matters for the jury's consideration in determining what the Cuba Eastern's own books had contained as to its actual net earnings, its financial condition, and its financial transactions bearing upon the true amount of said net earnings. We cannot hold that the court's refusal to exclude them from such consideration was error.

(3) Nor can we hold that the contents of the Cuba Eastern's books, so far as shown by Hatch's testimony or otherwise, ought to have been excluded as, in any event, inadmissible against the Trust Company. The evidence, already referred to, tending to connect the Trust Company with the Cuba Eastern's management and with the keeping of its books, we consider sufficient, if believed, to charge it with knowledge of what had been entered on said books with regard to matters such as those covered by Hatch's testimony and tabulation.

17. If the representations that the mortgage gave a first lien, and the Cuba Eastern's earnings exceeded its interest requirements, could properly have been found untrue by the jury, we cannot sustain the Trust Company's contention that it could not properly have been found aware of their untruth when it made its loans upon the subscribers' agreements.

As to the mortgage, the auditor's findings were, that correspondence between Sims, general manager of the road in Cuba—to whom the mortgage had been forwarded for record in 1905—and Randall, which was shown to Eldridge, De Lanoie, and in some instances to Barney, and covering the period August, 1905–February, 1908, informed the Trust Company that the Northeastern Cuba Railroad was never registered in Cuba, never had title to the property mortgaged, and that there had never been any recording in Cuba of the mortgage itself. That the evidence before them would have warranted the jury in coming to the same conclusion, we cannot doubt. No serious ground for any such doubt, indeed, seems to us suggested in the Trust Company's briefs.

The Trust Company does contend that good reason for a belief on its part that the mortgage had been recorded, and that, whether it had been or not, it was, by universally accepted law, a valid mortgage establishing a valid lien, might reasonably have been found from all the evidence, and therefore that it could not have been guilty of intent to

cheat or defraud. A belief, contrary to knowledge which it might have gained by due use of means under its control, could not, in our opinion, enable it, as against these subscribers, in fact misled by representations contrary to fact, to enforce subscriptions induced thereby and by it accepted and acted upon in silence. Acquiescence on its part in the misleading representations, under such circumstances, would be a legitimate inference.

As to the Cuba Eastern's earnings, the auditor's findings were that Eldridge, Randall, and De Lanoie—and therefore the Trust Company, —are chargeable with knowledge of the untruth of the representations made that the earnings were more than enough to meet interest requirements, and that the company was on an interest-paying basis. From the evidence before them the jury was warranted in adopting these conclusions. The facts upon which the auditor based them might well have been found by the jury, from said evidence, to the following effect: The various Cuban enterprises above mentioned, whereof the Cuba Eastern was one, having, in 1905, proved unsuccessful, notwithstanding doubts whether it would not be better to stop there and take the loss, the Trust Company's officers and officials in control of their management (see above paragraph 9), had proceeded to organize and control the Development Company in their aid. Sims, already selected by them in 1904 as the Cuba Eastern's general manager, had been, from the time he entered upon his duties, in constant, almost daily, communication, by letter or telegram, with Randall or De Lanoie regarding that railroad, its progress, prospects, and finances. All information of importance so communicated was habitually shown to Eldridge and at times to Barney. The correspondence was kept on file in the Trust Company's office. Besides the books kept in Cuba, those kept in New York by De Zayas and De Lanoie as above, there were various accounts with the Cuba Eastern kept on the Trust Company's own books.

That the Trust Company is chargeable with knowledge of what appeared from its books or from said correspondence files relating to an enterprise thus set on foot, under its supervision, in the hope of averting disaster to an earlier enterprise, wherein its reputation and credit had become involved as above, seems to us a legitimate conclusion. That the methods actually resorted to for meeting the Cuba Eastern's bond interest as it became due, payable at its own office, had been the subject of frequent and anxious consultation among its officers and officials referred to above, appeared from their own testimony before the jury, as did also the actual character of the methods involved. It was for the jury to say whether or not, in view of them, the bond interest had in fact been exceeded by the road's earnings.

[10] 18. Error is assigned by the Trust Company in respect to comments made by the court regarding certain of the letters from Sims which it put in evidence as tending to show the character of the information received by it from him, at various times during the year 1906, regarding the Cuba Eastern Railroad under his management. It complains that these were prevented from having due weight with the jury by remarks from the court while they were being offered. It appeared,

as the Trust Company contends, that during the period covered by said letters, the Cuba Eastern's bookkeeping had not, for a variety of reasons, been kept up to date, that its books were being remodeled and perfected by auditors as above, and that, except as gathered from Sims' statements, it was without information regarding the condition and progress of the road or its business, and that said letters were material on the question whether or not, in 1906, the officials in New York were informed as to the road's earnings since January 1, 1906; and on the question of their good faith. The letters, besides reporting as to details and requirements of construction work, contained encouraging statements as to the road's prospects of obtaining business.

The comments complained of were to the effect that the letters bore only remotely on the issues raised regarding the representations to the subscribers, and that such details as they dealt with were not likely to be of importance enough for the determination of said issues, to warrant the addition they made to the documentary evidence already before the jury, or the time necessarily consumed in reading them. The court appears to have made said comments in an effort to prevent undue accumulation of evidence only remotely material.

We think the view taken by the court as to the contents of the letters in question is justified by the record. It was the truth or falsity of specific representations, and the knowledge of the Trust Company relating thereto, upon which the jury were to pass; and the extent to which its officers and officials may have been encouraged to expect an ultimate favorable result from the enterprise had for that purpose little, if any, importance. The jury were more than once cautioned by the court, in connection with said comments, that they were to be guided by their own judgment upon the questions of fact before them, and not by any opinion regarding facts which the court might express. We do not think the comments in question, under the cautionary and qualifying remarks, were necessarily prejudicial, or that they exceeded recognized limits. We find no error warranting reversal upon this ground.

What has been said applies also to other comments complained of, relating to matters other than the Sims letters referred to.

[11] 19. In the seven suits brought against subscribers by the Trust Company, the jury were instructed, in substance, that if the agreements sued on were invalid as between the subscribers and the Development Company, appearing in said agreements as the party offering the bonds (paragraph 4 above), because procured by material false and fraudulent representations, the Trust Company could nevertheless recover, unless it knew, when making its loans and accepting said agreements as collateral, that they had been so procured; but that, if satisfied that the Trust Company then knew them to have been so procured, the burden being upon the subscribers to prove such knowledge, the jury's findings should be for the subscribers.

As to the alleged representations regarding the mortgage and the Cuba Eastern's earnings (paragraphs 16, 17, above), instructions were given defining the meaning of the terms therein used, and the jury were left to say whether the subscribers had sustained the burden of

showing them to have been false. If found to have been false, whether they were shown to have been material and fraudulent, was left to the jury; "fraudulent" being in substance defined as intentionally deceitful, and "material" as having been a real moving cause inducing the making of the contracts. A number of alleged false representations set forth in the subscribers' answers, other than those specifically dealt with as above (paragraph 14), and in the auditor's reports, were treated as requiring no definition of their language by the court, and the jury were left to deal with them according to the instructions already given regarding the representations as to the mortgage and the net earnings of the guarantor railroad. The representations thus dealt with were as to specific opportunities for profitable business to be made available by construction of the road, and of importance mainly as tending to encourage belief in the representations regarding its earnings.

As to what would amount to knowledge on the Trust Company's part of the making of said representations, or of their false and fraudulent character, the instructions were in substance that knowledge coming to its officers, knowledge of Randall and De Lanoie, so far as obtained in performing duties delegated to them by it, knowledge to be gathered from entries on its own books, the knowledge acquired by Randall and De Lanoie in matters not delegated to them by it as part of their duties, but which, acquired by them, they communicated to its officers, was to be taken as knowledge of the Trust Company. Such knowledge had been shown, it was stated, of the contents of the book prospectuses accompanying four of the agreements (paragraph 4 above). As to the contents of the map prospectuses, it was left to the jury to say whether or not they would believe denials by Eldridge and Randall that they had knowledge thereof. The jury were told, in substance, that if satisfied that Bennett had habitually, commonly, and as his regular practice used said map prospectuses as inducements to subscribe, and if Eldridge or Barney, or Randall, so far as he communicated it to Eldridge, knew that fact, the inference would be warranted that the representations in said map prospectuses had been used, with the Trust Company's knowledge, in procuring each subscription here in question, and, if satisfied that the representations in all said prospectuses were in fact false and fraudulent, that similar inferences would be warranted as to the Trust Company's knowledge of their false and fraudulent character.

The jury found for the defendant in each of the above suits, and also found specially, in answer to questions propounded by the court, that the agreement sued on was procured by false and fraudulent material representations relied on by the defendant; that the fact that it had been so procured was known to the Trust Company at or before the time when it loaned money on the security of the agreement; and also at or before the time when it received and credited the sum received by it in payment or part payment thereunder.

Neither in the instructions given as above, nor in the above method of submission to the jury, do we find any error warranting reversal of the judgments entered for the defendants. The main reasons for this result have already appeared in what has been said. Separate

consideration of the many assignments of error, based upon refusal of the court to give numerous specific instructions requested, would occupy much space, and is believed unnecessary. After examination we are unable to say, in the case of any, that the court was bound to rule or instruct in the terms requested.

In one of said seven suits against subscribers, viz., No. 1213, against the Evans estate, the above instructions were made applicable only to the recovery sought of the amount loaned by the Trust Company upon Evans' agreement as collateral. It had also, as was not disputed, advanced on his account at his request, the payment upon acceptance of his subscription, and the amount so advanced was claimed in a separate count of its declaration—as to which the jury were instructed, in substance, that the Trust Company was entitled to recover, unless the defendant established, by a fair preponderance of evidence, that it made said advance in pursuance and in furtherance of a scheme, to which it was a party, to defraud him by obtaining money from him by means of fraudulent representations concerning the bonds. The instructions regarding this portion of the recovery sought in No. 1213 were, as will appear below, similar in effect to those given regarding the recoveries sought by subscribers against the Trust Company in the six suits referred to in the next following paragraph, and in connection with them the special findings of the jury there referred to are to be considered. The verdict in No. 1213 was, as has been stated, for the defendant.

20. In the six suits brought by the subscribers against the Trust Company, the jury were, in substance, instructed that the subscriber would not necessarily be entitled to recover, even if their finding should be that the Trust Company knew of fraud affecting the agreement at the time when it accepted the same as collateral; that the subscriber must show more than mere knowledge on the Trust Company's part that payment to it of the money claimed had been induced by false and fraudulent representations; and that active participation on its part must be found, in a scheme so to procure money, in view of all the evidence relating to Bennett's representations to and dealing with said subscribers and the Trust Company or the Trust Company's connection and dealings with him or with the Development Company, and with the previous Cuban enterprises, in order to warrant recovery by the subscriber. Besides the other questions submitted to them, the jury were asked to find specially whether the Trust Company was knowingly co-operating, with Bennett or others, in a plan to procure subscriptions to the bonds by making false and fraudulent representations about them to the prospective purchasers thereof, and, if so, whether the subscription agreement sued on was so procured in pursuance of said plan.

The questions were answered by the jury in the affirmative, and their verdicts were in each of said six cases for the plaintiff subscriber for the amount paid to the Trust Company, with interest.

The Trust Company fails to satisfy us that it was entitled to instructions more favorable to it than the above upon the points involved in the suits against it, or in that portion of its claim in No. 1213 referred to in paragraph 19 above. In the view we have taken of all these cases

we are unable to hold that any error was committed in any of them requiring reversal of the judgment.

In Nos. 1210–1216, inclusive, the judgments of the District Court are affirmed. The defendant in error in each case recovers costs in this court.

In Nos. 1217–1222, inclusive, the judgments of the District Court are affirmed, with interest. The defendant in error in each case recovers costs in this court.

On Petitions for Rehearing.

PER CURIAM. The grounds set forth for these applications consist mainly in assertions that certain of the conclusions reached in our opinion of December 20, 1917, are erroneous. The arguments in support of these assertions are to a great extent either arguments made in substance at the hearing or such as might then have been made if regarded as important; and however appropriate upon a rehearing, if granted, they do not seem to us appropriate for the purpose of showing that essential features of the case have been overlooked or misunderstood.

1. The conclusions stated in paragraph 15 of the opinion are those first complained of by the petitioner. The Trust Company's reliance upon the propositions that the New York court referred to had jurisdiction over the mortgage trustees, the mortgage and the mortgaged property, and that its decree was entitled to full faith and credit, seems to us sufficiently dealt with and disposed of by what is said in the opinion. We cannot regard the Trust Company as entitled to claim that these contentions have not been duly considered.

[12] 2. The conclusions stated in paragraph 16 (2) of the opinion are those of which the petitions next complain.

Assuming that the stipulation between counsel before Hatch's deposition was taken should properly have been included with his deposition in the record, as it was not, it could have been considered by this court only upon the assumption that it was before the District Court when the ruling was made at the trial admitting Hatch's tabulation from and testimony about the books referred to, notwithstanding the fact that the books themselves were not then produced before the jury; and we should still be unable to find sufficient ground for holding erroneous the ruling made by the District Court, in view of the facts of the case as then before it. The proper time to cross-examine Hatch upon his testimony regarding the books was when he gave his deposition, having them before him. We do not think that the stipulation as to the reservation of objections, without distinct notice that production of the books would be insisted on when the deposition was used, could justly have been treated as entitling the Trust Company to decline the opportunity for cross-examination then offered, and at the trial, having raised no such objection before the auditor, to accomplish the exclusion of Hatch's testimony regarding the books because of their nonproduction with his deposition.

Testimony like Hatch's regarding these books is, generally speaking, admissible without production before the jury of the original books

themselves, provided only that the books are at hand, or accessible to the opposing party if the occasion seems to require it. In the case of these books, the bookkeeping had been done under the general control and supervision of the Trust Company's officers or officials who constituted the controlling force in the Railroad Company's management. Under the circumstances shown, which include the Trust Company's relation to the Cuban enterprises referred to in paragraph 9 of the opinion, and to this Railroad Company; its at least quasi custody of the books, and Hatch's relations to the Trust Company and to the Cuban enterprises; and in view of the unseasonableness of the objection based on their nonproduction at the trial—we deem it a question of little substance whether the books, or any of them, were in New York or in Cuba when Hatch testified. We find nothing to show that his tabulation included anything which could not have been found on the books kept in New York.

3. The remaining conclusions whereof the petitions complain are those set forth in paragraph 9 of the opinion. In what is urged regarding them, we find nothing more than reiteration of arguments already fully considered and passed upon. A statement made in the opinion that "he [Bennett] was a stockholder in the company" is contradicted, and the assertion is made that there was no evidence to that effect. We think the statement fully warranted by the testimony of Randall, the Trust Company's trust officer, given by him when called as a witness in rebuttal by the Trust Company. During his cross-examination he said, among other things, in answer to X–Q. 55, on page 787 of the record:

"Bennett was a stockholder in the Knickerbocker Trust Company for a small amount. The stock in 1905 and 1906 was worth $1,000 a share."

No judge who concurred in the judgments heretofore rendered desiring that the present petitions for rehearing should be granted, they are denied.

McCOY v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 12, 1918.)

No. 3082.

COURTS ⊜376—COMPETENCY OF WITNESSES—RULE OF DECISION IN FEDERAL COURT—STATE LAW.

When the territory of Florida applied for admission into the Union, its citizens had in 1839 adopted a Constitution, declaring in article 17, § 1, that all laws and parts of laws now in force or which may be hereafter passed, not repugnant to the provisions of the Constitution, shall continue in force until by operation of their provisions or limitations the same shall cease to be in force, or until the General Assembly shall alter or repeal the same. By Act March 15, 1843 (Laws 1843, No. 37), it was enacted by the territorial Legislature of Florida that no person shall be deemed an incompetent witness by reason of having committed any crime, unless he has been convicted thereof in the territory, but the conviction of any person in any court without the territory of a crime which, had he been convicted thereof within the territory, would render him an incompetent witness may be given in evidence to affect his credibility. Florida was admitted into the Union as a state on March 3, 1845, and every department became filled at once by the adoption of territorial laws and appointment of territorial officers. Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 73, declares that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. *Held*, that the Judiciary Act adopted the law of the state in force when it was admitted to the Union and the federal courts were created therein, and hence, in a criminal prosecution in a federal District Court for Florida, a witness convicted of a felony in the District Court for Arkansas is competent.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Thomas C. McCoy was convicted of conspiracy to defraud the United States by removing and putting on the market large quantities of distilled spirits without the payment of the tax thereon, and he brings error. Affirmed.

A. E. Holton, of Winston-Salem, N. C., for plaintiff in error.

H. S. Phillips, U. S. Atty., of Tampa, Fla., and Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The plaintiff in error was convicted in the District Court for the Southern District of Florida of conspiracy to defraud the United States, by removing and putting on the market large quantities of distilled spirits without the payment of the tax thereon. A witness who delivered material testimony against the defendant had been previously convicted in the United States District Court for the Western District of Arkansas, under an indictment charging him with the re-use of internal revenue stamps, and sentenced to nine years' imprisonment in the Leavenworth penitentiary; and was undergoing this sentence at the time he was offered as a witness.

Objection was made to his competency as a witness because he was a convicted felon. The objection was overruled, and the witness was permitted to testify.

The courts of the United States uniformly held from the time they were created that the rules of evidence in criminal cases were the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. This proposition was first challenged in the Supreme Court of the United States some 60-odd years after the passage of the Judiciary Act of 1789, and the court adhered to the practice hitherto followed. United States v. Reid, 12 How. 361, 13 L. Ed. 1023. After reference to the Judiciary Act of 1789 and the Crimes Act of 1790 (Act April 30, 1790, c. 9, 1 Stat. 112), Chief Justice Taney in that case said:

"Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of Congress omit, as well as from what they contain. But this could not be the common law as it existed at the time of the emigration of the colonists, for the Constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer. It could not be the rule which at that time prevailed in England, for England was then a foreign country, and her laws foreign laws. And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts."

Half a century after the pronouncement in the Reid Case, supra, the question of the competency of witnesses in criminal trials in the courts of the United States was again before the Supreme Court of the United States in the case of Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. In that case the trial occurred in the District Court for the Northern District of Texas. A witness convicted and sentenced for felony, in the superior court of Iredell county, state of North Carolina, was permitted to testify against an objection as to his competency because of his previous conviction of a felony. In ruling on this exception, the Supreme Court examined the law of Texas as it existed at the time of the incorporation of that state into the Union and the legislation of the Congress of the United States, and reached the conclusion that, inasmuch as there had been no express legislation by Congress on the subject, modifying or changing the law of Texas as it existed at the time of the annexation of that state, the statute of Texas existing at the time that state became a part of the Union controlled, and held the witness to be competent. The statute of the Republic of Texas had adopted the common law of England, so far as the same was not inconsistent with the laws of the Republic of Texas. There was a later statute, enacted by the state of Texas after that state came into the Union, and this later statute was urged as furnishing the rule prescribing the competency of witnesses, rather

than that in force at the time of the annexation of Texas. The holding of the court was expressed as follows (144 U. S. at page 303, 12 Sup. Ct. 630, 36 L. Ed. 429):

"The competency of witnesses in criminal trials in the courts of the United States held within the state of Texas is not governed by a statute of the state which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a state."

We thus deduce the rule, as expounded in this case and in the Reid Case, to be that, in the absence of specific legislation by Congress, the rules of evidence in the courts of the United States affecting the competency of witnesses in criminal trials is the law of the state in which the trial occurs as it existed when that state became a part of the Union.

Although the Congress of the United States by legislation has disqualified as a witness one convicted of perjury or subornation of perjury, and has made specific provisions for a defendant to testify at his own request, and for a husband or wife to testify in any prosecution for bigamy or unlawful cohabitation, yet no legislation has come under our notice affecting the rule prescribed in the Reid and Logan Cases on the subject of the competency of a witness who had been previously convicted of a felony.

When the territory of Florida applied for admission into the Union, its citizens had, in 1839, adopted a Constitution, which contained the following provision, in section 1, article 17, thereof:

"That all laws and parts of laws, now in force, or which may be hereafter passed by the government and legislative council of the territory of Florida, not repugnant to the provisions of this Constitution, shall continue in force, until by operation of their provisions or limitations, the same shall cease to be in force, or until the General Assembly of this state shall alter or repeal the same," etc.

By the act of March 15, 1843 (Laws 1843, No. 37), it was enacted by the territorial Legislature of Florida:

"That no person shall be deemed an incompetent witness by reason of having committed any crime, unless he has been convicted thereof in this territory; but the conviction of any person, in any court without the territory, of a crime which, if he had been convicted thereof within this territory, would render him an incompetent witness here, may be given in evidence to affect his credibility."

Florida was admitted into the Union as a state on March 3, 1845; and on the admission of Florida as a state the organization of the government under the Constitution became complete, and every department became filled at once, by the adoption of territorial laws and the appointment of territorial officers, for the time being. Benner et al. v. Porter, 9 How. 236, 13 L. Ed. 119.

The conclusion, then, is inevitable that the witness to whom objection was made was competent to testify under the Florida territorial act of March 15, 1843, because that act, under the provisions of section 1, article 17, of the Constitution of 1839, immediately became the law of the state of Florida on March 3, 1845, the date of the admission of Florida into the Union as a state.

We have carefully examined the other assignments of error, and they are without merit, and are of such character as not to require any detailed reference.

The judgment is affirmed.

BATTS, Circuit Judge (concurring in the judgment). Upon trial of defendant in the District Court of the United States for the Southern District of Florida, for an offense against the United States, the testimony of one Casper was received. The witness was at the time serving a sentence for having used canceled revenue stamps of the United States, following conviction in the United States District Court in Arkansas. If his testimony was improperly received, the judgment in this case should be set aside.

The government insists that the competency of the witness to testify is determined by a statute of Florida, passed March 10, 1845 (Laws 1845, No. 14), a date subsequent to the passage of the act authorizing the admission of the state into the Union, but prior to the organization of the state government. The act of March 10, 1845, provided that no witness should be excluded by reason of having been convicted of a criminal offense, except certain named offenses, which did not include the crime for which Casper was convicted. It is further insisted that, if this act does not have application, the law to be applied is a territorial act of 1843, to the effect that:

"No person shall be deemed an incompetent witness by reason of having committed any crime, unless he has been convicted thereof in this territory."

The conclusion reached by my Brethren is to the effect that the rules of evidence to be applied by the federal courts in criminal cases are the rules which obtained in the territory included within a district at the time of the establishment of the federal court therein, or at the time the state entered the Union. The conclusion which I have reached is that the common law, as it obtained in the original states at the time of the passage of the Judiciary Act, as modified by acts of Congress since that time, constitutes the rules of evidence to be applied in criminal cases in federal courts.

The opinion of the majority is predicated upon the cases of United States v. Reid, 12 How. 361, 13 L. Ed. 1023, and Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. These cases do not, in my judgment, establish the proposition made by them. The cases consist, on the contrary, with the rules established by practice from the beginning of the government to this time and essential to an orderly and uniform administration of the criminal laws of the United States.

The case of United States v. Reid, supra, involved the construction of the Thirty-Fourth section of the act of Congress of 1789, the Judiciary Act; the section now being codified in section 721 of the Revised Statutes (Comp. St. 1916, § 1538). The language of the section was held to extend to civil cases only. It is suggested that:

"It could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States."

The opinion calls attention to the fact:

"Nor is there any act of Congress prescribing, in express words, the rules by which the courts of the United States are to be governed in the admission of testimony in criminal cases."

Continuing:

"But we think it may be found with sufficient certainty, not, indeed, in direct terms, but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States."

And:

"The law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789."

Again, the court says:

"But the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of the state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases."

The statement of the law thus made in the Reid Case is certainly very different from that now announced by this court. It is true that there is no statement to the effect that no law of a territory made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases; nor is there a statement to the effect that no law of a foreign jurisdiction, made operative after 1789, can affect the mode of proceeding or the rules of evidence in criminal cases. But, certainly, any ruling which will permit a statute of any territory, or a law of any jurisdiction conflicting with the common law as it existed in 1789, to modify that law in the trial of criminal cases in the courts of the United States, would be in conflict with the reasoning upon which the court in the Reid Case concluded that the common law as it existed in 1789 had become a part of the federal judicial machinery.

The construction of section 858 again arose in the case of Logan v. United States, supra, the court stating that the question whether the existing statutes of the state of Texas upon this subject are applicable to criminal trials in the courts of the United States held within the state depended thereupon. It is shown that the common law of England was, in certain criminal matters, adopted by the Republic of Texas in 1836, and that this act was in force when Texas was admitted to the Union in 1845. The court quotes from the Reid Case, supra, to this effect:

"The law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state as it was when the courts of the United States were established by the Judiciary Act of 1789."

Again:

"The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of 60 years."

The discussion is concluded:

"And therefore the competency of witnesses in criminal trials in the courts of the United States held within the state of Texas is not governed by a statute of the state which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law; which, as has been seen, was the law of Texas before the passage of that statute and the admission of Texas into the Union as a state."

It is, of course, possible to argue from this last quotation that, if the common law had not obtained in Texas at the time of its admission into the Union, some different rule of law would have applied. This, however, is not the decision made. The decision is that the competency of witnesses in criminal trials in courts of the United States is governed by the common law. There was no necessity for making any other ruling, and no other ruling was made. The mere statement which followed this announcement of the law, to the effect that the common law obtained in Texas at that time, is, indeed, a statement of fact, but not a statement of any fact which the opinion at any place indicates could have affected the decision rendered. So far as I have been able to ascertain, this is the latest expression from the Supreme Court. In the case, however, of Maxey v. United States, 207 Fed. 329, 125 C. C. A. 79, the Logan Case is cited and this language used:

"The competency of witnesses to testify in criminal cases in the courts of the United States is determined by the common law, except where Congress in special cases may otherwise provide."

The distinction made by the Judiciary Act of 1789 between the rules of evidence to be applied in civil cases and in criminal cases was entirely proper. In civil cases arising at the common law, or in equity, or in admiralty cases, the property rights to be determined are so intimately connected with the rules of evidence by which these rights are established, and the property rights within the several states are so diverse, that the law, to the effect that the rules of evidence which obtained in the several states should be utilized by the courts, was not only an eminently proper one, but one absolutely essential to an efficient administration of the laws of the states in the courts of the United States. In criminal cases, on the other hand, the courts of the United States administered no law of any state; they have alone in such cases to do with the statutes of the United States. There is uniformity in the criminal law. It has been the intention of Congress, in passing each criminal statute, that it should have a like application to every person affected by the laws of the United States. It could not have been intended that one person could be convicted in a state of an offense against the United States, and that another person who had done the same thing in another state might escape conviction on account of a difference in the rules of evidence, prescribed, not by Congress, but by some law-making power either subordinate to it or foreign to it. It was intended that the laws should have an equal and uniform application to every person and to every part of the United States. The Judiciary Act was passed by a government within all parts of whose territory the common law with reference to the admission of evidence obtained, and it should be held, in the absence of specific provisions changing the rule, to have been intended that the

established rules of evidence should be utilized. As a matter of fact, that has been the uniform rule.

Upon three different occasions, large additions have been made to the United States of territories which before the acquisition were not subject to the common law. The territory included in the Florida Purchase was subject to the Spanish law; the territory included in the Louisiana Purchase was subject to the French law; the territory acquired from Mexico had for the groundwork of its jurisprudence the civil law as developed in Spain and her colonies. When these lands were acquired, the mere act of acquisition did not give to them a United States system of laws. There was no such system. Certain constitutional provisions became applicable, and Congress had the power to pass such laws affecting them as it saw fit. But the particular matter under consideration was not the subject of congressional action, and the territories, when brought under the control of the federal courts, were either without rules of evidence, or retained the rules which theretofore obtained, or were subject to the rules which the courts had been in the habit of applying. If the question were ever practically raised, it was settled in a practical way by the courts continuing, as before, to apply the common-law rules of evidence as modified by Congress.

The act of Congress, in making the rules of evidence in civil cases responsive to the existing and future laws of the states, carried the necessary implication that the criminal cases should be subject to other rules. These rules were not, in terms, prescribed. The necessary implication from this was that these rules, which were an essential part of all judicial procedure with which the makers of the law and the people who were to administer and who were affected by the law were familiar, should become a part of the law. Before the formation of the government, the common law obtained in each of the colonies which afterwards became states in the Union. Its principles permeated all action in each of the efforts made by the colonies at combination and confederation, and in all administrative measures thereunder. When the Constitution of the United States was formulated the common law was recognized. All legislation had thereafter was with reference to it. The Revolution had abrogated some of its principles and some of the perversions of its principles. The Constitution and its amendments had repealed some of its recognized tenets. But the people were a common-law people. The common law was a part of their lives, as the Christian religion was a part. Much of the legislation could not be interpreted without a reference to it. Much of it could not be made effective without its help. It supplied all gaps. There was no more occasion to mention it than there had been primarily to formally enact its principles.

Subsequent to the formation of this government there were acts in a number of the states formally adopting or declaring the existence of the common law. There was some divergence in the defining of its terms and extent, but at the time of the act of 1789 there was no recognition of any difference in the several states as to what constituted the common law. The act was doubtless passed upon the assumption

of its uniformity in all the territory over which the jurisdiction of the courts of the United States was extended. It was in fact uniform. Since that time a few divergences have occurred in the courts in expressing what the common law was; but there has been at no time any substantial difference of opinion as to what the common law was in the colonies at the time of the separation from the mother country, and the establishment of the courts of the United States.

The effect of the establishment of the federal courts was to establish rules of evidence and procedure, that went with the courts wherever the courts went. Its procedure was not dependent upon alien systems; its actions were not determined by territorial legislation. The jurisdiction being extended over new lands in civil cases, it inquired into the rules of evidence by which property rights had been established and by which they must be maintained, because the law so provided, and any other provision would have been impractical and unwise. In criminal cases it applied the law of its own creation—the common law as it existed at the time of its creation, because there was a necessary implication that the act so intended, and because any other procedure would have been impractical and unwise.

The extension of the territorial jurisdiction of the federal courts in criminal cases cannot be held to have created the diversity which would have resulted if the courts had followed the rules which severally obtained in the absorbed territories. To permit such result would inevitably destroy the uniformity required for a proper administration of the criminal statutes. To now apply in the several states created from the Louisiana Purchase the civil law as developed in France prior to 1803, as modified by territorial Legislatures, would present difficulties that furnish no compensations—would bring about confusion where clearness and simplicity are paramount considerations. Like observations are to be made with reference to states whose territory was acquired from Mexico. This case illustrates the unnecessary confusion to result from the acquisition of Florida, if we are to forget that this is fundamentally a common-law country. These difficulties have been avoided for more than a century. No good reason can be advanced why we should now abandon the established practice, disregard the decisions which have been made, and inject confusion and doubt where certainty is essential.

Since the preparation of the foregoing opinion, advance sheets of the decision of the Supreme Court in Rosen et al. v. United States (October Term, 1917) 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. —, have been received. A witness who had been adjudged guilty of forgery in New York was held a competent witness in a District Court of the United States in that state. The ruling is made "in the light of general authority and sound reason." It is gratifying that the Supreme Court has been able to find a way to bring the law more nearly in harmony with progressive thought in the matter of competency of witnesses. The views heretofore expressed are adhered to, but the decision obviates the confusion which would have resulted from having a different rule of evidence for each state, and enables a cheerful concurrence in the judgment of affirmance herein rendered.

FRICKE v. INTERNATIONAL HARVESTER CO.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1917.)

No. 4863.

1. TRIAL ⟸139(1)—DIRECTION OF VERDICT—GROUNDS.
   It is the duty of the trial court to direct a verdict at the close of the evidence in two classes of cases: (1) That class in which the evidence is undisputed; and (2) that class in which the evidence is conflicting, but is of so conclusive a character that the court, in the exercise of a sound judicial discretion, would set aside a verdict in opposition to it.
2. APPEAL AND ERROR ⟸997(3)—REVIEW—DISCRETION OF LOWER COURT—DIRECTION OF VERDICT.
   When a trial court has directed a verdict upon conflicting evidence, the appellate court may not lawfully reverse the judgment founded upon it, unless upon a consideration of the evidence it is convinced that it was not of such a conclusive character that the court below, in the exercise of a sound judicial discretion, should not have sustained a verdict in opposition to it.
3. CONTRACTS ⟸94(1)—FRAUDULENT REPRESENTATIONS—NATURE AND ELEMENTS.
   False representations, which will invalidate a contract, must be such as to constitute actual or legal fraud; and indispensable elements of such fraud are (1) that the representations must have been material to the contract or transaction at the time they were made; (2) the misrepresented facts must be facts of which the victim is ignorant, and of which a person of ordinary sagacity and diligence would have acquired no knowledge; (3) the misrepresentations must be well calculated to deceive, and to induce the victim to make the contract; and (4) they must have induced him to do so.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]
4. BILLS AND NOTES ⟸520—VALIDITY—FRAUDULENT REPRESENTATIONS.
   Evidence *held* insufficient to sustain the defense that defendant was induced to sign a note as surety for an indebtedness for which she was already liable as guarantor, by false representations made by the creditor's agent several months before as to the solvency of the principal maker, where she knew, when the representations were made and at the time she signed the note, that his indebtedness was large and increasing.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action at law by the International Harvester Company against Amelia E. Fricke. Judgment for plaintiff, and defendant brings error. Affirmed.

The International Harvester Company, a corporation, sued Mrs. Amelia E. Fricke on a promissory note for $3,381.64, payable to it, dated October 27, 1914, signed by her and C. A. Bard. She defended on the ground that the agents of the Harvester Company had induced her to sign the note to enable Bard to conduct his business as an implement dealer with that company, by false representations which they made to her on March 5, 1912, February 14, 1913, and June 5, 1914, to the effect that Bard was solvent and able to pay his liabilities, when they knew these representations were false, and she had no notice or knowledge of that fact and believed them to be true. At the close of the trial the court instructed the jury to return a verdict for the plaintiff, and this ruling is the alleged error assigned. Mrs. Fricke and Bard testified to the representations, and the agents testified that they never made any of them. Laying aside the testimony of the agents where it conflicts with that of

Mrs. Fricke and Bard, the material facts, of which there was substantial evidence, were these:

C. A. Bard was an implement dealer at Creighton, Neb., and dealt with the plaintiff from 1894 until 1915. Mrs. Fricke and her husband were engaged in farming 12 miles from Creighton from 1880 until 1893, when he died. Mrs. Fricke continued the farming operations from that time until the day of the trial. Mr. Fricke and Mr. Bard were friends, and before Mr. Fricke's death he advised his wife to consult Mr. Bard and follow his advice. It was the practice of the plaintiff annually to make an agency contract with an implement dealer, and to take a guaranty of the payment of any liability which he should incur during the following year, and at the end of the year to take promissory notes for any balance he then owed it, and it followed this practice in its dealings with Bard. Mrs. Fricke was his friend, she wanted him to succeed, and she testified that she wanted to help him, and that at his request, and without any representation by or solicitation from the plaintiff or its agents, she signed for Mr. Bard and with him his annual agency contracts and his promissory notes for balances due to the plaintiff from 1904 until March 5, 1912. At that time she owed the plaintiff $4,784.83 on promissory notes signed by her and Bard on January 1, 1912, and January 2, 1912, for the balance owing the plaintiff upon Bard's 1911 business, and $7,094 on their notes and guaranty contracts for balances owing the plaintiff on Bard's business for 1910 and prior years, amounting in the aggregate to $11,878.93. Bard was making annual sales of from $30,000 to $50,000 a year, and he wanted to obtain an agency contract and to make a guaranty contract for the year 1912. On the business for 1911 he had lost about $5,000, and had given the notes of himself and Mrs. Fricke for the $4,784.83, representing substantially this loss, payable between May 31 and October 2, 1912. Thereupon Bard and Mrs. Fricke and Lyons and Kilbourn, agents of the plaintiff, met. Bard wanted the agency contract. Lyons and Kilbourn wanted a payment of the $7,094 that was due; or a renewal of the notes. Bard asked Mrs. Fricke to sign renewal notes and the guaranty contract for 1912. She said she did not like to do so, because she had heard that Rehmer, another agent of the plaintiff, had said that Bard was not good. Kilbourn, whom she met for the first time that day, then told her that Bard was good, that he had plenty of property and would have $7,000 surplus if he was sold out at that time, and told her to sign the papers and help him, as he wanted to have longer time and his credit would be better, and there never would be any trouble for her. Thereupon she signed the guaranty contract and the agency contract for 1912 and the renewal notes for the $7,094, which were seven in number, payable respectively on the 1st days of the months of April, May, June, July, August, September, and October, 1912. Bard was unable to reduce his indebtedness to the plaintiff in the year 1912, and he and Mrs. Fricke on February 14, 1913, owed the plaintiff $12,990. Bard wanted an agency contract for 1913; Lyons and Kilbourn wanted payment of the $12,990, or security for its payment. Mrs. Fricke, Bard, Lyons, and Kilbourn met. Mrs. Fricke said, "What do they want with me?" Bard replied, "They want a real estate mortgage." Mrs. Fricke said, "No, never." Lyons said, "What do you want to do, pay this or give a mortgage; there is no harm, we will guarantee that; we will let Bard have the interest cheaper a cent, and I will hold the mortgage." He also told her that, if she did nothing, they would have to apply for a receiver of Bard's property, or for a judgment. Lyons and Kilbourn both said that Bard was good, and one of them said if he was then sold out there would be a surplus of $5,000. Mrs. Fricke said, "Can you make it Mr. Bard?" Bard replied, "I have $2,000 to pay on the first payment, and if you give me so many years, I forgot how many years, five or six, I can make it." They then drew six notes, for $2,000 each, payable respectively on the 1st days of October in each of the years 1913, 1914, 1915, 1916, 1917, and 1918, and a mortgage on Mrs. Fricke's farm, or a part of it, to secure the notes, and she signed the notes and mortgage. Bard was more successful in 1913. He paid all his liabilities for that year, and the mortgage note of $2,000 payable October 1, 1913, so that in June, 1914, Mrs. Fricke's liability had been reduced $2,000. On June 5, 1914, Bard wanted an agency contract and a guar-

anty contract for the year 1914. Mr. Boltz one of the plaintiff's agents, was present. Mrs. Fricke said she was getting sick and tired of monkeying around. Boltz said, 'Don't talk foolish; Bard is good for it; why not sign? we don't want any fuss about that;' and she signed. When on October 1, 1914, the second mortgage note came due, Bard failed to pay it, and on October 27, 1914, he and Mrs. Fricke owed the plaintiff $3,381.64 on the guaranty contract relative to the business of the year 1914, and they gave their note in suit therefor.

There was no evidence of any representation or statement of any agent of the plaintiff relative to the financial standing of Bard at the time this note was made, or of any other representations than those made on March 5, 1912, February 14, 1913, and June 5, 1914; but Mrs. Fricke testified that in giving that note she believed and relied upon the representations made at those times, and that she would not have signed the note had they not been made. She also testified at one time: "Q. During the time you was signing all these papers, did you make any investigation as to what Mr. Bard's financial condition was? A. Yes; I asked several times. I did not know nothing about business, but he showed me his bank books, and they looked good, and he was doing a good business, and I supposed everything was all right. Q. You mean Mr. Bard showed you his bank books? A. Yes, sir. Q. You knew, of course, at the time you signed the mortgage for $12,000, that he was in debt some? A. Yes; that is what they wanted the mortgage for." And at another time: "Q. You never did make any investigation about Bard around there in Creighton? A. No, sir. Q. You signed this $12,000 mortgage and all these other papers, and never made any inquiry about Bard at all no time for the 12 years you have been signing? A. No, sir." Mrs. Fricke is a German woman, who, with a hired man and her son, who was 26 years old, when she testified, had carried on her farm of 160 acres, and perhaps more, from the death of her husband in 1893 until the time of the trial. She had not been engaged in other business, and was not familiar with other business transactions. Bard was insolvent after the year 1911, when he lost about $5,000 in his business. On March 1, 1911, Bard made a statement in writing to the plaintiff of his assets and liabilities, from which it appeared that, aside from $950 of incumbrances on his real estate, he owed $8,200 and had available assets to the amount of $11,900. There was no evidence that the plaintiff or its agents had any other knowledge of his assets or liabilities, except the knowledge of his indebtedness to the plaintiff, his inability to pay it, of which Mrs. Fricke was equally well aware, and this statement which Bard had made.

H. C. Brome, of Omaha, Neb. (Clinton Brome, of Omaha, Neb., on the brief), for plaintiff in error.

Arthur F. Mullen, of Omaha, Neb. (William S. Elliott, of Chicago, Ill., on the brief), for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). [1, 2] It is the duty of the trial court to direct a verdict at the close of the evidence in two classes of cases: (1) That class in which the evidence is undisputed; and (2) that class in which the evidence is conflicting, but is of so conclusive a character that the court, in the exercise of a sound judicial discretion, would set aside a verdict in opposition to it. And when the trial court has directed a verdict upon conflicting evidence the appellate court may not lawfully reverse it, or the judgment founded upon it, unless, upon a consideration of the evidence, it is convinced that it was not of such a conclusive character that the court below, in the exercise of a sound judicial discretion, should not have sustained a verdict in the opposite direction. Patton v. Texas & Pacific

Ry. Co., 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361; Woodward v. Chicago, M. & St. Paul Ry. Co., 145 Fed. 577, 578, 75 C. C. A. 591, 592, and cases there cited; Canadian Northern Ry. Co. v. Senske, 201 Fed. 637, 644, 120 C. C. A. 65, 72.

[3, 4] The defendant seeks to avoid her contract to pay the plaintiff $3,381.64 on the ground that she was induced to make it by the false representations of the plaintiff relative to the financial standing of Mr. Bard. False representations and acts induced thereby, which constitute actual or legal fraud, are essential to such a cause of action or defense. Indispensable elements of such a fraud are: (1) The materiality of the misrepresentations to the contract or transaction at the time they were made; (2) the misrepresented facts must be facts concerning which the victim is ignorant, and of which a person of ordinary sagacity and diligence in his place would have acquired no knowledge; (3) the misrepresentations must be well calculated to deceive and to induce the victim to make the contract; and (4) they must have induced him to do so. Farwell v. Colonial Trust Co., 147 Fed. 480, 483, 78 C. C. A. 22, 25. Mrs. Fricke and Mr. Bard had been friends before the death of her husband in 1893, and have been so ever since. She always wanted to help him. From 1904 until March 4, 1912, she had signed agency contracts, guaranty contracts, and promissory notes for and with him at his request, without any consideration and without any suggestion or representation by the plaintiff or its agents, until she had become indebted thereon for more than $12,000. On March 5, 1912, she knew that she owed on Bard's notes and contracts $12,000, that $7,094 of this indebtedness arose out of transactions prior to 1911, that this prior indebtedness was overdue, that Bard could not pay it then, and that during the year 1911 he had lost $4,784.83, for which she had given her note in January, 1912. At Bard's request she signed new notes for the $7,094 on March 5, 1912. She was not so ignorant of Bard's precarious financial condition that a person of ordinary sagacity and diligence in her place would not have acquired knowledge of it. She then met Lyons and Kilbourn for the first time, and it is incredible that she was induced by the statement as to her friend Bard's financial standing of one of these strangers, acting for the opposing party to the contracts, for her creditor, to sign the renewal notes of that date. On February 14, 1913, she knew all she had theretofore known of Bard's doubtful financial situation and this much more: That he had not paid the notes for $4,784.83 which she had signed with him in January, 1912, that his indebtedness had not decreased, but had increased since March 5, 1912, that he could not then pay that indebtedness, that plaintiff would apply for a receiver of his property and business, or for a judgment on the notes which she and Bard had signed, unless its claim was secured by a mortgage upon her farm. She said at first that she would not give the security, but when she found that by making the mortgage she could get such an extension of the time of payment, that Bard would be required to pay only $2,000 a year for six years, and Bard requested her to make the new notes and mortgage, she said, "Can you make it Mr. Bard?" and he replied, "I have $2,000 to pay

on the first payment, and if you give me so many years, I forgot how many years, five or six, I can make it." Thereupon she signed.

It is true that Lyons and Kilbourn told her that Bard was good, that he was worth $5,000 above his debts, that there was no harm, and they would guarantee that. But she was already bound by notes and contracts she had signed to pay the debt for which she gave the new notes and the mortgage. Receivership for her friend or judgments against both of them was the alternative, if she failed to give the security. If she believed the statement of the agents that Bard was good, and if sold out then would have a surplus of $5,000 above his debts, why did she not permit the receivership or the judgments, and thus relieve herself of the entire liability? The evidence in this case is too conclusive to leave a doubt that it was not because of the statements of the agents about the financial situation of Bard, but because of her friendship for Bard and of his request for her help, that she signed the notes and the mortgage. Moreover, neither she nor any person with ordinary sagacity and diligence in her circumstances and with her knowledge of Bard's repeated failures, his increased indebtedness, and his inability to pay, could have failed to be aware of his precarious financial situation. For these reasons, and also because the representations of March 5, 1912, and February 14, 1913, were not made by the agents for the purpose of inducing the making of the note of October 27, 1914, and it was not the natural and probable effect of those representations to induce the making of that note, and those representations were so remote in time and under such different circumstances that it is preposterous to believe that they induced the making thereof, or of the guaranty contract, or agency contract of June 5, 1914, these representations are here laid aside.

The note in suit was not given for any part of the indebtedness for which the notes and contracts of 1913 and prior years were made. It was given for the amount due at its date, October 27, 1914, under the agency contract and guaranty contract of June 5, 1914. There was no representation made at the time the note was given or after June 5, 1914, and all the representation that was made on that day was that of Boltz, the plaintiff's agent, in the words: "Don't talk foolish; Bard is good for it; why not sign? We don't want any fuss about it." At that time Bard had been able, since the mortgage was given in February, 1913, to pay all the liabilities incurred that year and one of the six notes for $2,000, which had been given on February 14, 1913, for the indebtedness of prior years. It is too great a stretch of faith or of imagination to believe that Mrs. Fricke was so ignorant of Bard's financial situation and so influenced by this statement of Boltz that it either caused, or assisted to cause, her to sign these contracts or the note she made more than four months later, and the conclusion is irresistible that upon the evidence in this case the court below, in the exercise of a sound judicial discretion, could not have sustained a verdict in her favor.

The judgment below must therefore be affirmed; and it is so ordered.

MURRAY v. UNITED STATES.

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

No. 1511.

1. POST OFFICE ⊂⊃48(1)—OFFENSES—INDICTMENT—SUFFICIENCY.
Criminal Code (Act March 4, 1909, c. 321) § 217, 35 Stat. 1131 (Comp. St. 1916, § 10387), declares that whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared to be nonmailable, with the design, intent, or purpose to kill or in any wise hurt, harm, or injure another, shall be punished. An indictment charged that accused deposited and caused to be deposited in a post office of the United States, to wit, the post office at Charleston, W. Va., for mailing and delivering, a certain poison, to wit, strychnine, with the design, intent, and purpose on the part of accused to hurt, harm, injure, and kill another person, to wit, George C. Jones. *Held*, that the indictment, which was in the words of the statute, was sufficient to apprise accused fully and plainly of the nature of the offense for which he was indicted; it being unnecessary to aver that the letter deposited for mailing was sent to any particular person, or at what point or post office it was addressed.

2. INDICTMENT AND INFORMATION ⊂⊃125(19)—SUFFICIENCY—DUPLICITY.
An indictment charging a violation of Criminal Code, § 217, which alleged that accused did deposit and cause to be deposited in the post office for mailing and delivery a poison, etc., is not duplicitous because of the allegation that accused did deposit and cause to be deposited such poison.

3. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE—SUFFICIENCY.
In a prosecution under Criminal Code, § 217, for depositing and causing to be deposited in the post office for mailing a poison with the intent to kill another, evidence *held* sufficient to support a conviction.

4. CRIMINAL LAW ⊂⊃458—OPINION EVIDENCE—HANDWRITING—COMPETENCY OF WITNESS.
Any one who is familiar with a person's handwriting from having seen him write, though only once, is competent as a nonexpert to give his opinion as to the genuineness of a signature; and hence witnesses who had seen the writing of defendant, who was charged with depositing and causing to be deposited in the post office a letter containing poison, etc., are competent to testify that the writing and signature was that of accused.

5. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE—SUFFICIENCY.
In a prosecution for depositing and causing to be deposited in a post office a poison for mailing with intent to kill another, evidence *held* to show that the poison mentioned by an expert witness for the prosecution was that deposited in the post office.

6. WITNESSES ⊂⊃372(2)—INTEREST AND BIAS—SHOWING.
Accused was charged with depositing and causing to be deposited in the post office for mailing a letter containing poison. It appeared that the letter was addressed to "Mrs. C. G. Cornell," and one Jones, who received and opened the letter, testified that his wife frequently received letters addressed in that manner. The letter itself was addressed to "Mrs. Dollie Jones," and urged her to use the inclosed poison to kill her husband, so that she and the writer could live together. *Held*, that as, after her husband intercepted the letter, Mrs. Jones left him and went to live with accused, questions as to whether she was in love with accused and had been intimate with him were not objectionable.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Charles P. Murray was convicted of a violation of Criminal Code, § 217, for having deposited and caused to be deposited in the Post Office for mailing a poison with the design and intent to injure and kill another, and he brings error. Affirmed.

B. J. Pettigrew, E. E. Robertson, and Jas. B. Menager, all of Charleston, W. Va., for plaintiff in error.

Wm. G. Barnhart, U. S. Atty., of Charleston, W. Va., and Wm. E. Ross, Asst. U. S. Atty., of Bluefield, W. Va.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error, defendant below, was indicted, tried, and convicted in the District Court of the United States for the Southern District of West Virginia for an alleged violation of section 217 of the Criminal Code of the United States. That portion of the indictment which is material charges the defendant with having—

"* * * deposited and caused to be deposited, in a post office of the United States, to wit, the post office of the United States at Charleston, in the state of West Virginia, * * * for mailing and delivering a certain poison, to wit, strychnine, with the design, intent, and purpose upon the part of him, the said Charles P. Murray, to hurt, harm, injure and kill another person, to wit, George C. Jones."

[1] It is insisted by counsel for defendant that the indictment is insufficient, in that it does not apprise the defendant fully and plainly of the nature of the offense for which he is indicted. The defendant filed a demurrer, and also a motion to quash the indictment, which were overruled by the court below. We will therefore consider first the question as to whether the court below erred in overruling defendant's demurrer. The section under which defendant was indicted reads in part as follows:

"* * * And whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, whether transmitted in accordance with the rules and regulations authorized to be prescribed by the Postmaster General or not, with the design, intent, or purpose to kill, or in any wise hurt, harm, or injure another, or damage, deface, or otherwise injure the mails or other property, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both."

It will be observed that the indictment is in the language of the statute in so far as the essential elements are concerned. It is true that it is not averred that the letter in question was sent to any particular person, nor does it appear at what point or post office it was addressed. There is nothing in the provision of the statute under which the defendant is indicted which places upon the government the burden of alleging and proving to whom the letter was addressed or at what particular post office it was addressed. It appears that the indictment was

drawn under the provisions of the statute which provides a penalty against "whoever shall knowingly deposit or cause to be deposited for mailing and delivery," and not under that provision which provides a penalty against one who "shall knowingly cause to be delivered by mail according to the direction thereof," etc. These provisions are separate and distinct; the first fixing a penalty against one who deposits or causes to be deposited, while the second provides a penalty against whoever delivers or causes to be delivered, etc.

[2] However, it is insisted by counsel for defendant that, while the indictment contains but one count, it embraces two separate and distinct offenses, "did deposit and cause to be deposited," "thereby constituting duplicity." This contention is without merit. In the case of United States v. James (D. C.) 74 Fed. 545, the fourth syllabus is as follows:

"An allegation that defendant 'did deposit, and cause to be deposited,' obscene matter in the mails, is not such duplicity as vitiates an indictment."

See Harvey v. United States, 126 Fed. 357, 61 C. C. A. 61; Bates v. United States (C. C.) 10 Fed. 92.

The foregoing decisions relate to cases where defendants were indicted under the statute which prohibits the sending of obscene matter through the mail. The language employed in that statute is the same as that of section 217. We have carefully considered every view of this phase of the question, and are of opinion that the refusal of the court below to sustain the demurrer to the indictment was eminently proper.

[3] We now come to a consideration of the merits of the case. It is insisted by counsel for defendant that there was no legal evidence connecting, or which tended to connect, the defendant with the crime charged in the indictment.

The government introduced George C. Jones as a witness, who, among other things, testified that he took the letter out of the post office which contained the poison; that it was addressed to "Mrs. C. G. Cornell, Dola, W. Va.," and that his wife frequently received letters addressed in this manner, the name "Cornell" being the name of her mother; that the letter was mailed at Charleston, W. Va., February 5, 1916. Witness further testified that he was familiar with the handwriting of the defendant "and that the handwriting contained in the letter and the signature was, he thought, the handwriting of the defendant"; that prior to September, 1915, witness, together with his wife, his daughter Ernestine, another daughter, and a small adopted son, at different times lived at Acme and Wakeforest, on Cabin creek, W. Va.; that the defendant frequently came to the home of witness, and at various times prior thereto there had been some trouble between defendant and witness.

E. R. Morgan, postmaster at Berlin, and bookkeeper for the Wyatt Coal Company, for which defendant worked, testified that he was familiar with the signature of defendant, and that in his judgment the signature attached to the letter in question was that of the defendant; that the Wyatt Coal Company was closed on February 5, 1916, the day on which the letter in question was mailed.

Defendant introduced in his own behalf Dollie Jones, who admitted that Murray had often addressed letters to her as "Mrs. C. G. Cornell." She further admitted that she had left her husband and gone to live with the defendant, and defendant admitted that he had left his wife and one small child and had gone to live with Dollie Jones. The defendant also admitted that the letter resembled his own handwriting. An unsigned letter and envelope addressed to the postmaster at Ono, W. Va., was handed to defendant, and he admitted that he had written the same.

Thus, in addition to the other facts and circumstances, all of which we think point unerringly to the guilt of the defendant, the jury had the admitted handwriting of defendant, which they compared with the letter in question. It further appears that, after Jones had shown his wife the letter and poison, she left him and took up her residence with the defendant.

[4] It is insisted by counsel for defendant that the court below erred in permitting the government witnesses to testify that the handwriting contained in the letter in question and the signature attached thereto, in their opinion, was the signature and handwriting of the defendant, inasmuch as neither of these witnesses qualified or attempted to qualify as experts. It should be borne in mind that these witnesses testified that they were familiar with the handwriting of the defendant, and were not, therefore, offered as experts. Underhill on Criminal Evidence (2d Ed.) § 429, in referring to this point says:

"Any one who is familiar with a person's writing from having seen him write, though only once, or, never having seen him write, from carrying on correspondence with him, or from opportunities afforded from frequently handling writing known to have been written by the person, is competent, as a nonexpert, to give his opinion as to the genuineness of his signature."

We think that under the circumstances the ruling of the court below was proper.

[5] It is also insisted that there was no evidence to show that the strychnine mentioned by Dr. Hubbard was the strychnine received by Jones. It appears from the testimony of Jones, as we have already stated, that he obtained the letter in question from the post office and that it contained a whitish-like powder in a small envelope; that he turned this over to Harry L. Conner, a post office inspector. This letter, which it was shown was in the handwriting of the defendant and signed by him, is in the following language:

"burn this at once

"Laing, W. Va., Feb. 5, 1916.

"Mrs. Dollie Jones, Dola, W. Va.—Dearest Dollie: I can not wait any longer, so inclosed is the stuff I said I would send you. Now give it to George the next time he has one of those spells, in a glass of water, and people will think he died in a fit; then my dear sweetheart you will be free and I will leave Minnie and we will go some where we are not known and go to housekeeping. Now, dear, do as you agreed to and all will be well. I will not write you any more until you do the work, and you must not write to me until you need me.

"From your true lover,

"Burn this. C. P. Murray, Laing.

"P. S.—Will mail this from Charleston."

The contents of the small envelope were forwarded to the Post Office Department, at Washington, D. C., accompanied by a letter requesting that the Department take the contents of the envelope to the Bureau of Chemistry for analysis. Dr. Hubbard, who testified that he was an analytical chemist, stated that he was—

"employed by the United States government, as such chemist in the Bureau of Chemistry of the Agriculture Department of the United States, at Washington, D. C.; that, on May 12, 1916, he received a communication from the Post Office Department of the United States, inclosing copy of a letter from Post Office Inspector Conner to the Post Office Department, requesting an analysis of some powder inclosed in a small envelope, which small envelope witness produced and exhibited in evidence; that the quantity of the powder, when received by witness, was about one-third of a teaspoonful; that witness made an analysis of the same, and found same to contain three per cent. of strychnine; that the same was poison, and of a sufficient quantity to cause death, should the whole or even a part of same be administered to a human being. Witness further testified that the powder, analyzed by him, had not theretofore been in tablet form, for the reason that strychnine tablets are composed of strychnine and sugar of milk; whereas, the powder, analyzed by witness, was composed of strychnine and cornstarch."

We think this evidence is sufficient to show that the powder exhibited in court was the identical powder which had been received by Jones through the mail addressed to "Mrs. C. G. Cornell, Dola, W. Va." It clearly appears that, from the time Jones received the letter with the powdered contents until the same was delivered to the Bureau of Chemistry, the powdered contents were in the possession of Conner and the post office officials of the United States; that the letter and contents were forwarded by Conner to the Post Office Department, and that Dr. Hubbard received the powdered contents from the Post Office Department. Thus it appears that the envelope and its contents were not out of the custody of the post office officials until the same were delivered to the Bureau of Chemistry where Dr. Hubbard, as an employé, made the analysis.

[6] This disposes of all the questions raised, except the contention of defendant that it was improper to ask Dollie Jones as to whether she was in love with the defendant and had been intimate with him. In view of the crime with which defendant is charged and the relations that existed between Dollie Jones and himself, we think this question, tending as it did to show the interest of the witness and bias in favor of defendant, was material to the issue there being tried.

The evidence in this case clearly tends to show that the defendant and Dollie Jones devised a scheme by which they hoped to get rid of George C. Jones, and with that end in view the defendant forwarded to Dollie Jones the powder in question in an envelope addressed to "Mrs. C. G. Cornell." It appears that the defendant and Jones' wife began to live together as man and wife very soon after the letter in question was received, and this strongly corroborates the contention of the government that the powders were sent by the defendant with the view of having Jones' wife poison him and thus pave the way for their illicit intercourse. The improper conduct of the defendant and Dollie Jones after they had been thwarted in their attempt to kill Jones

was in defiance of the state law and in utter disregard of all rules of decency and proper living.

We think the defendant had a fair and impartial trial, and that his conduct merits the punishment provided by the statute.

Affirmed.

E. G. STAUDE MFG. CO. et al. v. LABOMBARDE et al.

(Circuit Court of Appeals, First Circuit. January 9, 1918.)

No. 1276.

APPEAL AND ERROR ⊂=1222—CORRECTION OF MANDATE—PETITION THEREFOR.

Generally speaking, an application to recall and correct a mandate cannot be made after the close of the term, except as to errors of mere form; hence, after the expiration of the term at which a decree was reversed, appellant's petition to recall mandate for correction by adding to the costs taxed, must be denied, where the item sought to be added was contested, and no voucher therefor appeared to have been before the clerk when he prepared the mandate.

Appeal from the District Court of the United States for the District of New Hampshire.

Suit by the E. G. Staude Manufacturing Company and others against Elie W. Labombarde and others. A decree dismissing the bill without prejudice, but awarding costs to defendants, was reversed on plaintiff's appeal. On petition to recall mandate. Denied.

Nathan Heard, of Boston, Mass., for petitioners.

Geo. A. Rockwell, of Boston, Mass., for defendants.

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

PER CURIAM. On June 7, 1917, the decree appealed from was reversed, and the case remanded to the District Court for further proceedings, the appellants to recover their costs in this court. See the opinion of the above date in this case. 243 Fed. 362, — C. C. A. —. Judgment was rendered accordingly on the same day, and on August 8, 1917, a mandate issued, wherein the appellants' costs were taxed by the clerk at $68.20.

The mandate was delivered by the clerk to the appellants' counsel, who has filed the present petition, asking for its recall and correction by adding to the costs, as taxed, the further sum of $114.50, said to have been disbursed by the appellants for printing the transcript of record on appeal.

This petition was not filed until October 30, 1917. At that time the October term, 1916, during which the above decision was made and the costs taxed as above, had closed, and the October term, 1917, had begun. The mandate has not been filed in the District Court.

The costs, having been taxed during the October term, 1916, form

part of the judgment. Generally speaking, an application to recall and correct a mandate cannot be made after the close of the term. Foster, Federal Practice (4th Ed.) 2149. Except as to errors of mere form, clerical errors, or misprision of the clerk, or the like, our power to correct the judgment as it stands came to an end with the term at which it was rendered. Schell v. Dodge, 107 U. S. 629, 2 Sup. Ct. 830, 27 L. Ed. 601. The alleged error now sought to be corrected does not, as it seems to us, fall under any of these descriptions. No voucher for the amount now sought to be added to the taxation appears to have been before the clerk when he made it. The present motion is opposed by the appellees, who deny that the amount in question could lawfully have been taxed at any time. This question, if raised within the term, we could have considered. As the matter stands, we are obliged to deny the petition.

Petition denied.

McCULLOUGH v. UNITED GROCERS' CORP.

(District Court, N. D. Ohio, E. D. January 29, 1918.)

No. 9606.

1. COURTS ⟸274—FEDERAL COURTS—JURISDICTION—VENUE.
   While, under Judicial Code (Act March 3, 1911, c. 231) § 53, 36 Stat. 1101 (Comp. St. 1916, § 1035), every suit not of a local nature against a single defendant must, where the district contains more than one division, be brought in the division where the defendant resides, yet an action against a foreign corporation doing business in the state and district in which plaintiff resided should, under section 51 (Comp. St. 1916, § 1033), declaring that, where jurisdiction is founded upon diversity of citizenship, suit shall be brought only in the district of the residence of either the plaintiff or defendant, where there was more than one division in the district of plaintiff's residence, be brought in that division in which plaintiff resided, notwithstanding the foreign corporation did business in the other division of the district.
2. COURTS ⟸344—SERVICE OF PROCESS—STATE LAW.
   In an action at law, brought in the federal court, service of summons should be made in conformity to the state law.
3. CORPORATIONS ⟸668(4)—FOREIGN—SERVICE OF PROCESS.
   Under Gen. Code Ohio, § 11290, requiring service on a foreign corporation to be had on its managing agent, a return showing service on the secretary and treasurer of a foreign corporation is insufficient, and should be quashed, the statute prescribing the only method of obtaining service on a foreign corporation other than on an agent appointed to accept service, and the secretary and treasurer of a corporation not necessarily being its managing agent.

At Law. Action by W. C. McCullough against the United Grocers' Corporation. On motion to quash and set aside service of summons, on the ground that the action was not brought in the proper division, and that service was insufficient. Motion sustained on latter ground.

Reed, Meals & Eichelberger, of Cleveland, Ohio, and George W. Ritter, of Toledo, Ohio, for plaintiff.

Forrest Jeffries and Robert Newbegin, both of Toledo, Ohio, for defendant.

WESTENHAVER, District Judge. The jurisdiction of this court is based upon a diversity of citizenship between plaintiff and defendant. Plaintiff's petition avers that he is a citizen of the state of Ohio and a resident of the city of Cleveland, Ohio. This makes him a resident of the Eastern division of the Northern district of Ohio. The defendant, it is averred, is a corporation, organized and existing under the laws of the state of Delaware, and is engaged in the wholesale grocery business, with its principal place of business in the city of Toledo, Ohio. Toledo is in the Western division of the district. The marshal's return shows that the summons was served on the defendant—

"by leaving at the usual place of business (in Toledo) of the United Grocers' Corporation, with H. E. Wetherill, secretary and treasurer of United Grocers' Corporation, personally, a true and certified copy hereof."

Defendant appears specially and moves to quash and set aside the service of summons on two grounds: (1) That this action must be brought in the Western division, because the defendant resides there; (2) that, defendant being a foreign corporation, service can he had only on its managing agent.

[1] Section 53, Judicial Code, provides that:

"When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides."

If it be true that, on the fact averred, the defendant resides in the Western division of this district, this motion should be sustained. In Page v. Chillicothe (C. C.) 6 Fed. 599, Swing, District Judge, considering similar language, contained in the law, creating the Eastern and Western divisions of the Southern district of Ohio, expresses the opinion that an action must be brought in the division in which the defendant resides, and only refused to dismiss because defendant had appeared generally and was held thereby to have waived his privilege of being sued in the division in which he resided. But later, in United States v. Eddy (C. C.) 28 Fed. 226, the same question was carefully considered in an action instituted in this district. The motion was made to set aside the service, and was heard to Judges Welker and Hammond. The question was regarded of such importance that, at the suggestion of Judge Hammond, the hearing was adjourned to be heard before Mr. Justice Matthews of the United States Supreme Court and Judge Welker. It was held that the summons was improvidently and irregularly issued, service was set aside, and, a new summons having been issued later and served, the statute of limitations, it was held, did not cease to run until the suing out of the second summons.

The case here, however, is different. In my opinion, this case is controlled, not by section 53, but by section 51 of the Judicial Code. The latter section provides that, where jurisdiction is founded upon

diversity of citizenship, the suit shall be brought only in the district of the residence of either the plaintiff or defendant. The defendant, being a foreign corporation, it is settled law, is a citizen and resident only of the state under the laws of which it is organized; and, inasmuch as the plaintiff is a citizen and resident of the Northern district of Ohio and of the Eastern division thereof, and the defendant a citizen and resident only of the state of Delaware, this action was properly instituted in the Eastern division. Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Southern Pacific Co. v. Denton, 146 U. S. 204, 13 Sup. Ct. 44, 36 L. Ed. 942. See Simkins' Federal Suit in Equity, pp. 109, 115, where the authorities are cited and reviewed.

[2, 3]. Service of summons should be made here in conformity to the state law, and what is a good service under the state statute will be good in federal courts, provided only that the notice given by said summons is adequate, according to the rules of due process of law. The marshal's return shows a service pursuant to the state statute for service of summons on domestic corporation. Section 11290, G. C. of Ohio, requires the service on a foreign corporation to be had upon its managing agent. This section provides the only mode of obtaining service of summons on a foreign corporation, other than on an agent appointed to accept service of summons. It was so held in Goode v. Druggist Ass'n, 16 Ohio Dec. 586, and in Beach v. Kerr Turbine Co. (D. C.) 243 Fed. 706.

The secretary and treasurer of the defendant corporation is not necessarily the person having the management of its business in this state. If he is, the return could be amended by the marshal to show that fact, and the service already made would be good; otherwise, the motion to quash and set aside the service of summons should be sustained, and a new summons issued and served upon its managing agent—that is, a person in charge of its business.

The motion will be sustained on the second ground only. An exception may be noted on behalf of the plaintiff to this ruling.

Ex parte GRABER.

(District Court, N. D. Alabama, S. D. January 15, 1918.)

(Syllabus by the Court.)

1. WAR ⊜11—"ALIEN ENEMY"—DECLARATION OF INTENTION.

A subject or citizen of the Imperial and Royal Austro-Hungarian Government, residing within the United States when Congress declared a state of war to exist between these governments, and who has never been actually naturalized, but has merely declared his intention to become a citizen of the United States, is in law an alien enemy.

[Ed. Note.—For other definitions, see Words and Phrases, Alien Enemy.]

2. WAR ⟸11—ALIEN ENEMIES—ARREST AND DETENTION—STATUTES.
Section 4067, Rev. St. (Comp. St. 1916, § 7615), vesting the President with summary power to order the arrest and detention of alien enemies, is not limited or restricted by section 4069, Rev. St. (Comp. St. 1916, § 7617), authorizing United States courts, upon complaint and after hearing, to detain alien enemies; such section providing simply a method of dealing with alien enemies additional to that in section 4067, Rev. St.

3. HABEAS CORPUS ⟸92(1)—DISPUTED QUESTIONS OF FACT—DETERMINATION.
The courts do not pass upon disputed questions of fact on habeas corpus.

4. HABEAS CORPUS ⟸16—ALIEN ENEMIES—ARREST AND DETENTION.
The action of the President of the United States, through the officials designated by law, in ordering the summary arrest and detention under section 4067, Rev. St., of an alien enemy, within the United States after the declaration of war between the United States and Austro-Hungary, is conclusive, and not subject to judicial review on habeas corpus.

Application for habeas corpus by Oscar Graber to secure his release from confinement as an alien enemy. Application denied.

W. H. McCary and William Vaughan, both of Birmingham, Ala., for petitioner.

Thos. D. Samford, U. S. Atty., of Opelika, Ala., and Hubert J. Turney, of Cleveland, Ohio, for the United States.

HENRY D. CLAYTON, District Judge. This application for habeas corpus is filed by Oscar Graber, who alleges that he is unlawfully restrained of his liberty by the United States marshal for the Northern district of Alabama. Petitioner avers that he was "formerly a citizen of Croatia, a subject state of the kingdom of Hungary, a part of the Imperial Austro-Hungarian Government"; that about 15 years ago petitioner came to the United States, and upon reaching the age of 21 years declared his intention of becoming a citizen of the United States, and later filed a petition for naturalization. Graber further avers that since the issuance of the proclamation of the President of the United States on December 11, 1917, he has been held in confinement by the United States marshal, and it appears that he is confined as an alien Austrian enemy under authority from the President.

Under the provisions of the President's proclamation all natives, citizens, denizens, or subjects of Austria-Hungary, being males of the age of 14 years and upwards, who shall be within the United States and not actually naturalized, and—

"of whom there may be reasonable cause to believe that he is aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate any regulation duly promulgated by the President, or any criminal law of the United States, or of the states or territories thereof, will be subject to summary arrest by the United States marshal, or his deputy, or such other officer as the President shall designate, and to confinement in such penitentiary, prison, jail, military camp or other place of detention as may be directed by the President."

This proclamation was issued shortly after the passage of the joint resolution of the Senate and House of Representatives, dated Decem-

ber 7, 1917, declaring a state of war to exist between the United States and the Imperial and Royal Austro-Hungarian Government, and authorizing the President to employ the entire naval and military forces of the United States and the resources of the government to carry on the war and to bring the conflict to a successful termination. Section 4067, R. S. (Comp. Stat. 1916, § 7615), is as follows:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."

[1] 1. From what has been said above, it will be observed that Graber, the petitioner, has never actually been naturalized. Of course, his mere declaration of intention to become a citizen of the United States, such declaration never having been carried into effect, did not confer citizenship upon him; and such declaration of intention did not absolve Graber from the allegiance which he owes to the Austro-Hungarian government. He did not by his declaration of intention renounce his allegiance, but merely declared that it was his intention to do so at some future time; and so long as his foreign allegiance continues he remains an alien. Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31; In re Moses (C. C.) 83 Fed. 995. Graber has not divested himself of his alienage, and cannot do so until he becomes an American citizen by naturalization. It cannot be doubted that by the declaration of war he became in law an alien enemy, one who owes allegiance to an adverse belligerent. Lamar v. Browne, 92 U. S. 187, 23 L. Ed. 650.

[2] 2. The statutes of the United States provide two methods by which alien enemies may be restrained or removed. Under section 4067, R. S. (U. S. Comp. Stat. 1916, § 7615), quoted above, the President may direct the manner and degree of the restraint to which alien enemies shall be subject, and he is authorized to provide for the removal from the country of those who, not being permitted to reside within the United States, neglect or refuse to depart therefrom. Under section 4069, R. S. U. S. (U. S. Comp. Stat. 1916, § 7617), courts of the United States having criminal jurisdiction are authorized, after complaint and upon hearing, to cause alien enemies to be apprehended and confined or removed. This last section, however, is not a limitation or restriction upon the power given the President by section 4067, R. S., but provides an additional method of dealing with alien enemies. It

is clear that Congress did not intend that the power conferred on the President by section 4067, R. S., to remove alien enemies, should be exercised only as provided in section 4069, R. S., which requires a complaint against an alien enemy and a hearing. This latter method, with its attendant public trial, would oftentimes prove inadequate and ineffective, and the inevitable disclosing of facts would not always be best for the safety of the peace and security of the government. Congress recognized this and by the provisions of section 4067, R. S., vested the President with summary power to direct the confinement or removal of alien enemies.

[3] 3. Graber, in his petition for the writ, says that he has done nothing and contemplates doing nothing forbidden by the President's proclamation. His petition, then, in its last analysis, is reduced to a petition asking the court to review a disputed question of fact. Graber, as an alien enemy, and admittedly such by his own petition, confined by direction of the Executive, through the appropriate officers of the government, on the ground that he is about to violate a regulation duly promulgated by the President under authority of Congress, cannot be permitted to negative the fact, or the intention, by application for habeas corpus. Disputed questions of fact cannot be reviewed on habeas corpus. In re Strauss, 126 Fed. 327, 63 C. C. A. 99.

[4] 4. The President, acting in the manner and under the powers vested in him by law, has determined that the petitioner is a person who, either for the safety of the United States or for petitioner's own protection, should be restrained or interned. He has further decided that this alien enemy should be restrained as prescribed in section 4067, R. S. The officers of the law have taken the summary action authorized by that section, and the question is presented by petitioner whether this action of the President is subject to judicial review. The court thinks not.

The case of In re Moyer, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189, holds, and it is sound in principle and applicable here, that the decision of the chief executive of a state in suppressing insurrection is not subject to review in the courts. In that case Moyer, the petitioner, was arrested by authority of the commanding officer of the Colorado National Guard to prevent Moyer from taking part in an insurrection which the civil authorities had been unable to put down. The Governor of Colorado, acting under the authority conferred upon him by law, called out the militia to suppress the insurrection and restore law and order. The court said:

"By the reply it is alleged that, notwithstanding the proclamation and determination of the Governor that a state of insurrection existed in the county of San Miguel, as a matter of fact, these conditions did not exist at the time of such proclamation or the arrest of the petitioner, or at any other time. By section 5, art. 4, of our Constitution, the Governor is the commander in chief of the military forces of the state, * * * and he is thereby empowered to call out the militia to suppress insurrection. It must therefore become his duty to determine as a fact when conditions exist in a given locality which demand that, in the discharge of his duties as chief executive of the state, he shall employ the militia to suppress. This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county

of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment, but the judgment of another co-ordinate branch of the state government. In re Boyle [6 Idaho, 609] 57 Pac. 706 [45 L. R. A. 832, 96 Am. St. Rep. 286]; Luther v. Borden, 7 How. 1, 12 L. Ed. 581; Ex parte Moore, 64 N. C. 802; Martin v. Mott, 12 Wheat. (U. S.) 19, 6 L. Ed. 537."

And further, in the additional opinion of the Chief Justice (35 Colo. 164, 85 Pac. 209, 12 L. R. A. [N. S.] 979, 117 Am. St. Rep. 189), it is said:

"If the judicial department should undertake to review the facts upon which the Governor acted, it would be a direct interference with his authority, and an assumption of power on the part of the judiciary which does not exist."

The case of In re Boyle, 6 Idaho, 609, 57 Pac. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286, cited in the opinion in the Moyer Case, is also in point. There the President of the United States, at the request of the Governor of the state, sent a military force into the state. Application for habeas corpus having been made, the court held that it would not review the action of the Governor, and said:

"* * * It is not the province of the courts to hinder, delay, or place obstructions in the path of duty prescribed by law for the executive, but rather to render him all the aid and assistance in their power * * * to bring about the consummation most devoutly prayed for."

It may be well said of the power conferred upon the President to remove alien enemies, as was said of the power conferred upon him to call forth the militia to suppress insurrections:

"Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." Martin v. Mott, 12 Wheat. 19, 31, 6 L. Ed. 537.

The court is of the opinion that such is the true construction of section 4067, R. S. U. S., and that the President, or the officers through whom he acted, is the exclusive judge of whether Graber was such an alien enemy as for the safety of the United States should be restrained as provided by law.

"It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities, which the Executive must be presumed to possess of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny." Martin v. Mott, supra.

The principles governing the determination of this case are analogous to the principles applied when habeas corpus is sought to review decisions of the Secretary of Labor and other immigration officials, under the Immigration Act, that certain alien immigrants, at the time of entering the United States, were likely to become a public charge. It has generally been held that the decisions of the Secretary, after the administrative hearing provided for by the act, are final, and that

the courts are without power to review or modify them on application for habeas corpus. Ex parte Pugliese (D. C.) 209 Fed. 720. And the same is true of the decisions of the boards created under the Conscription Act, in passing upon claims for exemption. Indeed, the recent case of Angelus v. Sullivan, 246 Fed. 54, —— C. C. A. ——, is somewhat similar to this case. Angelus instituted a suit in the United States District Court for the Southern District of New York for the purpose of securing a review of the action taken by the local and district boards created under the Conscription Act, approved May 18, 1917 (40 Stat. 76). He alleged that he was a subject of Austria-Hungary, and an alien who had not declared his intention to become a citizen, and that as such he was not subject to conscription. He also averred that he had filed an affidavit claiming exemption on this ground, that the local board denied his claim of exemption, and that upon appeal the district board affirmed the ruling of the local board and Angelus was ordered to report for military service. The court held that the decision of the board denying Angelus' claim of exemption, on the ground that he was a subject of Austria-Hungary, was final, and could not be interfered with by the courts.

It is interesting to note, in the present circumstances, that the principles stated above are also followed by the English and Canadian courts. In the annotated note following the report of the case of Porter v. Freudenberg (English Court of Appeal) 1 K. B. 857 (1915) 5 B. R. C. 600, are cited the cases of Rex v. Vine Street Police Station (1915) 113 L. T. N. S. 971, and Re Gusetu (1915) 29 Can. Crim. Cas. 427, holding that the rule that a court will not entertain an application for habeas corpus from a prisoner of war applies to a civilian subject of an enemy state, who has been interned as a measure of public safety.

In this case the President, under the authority conferred upon him by law and in the manner prescribed by section 4067, R. S., has acted through the proper officials, and their determination that Graber is an alien enemy, who should be restrained or interned, is final and conclusive, and is not subject to review by the courts.

The application for the writ is denied.

MUIR v. LOUISVILLE & N. R. CO.

(District Court, W. D. Kentucky. March 2, 1918.)

1. CITIZENS ⟸2—CORPORATIONS.
A corporation is a citizen of the state under whose laws it was organized.

2. REMOVAL OF CAUSES ⟸95—EFFECT OF FILING PETITION AND BOND.
Where defendant appeared in an action in the state court, and tendered therein and prayed leave to file a petition for removal of the cause to the federal court, at the same time tendering a bond in the terms prescribed by law, with good and sufficient sureties, the cause was effectively removed to the federal court, notwithstanding the state court refused to enter the removal order sought.

3. COURTS ⟸508(8)—REFUSAL TO ENTER ORDER OF REMOVAL—INJUNCTION.
Where defendant's filing of a petition for removal of a cause to the federal court and tender of a bond effectually removed the cause, though the state court declined to enter an order of removal, the federal court may protect its jurisdiction by injunction order, restraining the plaintiffs and their attorneys from further prosecuting the action in the state court.

4. EVIDENCE ⟸46—JUDICIAL NOTICE—PRESIDENTIAL PROCLAMATIONS.
The courts will take judicial notice of the proclamation of the President of December 26, 1917, declaring the necessity to take possession and control of certain systems of transportation in the United States, including railroads.

5. UNITED STATES ⟸58½—PROPERTY—SEIZURE—LITIGATION.
Where property of the United States has been seized or impleaded in litigation between individuals, the government, through the suggestion by the district attorney, in a form showing title to the property in the United States, may secure release of the property without becoming a party, in which event the litigation must cease.

6. UNITED STATES ⟸125—JURISDICTION—ACTIONS AGAINST UNITED STATES.
Where by proclamation of December 26, 1917, the President, under Act Aug. 29, 1916, c. 418, § 1, 39 Stat. 645 (Comp. St. 1916, § 1974a), providing that the President is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable, took possession of and assumed control of every system of transportation within the United States, including railroads, the Secretary of the Treasury being appointed Director General, actions thereafter begun against a railroad company for causes arising prior to the proclamation cannot, despite the extremely broad war-making powers of Congress under Const. art. 1, § 8, be defeated on the ground that, as the United States had taken over the property of the railroad company and had not given its consent to be sued, the courts were without jurisdiction, the actions in effect being against the sovereign, for the doctrine that, where property of the government is seized or impleaded in litigation between individuals, the government may secure its release by suggestion of that fact, in which case the litigation must end, applies only where property has been actually seized or impleaded, and the mere institution of actions against railroad companies was not a seizure of property of which the government had taken control.

7. REMOVAL OF CAUSES ⟸19(1)—FEDERAL COURTS—JURISDICTIONS—"ACTIONS ARISING UNDER CONSTITUTION OR LAWS OF UNITED STATES."
In such case, as Act Aug. 29, 1916, does not authorize the President to make any proclamation of any character in taking possession and assum-

ing control of transportation systems, and thus the presidential proclamation is without force of law, actions begun in the state court against a railroad company after the President had taken possession of railroads, which were based on the negligence of the railroad company occurring prior to the executive action, cannot be removed to the federal courts, under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1091 (Comp. St. 1916, § 991 [1]), on the ground that they were actions arising under the Constitution and laws of the United States, for the cause of action was not based on any act of Congress, and the proclamation of the President, though it might have afforded basis for the actions, was without effect as law.

8. UNITED STATES ⟸28—LEGISLATIVE DEPARTMENT—EXECUTIVE REGULATIONS—STATUTE.

While Congress may authorize heads of executive departments or other officials to make regulations within certain limits, and when made within those limits such regulations have the force and effect of law, the delegation of authority to make regulatory orders gives no power to add to, take from, or modify the limitations prescribed by Congress, and, as Act Cong. Aug. 29, 1916, authorizing the President to take possession of and assume control of transportation systems through the Secretary of War, made no provision for presidential proclamation providing an elaborate scheme of control, such proclamation has no force as law.

9. CONSTITUTIONAL LAW ⟸105—VESTED RIGHTS—RETROACTIVE LEGISLATION.

Where, as a result of a railroad wreck, plaintiffs acquired causes of action against a railroad company arising out of the relation of carrier and passenger, such rights were then vested, and they cannot be taken away or divested by authority exerted thereafter, either by a legislative body or by an executive officer; and hence, though the President thereafter took possession of and assumed control of railroads under Act Aug. 29, 1916, such vested rights of action could not be interfered with.

10. REMOVAL OF CAUSES ⟸25(1)—ACTIONS ARISING UNDER LAWS AND CONSTITUTION OF UNITED STATES—RIGHT OF REMOVAL.

To remove from the state to the federal court an action on the ground that it arose under the Constitution and laws of the United States, such fact must appear from the initial pleading of the plaintiff; and, where it did not appear, such cause cannot be removed, though the action was one against a railroad company, and it was contended that, because the President, under Act Aug. 29, 1916, had taken possession of and assumed control of railroads before the initiation of the action, the cause was one removable, as arising under the laws of the United States.

Actions by J. W. Muir, administrator of George S. Muir, by Jasper W. Muir, administrator of N. W. Muir, by Thomas J. Miller, administrator of Mabel Brown Miller, by H. H. Mashburn, administrator of Emily Mashburn, by R. H. Miller, administrator of Lillian Miller, and by J. E. Smith against the Louisville & Nashville Railroad Company, which were begun in the state court and removed by defendant to the federal court. On motion to remand. The proceedings were also consolidated with suits in equity by the Louisville & Nashville Railroad Company against Jasper W. Muir, administrator of George S. Muir and others, and against the other plaintiffs and their attorneys, to enjoin proceedings in the state court, which had declined to enter an order for the removal sought. Motions for remand sustained, and the temporary restraining order issued on the several bills set aside and the bills dismissed.

Nat. W. Halstead and J. D. Wickliffe, both of Bardstown, Ky., and Frank P. Straus and Howard B. Lee, both of Louisville, Ky., for plaintiffs.

Helm Bruce, H. L. Stone, E. S. Jouett, and B. D. Warfield, all of Louisville, Ky., for defendant.

WALTER EVANS, District Judge. The first six of the above-styled suits are actions at law, which have been removed to this court, while the other six of them are suits in equity, brought in this court, seeking to enjoin separately the prosecution in the state court of each of the others.

[1] The Louisville & Nashville Railroad Company (which will be called the Railroad Company) is a corporation organized under the laws of this state, and therefore is a citizen of Kentucky. On December 20, 1917, there occurred at Shepherdsville, Ky., an accident to a passenger train of the Railroad Company which brought instant death to at least 45 passengers, ultimate death to not less than 4 more of them, and suffering and injury to 47 others. They were all at the time passengers on a train operated locally between Louisville, Ky., and Bardstown, Ky., which cities are about 40 miles apart. The disaster was the most distressing which had ever happened in the long life of the Railroad Company, and brought from its president, Mr. Milton H. Smith, a published statement, notably commendable in spirit and tone (which we are much tempted to insert in full), admitting liability and offering to make settlements in the fairest spirit. No adjustment of damages, however, could be reached in these cases.

At various dates between January 9, 1918, and February 2, 1918, the six actions at law first above styled were commenced by the respective plaintiffs therein against the Railroad Company in the Nelson circuit court of Kentucky. The amount sued for ranged from $100,000 to $35,000 in those five of the suits where death had occurred, and $20,000, the amount sued for in that one of the actions where death did not result from the injuries received.

[2] The term of the Nelson circuit court, then next, began on the second Monday (the 11th day) of February, 1918. At that time the Railroad Company appeared therein and tendered to that court and asked its leave to file in each of the cases its petition for the removal thereof to this court. It also with each petition tendered a bond in the terms prescribed by law, with good and sufficient surety thereon. Upon consideration of the motions for leave to file the several petitions for removal the Nelson circuit court denied each of them, and declined to enter an order for the removal sought, though in each case the court found the bond tendered to be sufficient. Obviously each of the suits was effectively removed to this court by what had been done. Traction Co. v. Mining Co., 196 U. S. 239, 244, 25 Sup. Ct. 251, 49 L. Ed. 462; Marshall v. Holmes, 141 U. S. 595, 12 Sup. Ct. 62, 35 L. Ed. 870, and cases cited; Stevenson v. Illinois Central R. R. Co. (C. C.) 192 Fed. 958.

A transcript of the record in each case was filed in this court on the 16th day of the same month. In no one of the six actions at law thus

removed was there any person sued as a defendant, except the Railroad Company. Each plaintiff in the six actions was a citizen of Kentucky, and his action was against another citizen of the same state. Each plaintiff in his pleading alleged in clear and explicit terms that the injured person, at the time of the accident, had been a passenger on the train then owned and operated by the Railroad Company, and that while such passenger, and by the gross and inexcusable negligence of the defendant in operating its train, the injury complained of had been inflicted. These averments in substance stated the whole cause of action, and nothing else was relied upon by the respective plaintiffs as a basis for the recovery sought.

[3] In this condition of the record the plaintiff in each of the actions thus removed entered a motion to remand it to the state court; but as that court had refused to remove the cases, and as each of them was upon its docket for trial at the term then in session, the Railroad Company filed in this court its separate bill in equity against each of the several plaintiffs in the actions at law and his attorneys therein, and thereby sought a separate injunction against the plaintiffs severally and their respective attorneys to prevent them from further prosecuting in the state court their respective actions which had been removed to this court. Pursuant to the prayer in its several bills, the Railroad Company moved in each case for an injunction pendente lite. Those motions and the motions to remand were all heard together, and must be determined upon the same propositions of law, and it is therefore convenient to embrace all of them in one opinion; it being apparent, we think, that, if this court has no jurisdiction, the actions at law must all be remanded to the state court, while, if the jurisdiction is here, that jurisdiction must be protected through the injunctions sought by the Railroad Company. This course is abundantly supported by the decision of the Supreme Court in Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 256, 25 Sup. Ct. 251, 49 L. Ed. 462, which affirmed the judgment of this court in 130 Fed. 794.

Section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1916, § 991(1)]) among other things, provides that:

"The District Courts shall have original jurisdiction as follows:
"First. Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and arises under the Constitution or laws of the United States."

And section 28 of the Code (Comp. St. 1916, § 1010) provides that "any suit of a civil nature, at law or in equity, arising under the Constitution and laws of the United States, * * * of which the District Courts of the United States are given original jurisdiction," may be removed by the defendant or defendants therein to the District Court, if brought in a state court.

Under these provisions the Railroad Company in its petitions claims the right to remove the cases. It is entirely clear, from the petitions of the several plaintiffs filed in the state court, that the amount in controversy in each case exceeds the sum or value of $3,000, exclusive of interest and costs, and equally is it clear that the cause of action

stated by each plaintiff is not one which appears from the plaintiff's pleading itself to arise under the Constitution or laws of the United States. This being so, the Railroad Company admits at the outset that it is confronted with many adverse rulings of the Supreme Court. Only one of these need be cited, for in its opinion in In re Winn, 213 U. S. at page 465, 29 Sup. Ct. 516, 53 L. Ed. 873, the court fully covered the subject when it said:

"It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. Louisville & Nashville Railroad v. Mottley, 211 U. S. 149 [29 Sup. Ct. 42, 53 L. Ed. 126], and cases cited. If the defendant has any such defense to the plaintiff's claim it may be set up in the state courts, and if properly set up, and denied by the highest court of the state, may ultimately be brought to this court for decision."

Nevertheless the Railroad Company seeks to maintain the jurisdiction of this court upon the general proposition that the facts stated in its petitions for removal are such as, if true, will authorize a departure from the general rule. We are thus brought to the novel, interesting, and important questions presented for determination. Aided by the able, ingenious, and energetic arguments of counsel for the various parties, we have given them very careful consideration.

The sole ground upon which the right of removal in each case is claimed is that the suit arises under the Constitution or laws of the United States; but obviously, as no one of them arises under any express clause or provision of the Constitution itself, the right to remove must be regarded as asserted upon the single proposition that each of the several actions arises under the "laws of the United States." Accordingly in each of its petitions for removal the Railroad Company states that in the act making appropriations for the support of the army for the then current fiscal year, approved August 29, 1916, there was a clause which reads as follows:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." 39 Stat. 645, 4 Comp. Stat. p. 3778, § 1974a.

Each petition for removal also states that on December 26, 1917, the President, therein reciting that previously in 1917 Congress had declared war, first against Germany, and afterwards against the Austro-Hungarian government, and that it had become necessary, under the legislative provision just copied, to take possession and control of certain systems of transportation for the transfer or transportation of troops, war material, and equipment therefor, and for other useful and desirable purposes connected with the prosecution of the war, had made proclamation that he, as President, through Newton D. Baker, Secretary of War, would take possession of and assume control at 12

o'clock noon on the 28th day of December, 1917 (though for accounting purposes such taking possession should only operate as from midnight on the 31st day of December, 1917), of every system of transportation within the United States, including railroads.

[4] It also appears in the proclamation, of which we take judicial notice, that while, nominally, possession and control of the systems of transportation are to be taken through the Secretary of War, in that document in plainly expressed language it is "directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads," and as such is given all the power and authority fully set forth in the proclamation, although this was done in "time of war" and obviously in a war emergency. As all know, Mr. McAdoo was then and is now the Secretary of the Treasury. It is also shown that at the time appointed in the proclamation he, as the Director General of Railroads, took full possession and control of such of the defendant's property as is designated in the proclamation, and yet holds the same.

In these circumstances the Railroad Company contends: (1) That as all its property has been taken from it in the manner stated, as the government cannot be sued without its consent, and as such consent has not been given, the courts have no right to proceed against the defendant in these cases; (2) that, as matter of law, it results from the facts shown that the actions which have been removed must be considered as having arisen under the laws of the United States, no one of them having been commenced in the state court until on or after January 9, 1918; and (3) that these facts bring about a situation which must be held to justify a ruling that these cases present an exception to the general rule that a removal cannot be sustained unless the plaintiff's own pleading shows on its face that his cause of action arises under the Constitution or laws of the United States.

[5, 6] These contentions involve questions of momentous importance, which, in the great crisis now upon the country, will only be discussed to the extent necessary to a proper determination of the rights demanded under them by the Railroad Company. Our decision must and will be limited to ascertaining what those rights are in these cases.

By article 1, section 1, of the Constitution, all the legislative power of the government is vested in the Congress. By the same article, section 8, Congress is given power to declare war, to raise and support armies, and to make all laws which may be necessary and proper for carrying into execution all the powers given by the section. All agree, and the courts hold, that in time of war the Congress has wide discretion in determining what is "necessary and proper" to make good its declaration of war against the enemies of the country. These provisions, in this connection, become all the more important because, in his proclamation, the President declared in express words that in taking control and possession of the railroads of the country he was acting by virtue of that statutory provision and the resolutions declaring war. This being true, and the Railroad Company making claim

to the right of removal of these cases from the state court upon the same statutory provisions and the action of the President thereunder, we are brought to the necessity of analyzing the provisions of that enactment. While by no means comprehensive, nor possibly adequate to the great emergency which subsequently arose, they are nevertheless, so far as they go, neither doubtful nor ambiguous. In order that they may serve the great purposes which they were intended to accomplish, they necessarily must be construed to carry the implied right, when control and possession of the transportation systems are taken under them, to have those systems utilized and operated in the most efficient manner. We shall yield full effect to these propositions in what we say concerning the proper construction of the provisions themselves, so far as these cases demand it.

The statute authorizes the President (a) in time of war, (b) through the Secretary of War, (c) to take, possess, and assume control (d) of any system of transportation, to the exclusion, if necessary, of any other transportation thereon, (e) for the transfer or transportation of troops, war material, and equipment, and for such other purposes connected (f) with the emergency as may be needful or desirable. Under no established rule of interpretation can it be doubted that it was the intention of the legislative body to authorize, in time of war, the War Department and no other to take over the railroads for war purposes, such as transportation of troops and war material, and for such other purposes as might be desirable in the emergencies of war. Besides being an appropriate function of the War Department, it was the plain meaning of the statute which Congress enacted that the War Department should have authority over it, and even if we assume (which is inconceivable) that the Secretary of War declined for that department to take up the war work indicated, we find nothing in the statute which authorizes it to be taken up by the Treasury Department, nor by a Director General of Railroads; Congress not having intrusted the work to either. And the situation, if strict rules were to operate, might involve consideration of the question whether the rule stated by the Supreme Court in Smith v. Black, 115 U. S. at page 319, 6 Sup. Ct. 56, 29 L. Ed. 398, to the effect that, "where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person," would not apply.

But the Railroad Company in this case makes no objection to the taking over of its property under the proclamation, and we are no further concerned with the situation than to inquire whether there is anything in the entire record from which we may fairly draw the legal conclusion, either upon the statute or the President's proclamation, or upon anything done under either, that the several actions which have been removed arise under the Constitution or laws of the United States, and especially as all that has been done by the government was done after each of the causes of action had become perfect as against the Railroad Company.

True, as the Railroad Company insists, the law is that the United States cannot be sued without its consent; also it is true that the government has not consented to being sued in these cases, though, if

ownership and title to the property of the Railroad Company has passed to the United States, the authorities establish the proposition that, if that property has been seized or impleaded in a litigation between individuals, the government, through the district attorney, may secure its release by suggestion to the court without making the government a party. In such cases, when the district attorney makes the suggestion in a form which shows the United States to have title, the litigation must end. Stanley v. Schwalby, 147 U. S. 512, 513, 13 Sup. Ct. 418, 37 L. Ed. 259; Carr v. United States, 98 U. S. 438, 25 L. Ed. 209; The Siren, 7 Wall. (74 U. S.) 153, 154, 19 L. Ed. 129. This doctrine, however, applies only where the property of the United States has been seized or is impleaded in some litigation. So far nothing of that sort has occurred or appears here, and we conclude that the first of the contentions of the Railroad Company above stated cannot be maintained.

[7-9] The second of the contentions of the Railroad Company, briefly stated, is that the actions were all brought in the state court after the promulgation of the President's proclamation and the taking possession thereunder of property of the Railroad Company. Much of what we have already said is applicable to this contention, but it requires further and somewhat more radical treatment, and especially must we ascertain what, if any, effect upon the rights of the plaintiffs in the litigation the proclamation of the President can have.

Certainly the proposition is so well established as to be elementary that Congress may authorize heads of departments or other officers to make regulations within certain limits, and, when made within those limits, such regulations have the force and effect of law, and may be enforced as such; but it has often been held that the delegation of authority to make regulatory orders gives no power to add to, take from, or modify the limitations prescribed by Congress. United States v. 200 Barrels Whisky, 95 U. S. 576, 24 L. Ed. 491; United States v. 11,150 Pounds Butter, 195 Fed. 663, 664, 115 C. C. A. 463. In many instances proclamations by the President, authorized by the Constitution or by statute, have been given great effect. Notably was this so in United States v. Klien, 13 Wall. 129, 20 L. Ed. 519, and Armstrong v. United States, 13 Wall. 154, 20 L. Ed. 614, and other cases.

On its face the act of August 29, 1916, does not give authority to the President to make or promulgate a proclamation of any character. No one, however, could or would contend that he had not abundant authority to issue such documents whenever he thought it proper to give notice or information to the public. But such papers cannot have any effect as laws, in the absence of express constitutional or congressional authorization. We cannot say that the President had any view to the contrary of this when he issued the proclamation in question; but the second contention of the Railroad Company, which demands consideration, is and necessarily must be based upon the idea that that document did have the force and effect of law, and should, as such, be enforced to the extent that it therefrom be made to result that any suit subsequently brought against a railroad company whose property had been taken into possession under the statute (even if

such suit were brought upon a cause of action which had been perfected on or before December 20, 1917) arose under the laws of the United States. While the statute is silent upon the subject of litigation of any character, it by no means follows that causes of action might not arise thereunder. The vital question here is not that, but is this: Did the causes of action of the several plaintiffs, as stated in their petitions, so arise, or did they arise under the proclamation of the President? In the familiar and oft-cited case of Tennessee v. Davis, 100 U. S. at page 264, 25 L. Ed. 648, the Supreme Court said:

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted."

This language was repeated in the case of Bock v. Perkins, 139 U. S. at page 630, 11 Sup. Ct. 677, 35 L. Ed. 314, and, when we subject the cases before us to this authoritative test, can we properly say it is met? We think clearly not, because obviously these cases arose out of the facts stated in the pleadings of the several plaintiffs, and not out of the legislation of Congress. Nevertheless, in effect it is urged that, when the statute is read in connection with the proclamation of the President, the test is met. There possibly might be great force in this view, were it not, first, that the statute does not authorize the proclamation, and therefore leaves that document without force as legislation of Congress or as a law of the United States; and, second, that the causes of action arose upon facts plainly stated by the plaintiffs, and consequently, even if it could by any possibility be said that they arose under the proclamation, they nevertheless would not arise under any law of the United States—the proclamation not being such. The statute is silent upon the subject of litigation of any character, and does not attempt to close either the state or federal courts to any person who might already have an existing cause of action against any railroad company upon the mere ground that the property of the company had been taken over for a temporary though most important use. The proclamation designates Mr. McAdoo as Director General of Railroads. This position being unknown to the law, its powers are not fixed; but we suppose it was the intention to make him, not only a member, but the head, of the board of directors of each railroad company, the property of which was taken into possession—thus giving him, instead of the Secretary of War, the control of all operations under the statute. Many rules for him to enforce appear to be prescribed in the proclamation, but we pass over all of them as having no bearing upon the cases before us, except that one of them which is in this language:

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

We find no statutory warrant for this provision in the proclamation, and especially none for the exception mentioned in the last clause of

it. We may, however, ignore that exception, because nothing appears to show any attempt to carry it into effect; but, even if we suppose that the other limited interruption of the rights of litigants while the war goes on should be patriotically accepted by all good citizens, litigant and otherwise, it by no means follows that the law authorizes any interference with the course of judicial procedure between litigants before the time arrives when there might be attempts to seize, under execution issued upon final judgments, property in the temporary possession of the United States under the proclamation. Nor can we see how even a right to prevent interruption of such temporary possession after final judgment has been rendered can, per se and independently of the nature of the cause of action, support the theory of the Railroad Company that the suits in which judgments may be rendered arise under the Constitution or laws of the United States.

The non sequitur becomes apparent when we recall the exact nature of the cause of action declared upon by the respective plaintiffs. Upon the allegations of his pleading each plaintiff seeks a money judgment and nothing else. Neither of the plaintiffs has made any claim in his pleading to be entitled, under our Code of Practice, to any provisional remedy like an attachment or other similar writ under which any part of defendant's property could be seized pendente lite. When, if ever, judgments shall be rendered in favor of the plaintiffs, the question of means for their enforcement shall arise, it may demand the consideration of the trial court; but at present we are concerned only with the question of whether we have jurisdiction—not, indeed, to seize property, but "to hear and determine a cause." The question of jurisdiction here must be determined upon the nature of the cause of action, and from that we ascertain whether it arises under any law of the United States.

Furthermore, it is obvious from the averments of his pleading that the cause of action of each plaintiff arose and was perfected immediately after the infliction of the injuries complained of. At once thereafter each plaintiff had a clear right to sue upon that cause of action. Each one of them promptly exercised that right and commenced his action at law in the state court. As it is quite obvious from the pleadings of the plaintiffs that each of the causes of action arose out of what occurred while the relationship of passenger and common carrier existed, and not out of any law of the United States, the right of each plaintiff to sue became a vested right on December 20, 1917, and cannot be taken away or devested by any authority exerted, ex post facto, either by a legislative body or by an executive officer of any degree. This proposition was clearly announced by the Supreme Court when, in Angle v. Chicago, St. Paul, etc., Railway, 151 U. S. at page 19, 14 Sup. Ct. 247, 38 L. Ed. 55, it said:

"A right of action to recover damages for an injury is property, and has a Legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong; but neither executive nor Legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."

After the plaintiffs' causes of action had all arisen, the President's proclamation was promulgated, and in pursuance thereof possession

and control of the Railroad Company's property was taken. Upon this state of fact as its sole basis the Railroad Company contends that each of the separate causes of action arose under the laws of the United States. After most careful consideration we have, upon the grounds stated, concluded that this contention has not been maintained and is not maintainable.

[10] The third contention of the Railroad Company is that the facts here justify the conclusion that these cases present an exception to the general rule that in order to remove the plaintiff's petition on its face must show how the action arises under the Constitution or laws of the United States, and in support of this suggestion the counsel for the Railroad Company cite cases like Pacific R. R. Removal Cases, 115 U. S. 1–24, 5 Sup. Ct. 1113, 29 L. Ed. 319; Texas & Pacific R. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300; Toledo R. R. v. Penna. Ry. (C. C.) 54 Fed. 730, 19 L. R. A. 387.

Careful consideration of each of these cases has failed to convince us that any one of them has any tendency in the direction suggested. It is an everyday construction of the Removal Act that the diverse citizenship of the parties may be shown for the first time in the petition for removal, for the reason that in stating a cause of action an allegation of citizenship is not material, and need not be made by the plaintiff; but it is different as to the amount in controversy. In respect to that the plaintiff must, in an action at law, state the amount he seeks to recover, and ordinarily the case is not removable unless the amount in controversy exceeds the sum or value of $3,000 and is claimed by the plaintiff in his pleading. So, in stating the nature of his claim, the plaintiff's pleading should show, and, if well constructed, does show, the nature of his claim and how it arises, and in this way, if he seeks to recover under the Constitution or laws of the United States, it will inevitably so appear. These propositions are the basis of the rule stated in the Winn Case, supra, and in the extract we have made from the opinion in that case the Supreme Court has pointed out that, if the defendant has any defense based upon the claim that the action is one arising under the Constitution and laws of the United States, he can set it up in the state court, and, if it is denied, he can carry the case to the Supreme Court.

The several motions of the plaintiffs to remand to the Nelson circuit court will be sustained for want of jurisdiction in this court. In each of the equity suits the temporary restraining order made at the hearing will be set aside, the motions for temporary injunctions will be each overruled, and each of the bills in equity will be dismissed, with costs.

Orders accordingly may be entered.

EXPANDED METAL CO. et al. v. GENERAL FIREPROOFING CO.

(District Court, N. D. Ohio, E. D. December 15, 1917.)

No. 6.

1. PATENTS ⟸318(2)—ACCOUNTING FOR INFRINGEMENT—RIGHT TO BOTH PROFITS AND DAMAGES.
Where, on an accounting for damages and profits in an infringement suit, the profits made by defendant are in excess of complainant's damages, complainant is not entitled to recover damages in addition to profits.

2. PATENTS ⟸319(3)—SUITS FOR INFRINGEMENT—RIGHT TO INCREASE OF DAMAGES.
Where defendant, before making use of the process subsequently held to be an infringement, obtained the opinion of counsel of standing that it did not infringe, and during the entire time of the infringement there were decisions of federal courts of high authority holding the patent invalid, the question being finally settled in favor of its validity by the Supreme Court, the damages should not be trebled by the court, nor any sum added as punishment, or for complainant's expense of litigation.

3. PATENTS ⟸319(1)—DAMAGES FOR INFRINGEMENT—ESTABLISHED ROYALTY.
A master's finding of an established license fee for the use of a patented process, making it the measure of damages for infringement, *held* not erroneous, because the licenses granted also included the right to use other patented processes, and were exclusive within a limited territory, where the processes licensed were not capable of conjoint use, but the licensees had the option to use either, and the same royalty was paid after the other patents expired, including during the time of infringement.

4. PATENTS ⟸318(6)—INFRINGEMENT—PROFITS RECOVERABLE.
An infringer is liable for only such profits as were actually made by the infringement, and is entitled to a deduction of expenses and losses incurred in good faith in marketing its product, although by better business methods its might have realized larger profits.

5. PATENTS ⟸318(6)—INFRINGEMENT—ACCOUNTING FOR PROFITS.
An infringer, on an accounting for profits, is not entitled to a deduction of interest on the capital invested.

6. PATENTS ⟸318(4)—INFRINGEMENT—ACCOUNTING FOR PROFITS.
An infringer of a patent for a process is liable for all the profits made on the product of such process, in the absence of proof that other processes, adequate to produce the same product, were open to its use and of the cost of production by their use.

7. PATENTS ⟸318(4)—INFRINGEMENT—ACCOUNTING FOR PROFITS.
To entitle an infringer of a process patent to reduce its liability for profits because of other processes which were open to its use, such processes must have been in existence and open to public use when the infringement commenced; it cannot avail itself of a process developed afterward by itself, or others, and used only experimentally or occasionally during the time of infringement, for the purpose of avoiding or minimizing its liability.

8. PATENTS ⟸322—ACCOUNTING FOR INFRINGEMENT—HEARING BEFORE MASTER.
Where an accounting before a master for infringement continued for five years, and complainant had full access to defendant's books and caused them to be examined by an expert, it was not an abuse of discretion for the master, at the time of final argument on his report, two years later, to refuse to reopen the proofs to permit complainant to re-examine the books and introduce further evidence.

9. PATENTS ⇐322—INFRINGEMENT—ACCOUNTING FOR PROFITS.
Where, on an accounting for profits by an infringer, it was given credit for losses incurred in the sale of its product, some of which, it appears, were recovered after the master's report, complainant is entitled to a further accounting with respect thereto.

In Equity. Suit by the Expanded Metal Company and the Consolidated Expanded Metal Companies against the General Fireproofing Company. On exceptions to master's report. Confirmed.

Price, Alburn, Crum & Alburn and Fay, Oberlin & Fay, all of Cleveland, Ohio, for plaintiffs.

Charles Neave, of New York City, and Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This cause is now before me on exceptions to a report of Special Master W. H. Marlatt, Esq., filed herein October 30, 1915, finding the damages sustained by complainant and the profits made by the defendant by reason of wrongful infringement by defendant of United States letters patent No. 527,242, issued October 9, 1894, to John F. Golding, and later assigned to complainant. Both parties have excepted, and, before proceeding to a statement or consideration of their exceptions, a brief preliminary statement of the case needs to be made.

This suit was begun in this court in February, 1905. Upon final hearing Judge Tayler held the patent invalid and dismissed the bill. (C. C.) 157 Fed. 564, August 6, 1907. Upon appeal the Circuit Court of Appeals of this circuit reversed this decision, holding the patent valid and infringed. 164 Fed. 849, 90 C. C. A. 611, October 16, 1908. Prior to these decisions, the Circuit Court of Appeals of the Third Circuit had held this patent to be invalid. 146 Fed. 984, 77 C. C. A. 230, September 10, 1906. In consequence of this conflict in the decisions of two different Circuit Courts of Appeal, the United States Supreme Court took jurisdiction of both cases by certiorari, and on final hearing reversed the judgment of the Third Circuit Court of Appeals and affirmed the judgment of this circuit, thus finally determining that said letters patent were valid and infringed by the defendant. 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, June 1, 1909.

This court, by decree dated August 3, 1909, thereupon appointed Mr. Marlatt as special master to ascertain and report an account of the gains, profits, and advantages which the defendant had made by reason of said infringement, and also of the damages that complainant had suffered by reason thereof. Later the Consolidated Expanded Metal Companies was permitted to intervene as a complainant, on the ground that it was a licensee of the original complainant for a part of the territory in which defendant had infringed, and was therefore entitled to all of the recovery made herein in excess of royalties due under its license to the original complainant. Its proportion of the recovery is stated by the master (page 27), and no question arises on the hearing respecting this finding, or the proper division of the ultimate recovery, if any, between the two complainants.

The period of time included in this accounting is from the early part of 1904, when defendant's infringement began, to August 20, 1909, when it ended, a period of approximately 5 years and 7 months. The patent in question covers a process for making what is known as expanded sheet metal. During all this period of time the defendant used the process covered by complainant's patent, and is liable as an infringer for all the expanded sheet metal made by that process. The master finds that defendant made 7,618 tons of expanded sheet metal under 22 gauge and over 7 gauge, 347 tons of 22 gauge, and 9 tons of metal of 7 gauge. He allows complainant, as damages, the sum of $2.50 per ton on the first item, $4 per ton on the second, and $1 per ton on the third, making an aggregate of $20,442. This allowance is based on a finding that an established and uniform royalty is shown by the evidence at those rates for the use of the patented process in making expanded sheet metal. He further finds that complainant is entitled to interest thereon from the date the royalties would have been due complainant, had defendant been operating under a license similar to that granted to other licensees; also that defendant was not such a wanton infringer as warrants the trebling of these damages, and that, inasmuch as the profits made by the defendant are in excess of complainant's damages, complainant is not entitled to recover these damages in addition to said profits. He further finds that defendant has made profits, by reason of said infringement, in the sum of $61,867.81.

Complainant has taken 7 exceptions to the master's report. The defendant has taken 21 exceptions. These exceptions relate both to the finding of damages and of profits. I shall first consider the exceptions of both parties on the subject of complainant's damages.

Complainant excepts because the master refused to add the damages to the profits, and on this hearing also insists that the damages should be trebled (7th exception, master's printed report, 29; complainant's brief, 107). Defendant's exceptions to the finding of damages raise in different ways the question only of whether or not a sufficient showing is made of a fixed and uniform license system to furnish a basis of damages (exceptions 1 to 7, Master's Printed Report, pp. 65, 66).

[1] 1. I am of opinion that the master did not err in his conclusion of law that complainant is not entitled to recover damages in addition to profits.

As already stated, he finds the damages to be $20,442, and the profits $61,867.81, and if these findings are sustained complainant is not entitled to have the profits increased by adding thereto the other sum. It is only when the profits found are less than complainant's actual damages that a sum is added to profits in order to make the recovery equal to actual damages. It is true, as contended, equity now has, under section 4921, R. S., as amended in 1897 (Comp. St. 1916, § 9467), jurisdiction to assess actual damages of the plaintiff, as well as to ascertain defendant's profits; but this power does not permit an award of double compensation, but only permits an election to award

the larger sum. This actual damage may be trebled or increased under the authority of this section; but that is a different question. An examination of all the authorities cited convinces me that the rule adopted by the master is the correct, if not the uniform, rule. See the following: Walker on Patents (5th Ed.) § 573; 3 Robinson on Patents, § 1154; Birdsall v. Coolidge, 93 U. S. 64, 23 L. Ed. 802; Tilghman v. Proctor, 125 U. S. 136, 143, 8 Sup. Ct. 894, 31 L. Ed. 664; Yesbera v. Hardesty Mfg. Co. (6 C. C. A.) 166 Fed. 120, 127, 128, 92 C. C. A. 46; Dunn Mfg. Co. v. Standard Computing Scale Co. (6 C. C. A.) 204 Fed. 617, 624, 123 C. C. A. 111. Other cases to the same effect are cited by counsel for defendant, and an examination of them shows that they are in accord with the master's ruling. Among the cases cited in support of complainant's contention, I find none which, in my opinion, sustains it, except, perhaps, Fox v. Knickerbocker Engraving Co. (C. C.) 140 Fed. 714, decision by District Judge Hazel, and Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199, 135 C. C. A. 85, decision by the Circuit Court of Appeals, Third Circuit. It is not clear that either of these cases hold what is claimed for them; but, if they are susceptible of that construction, I am persuaded that they are not in accordance with the correct rule.

[2] 2. I am also of opinion that there is no error in the master's ruling that the damages found should not be trebled. This finding of the master was not excepted to. It is probable, therefore, that complainant is not in a position to urge this proposition. Waiving this objection, however, and treating the application as if it were now made in the first instance to this court, to exercise the discretion given by section 4921, R. S. (Comp. St. 1916, § 9467), either to treble or to increase the damages found, I am of opinion that such an application should be denied.

The defendant, before making use of the infringing process, obtained the advice of several counsel learned in the law, who advised that its conduct would not be an infringement or violation of complainant's patent. During the entire period of infringement there were decisions of federal courts of high authority holding that complainant's patent was invalid, and that defendant's acts were not an infringement of it. These conflicting opinions of court and counsel were not finally settled until the decision of the United States Supreme Court June 1, 1909. Nothing appears to impeach the defendant's good faith, or to warrant a belief that it was doing anything else than exercising what it believed to be its legal rights. No element of wantonness appears in its acts or conduct. In this situation damages should not be trebled, nor any sum added as punishment or for complainant's expense of litigation. Walker on Patents (5th Ed.) § 367.

[3] 3. I am of opinion that the master did not err in finding that an established royalty was shown by the evidence, nor in his conclusion of law that the same is to be taken as the measure of complainant's damages. The master's findings of fact on this issue are set forth at pages 3–11 of his printed report. The patent, as already stated, is for a methor or process of making expanded sheet metal. Complainant did not

manufacture, but was merely an owner of patents, and granted licenses to others to make use of the process. In these licenses the royalties were always measured by a certain rate per ton of sheet metal expanded by the process in question.

Defendant's infringement began in 1904. Several licenses had been granted prior to this time. In August, 1887, one was granted to Chess, Cook & Co. for the states of New York, Pennsylvania, New Jersey, Delaware, West Virginia, and Ohio; one was granted in May, 1896, to the Southern Expanded Metal Company for the states of Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, and the District of Columbia; another was granted in August, 1903, to the New York Engineering Company for the states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island; later, in April, 1905, another license agreement for this same territory was granted to the Eastern Expanded Metal Company. Two others, not produced at the hearing, had also been granted prior thereto: One to the Western Expanded Metal Company at San Francisco, and the other to the St. Louis Expanded Metal Company at St. Louis. The exact dates of these two licenses and the territory included therein, are not definitely shown. They had been canceled or terminated prior to the beginning of defendant's infringement.

In the early days of the patent all licensees were charged a uniform royalty of $5 a ton on all expanded sheet metal made by the process. Some licenses may have provided for the payment of $10 a ton, with a discount or rebate of $5 a ton. In effect, however, the rate in all was $5 a ton. Later, and prior to the beginning of defendant's infringement, the license fee was reduced and graded, and the prices fixed and established were as found by the master, namely, $2.50 a ton on all expanded metal under 22 gauge, $4 a ton on all over 22 gauge, and $1 a ton on all of 7 gauge. These prices, the master finds and the evidence shows, were the uniform and prevailing rates between the complainant and all its licensees during the entire period of infringement.

On behalf of defendant it is urged that this showing is insufficient, for two reasons: (1) That the license agreements included other patents for expanded sheet metal; and (2) that they were exclusive licensees. It is true other patents were included in these licenses. It is also true that they were exclusive licensees, in the sense that each licensee had the exclusive right to manufacture, sell, and use within the territory set forth in his license agreement. The master, however, finds that only one patent was used at any one time in expanding any sheet metal product; that the Golding and Durkee process, much used prior to complainant's invention, and during the early period of these licenses, went gradually out of use; that the licensee, whether he used one process or the other, paid uniformly the full license fee upon all the product produced by either process, and particularly by the process infringed by the defendant; that no two patents were used and available, or intended for use, concurrently in producing any part of the product; that as the earlier patents expired, leaving only complainant's patent in force, the same royalty was maintained and continued in force. In

point of fact, the patent for the Golding and Durkee process expired in 1902. It was the only other process used in expanding sheet metal. The rate of royalty found by the master was continued and paid thereafter, and during the period of infringement, when complainant's patent alone was the only unexpired patent. In view of these facts, the master is of opinion that no other consideration, except the right to use the patented process, entered into the payment or agreement to pay, at least since 1902, the license or royalty fee found by him.

These facts as found are not challenged. The inference therefrom that a fixed, uniform royalty is sufficiently shown to make it a basis for determining complainant's damages is, however, challenged by defendant's first 7 exceptions. I am of opinion that the master's conclusions are correct and should be sustained.

Counsel for defendant cite in support of their contention the following: Moffitt v. Cavanagh (C. C.) 27 Fed. 511; Colgate v. Western Mfg. Co. (C. C.) 28 Fed. 146; Bell v. United States Stamping Co. (C. C.) 32 Fed. 549–551; Hunt Bros. Fruit Packing Co. v. Cassiday, 53 Fed. 257, 3 C. C. A. 525; American Sulphite Pulp Co. v. De Grasse Paper Co., 193 Fed. 653, 113 C. C. A. 521. These authorities, it is said, hold that, when other patents are included, and when the licenses are exclusive they are not a just measure of the right acquired or taken by a wrongful infringer; in other words, that different things are being valued, and one is not the proper measure of the value of the other. Manifestly the licensee's payment should be made for a right substantially similar to that which the infringer wrongfully appropriated; otherwise, one cannot be said to be the fair market value of the other. A substantial similarity or equivalency between that for which the licensees were paying and that which the defendant appropriated does, however, appear on the facts as found. The payments of complainant's licensees were made for the right to use complainant's process in expanding sheet metal. This is precisely what the defendant wrongfully appropriated. It is true that the royalty payments were made under agreements which purported to give an exclusive right in a limited territory, but the exclusive force and effect of this right is, for practical purposes, much less than is contended. Keeler v. Standard Folding Bed Co., 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848. Defendant appropriated and exercised a right to manufacture, use, and sell equal to any other licensee; indeed, as is justly observed by the master, it exercised the right of selling throughout the entire United States. And it is also true, as observed by the master, neither defendant nor any one else ever did or could have acquired a license at a lower rate. On these facts, the royalties paid by complainant's licensees are to be taken as the correct measure of complainant's damages for defendant's wrongful infringement. These facts satisfy the settled rule under which a fixed and uniform royalty is made the measure of value of the patentee's right which defendant has wrongfully taken. Walker on Patents (5th Ed.) §§ 556–562. Nor is the royalty or license fee to be regarded as wanting in uniformity because it was higher in the early days, and later reduced to the basis adopted by the master. The fee had reached this

reduced basis before defendant began to infringe, and it was not reduced during the period of the infringement. In American Sulphite Pulp Co. v. De Grasse Paper Co., supra, it was held, on somewhat similar facts, that the patentee is entitled to recover damages based upon the lowest rate of license fee charged and collected at the time of the infringement, and, with a stronger reason, the lowest license fee at the time of defendant's infringement should be taken as that measure, when it remains the prevailing rate during the period of infringement.

Moreover, the master's finding of damages should, in my opinion, be sustained, even if this proof of an established royalty is, in some respects, insufficient to satisfy legal requirements. Certainly on these facts the rule of a reasonable royalty or general damages justifies an award of this sum. See United States Frumentum Co. v. Lauhoff, 216 Fed. 610, 617, 132 C. C. A. 614; Dowagiac Mfg. Co. v. Minnesota Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398.

Complainant's seventh exception and defendant's first 7 exceptions will therefore be overruled. Complainant's request to treble or increase the damages as found will be denied. I shall now proceed to a consideration of complainant's and defendant's exceptions to the master's finding that defendant's profits for the wrongful infringement are $61,867.81.

No exception is taken to the finding of the master as to the quantity of metal expanded by the use of the infringing process, nor as to the gross receipts of the defendant from its sale of the product. Complainant excepts, however, to a credit item allowed by the master of $90,417.66 for alleged expenses or losses of marketing expanded sheet metal in branch offices (exceptions 1 and 2, master's printed report, p. 28); also because the master allowed a credit item of $16,569.90 for interest on bills payable, instead of $9,113.11 (exception 4); also because the master allowed a credit item of $18,427.34 for depreciation, and an item of $1,032.91 for miscellaneous expenses.

On this hearing, the exceptions as to the two items last mentioned are not pressed (Complainant's Brief, p. 7). The fourth exception, relating to interest on bills payable, it is conceded should be overruled unless the item of $90,417.66 is disallowed (Complainant's Brief, p. 75). Complainant's exceptions to the master's report of profits is therefore reduced to the single item of $90,417.66, alleged expense for marketing product in branch offices.

Defendant has taken 14 exceptions to the master's report (pages 66–78). These exceptions present, however, only two questions for consideration: (1) The refusal of the master to allow an item of $33,684.68, interest on capital invested, for which credit was claimed; and (2) the allowance by the master of the entire profits made by defendant from the sale of the infringing product—it being contended that he should have allowed the sum of 60 cents a ton only, aggregating $4,784.40, which, it is said, is the profit or advantage obtained by using the infringing process over other processes open and available for use by defendant. These several exceptions will be briefly considered in their order.

[4] 1. This item of $90,417.66, alleged expense of marketing product through branch offices, is discussed in the master's report at pages 18–20. His finding of facts is in part challenged. It is said that there is no sufficient evidence to show that the defendant agreed with Messrs. Garretson and Ramsey, or with the Expanded Metal Fireproofing Company, in which name some of the business was done, that defendant would bear the losses of these branch offices. An examination of the evidence shows that the testimony in this respect is somewhat weak. In all other respects the master's finding of facts is, in my opinion, adequately supported. These branch offices, it appears, were established primarily to promote the sale of expanded sheet metal in reinforced concrete construction; that the defendant advanced to and expended on account of these branch offices large sums of money; that these sums were carried upon its books in a separate account and credited with all receipts from these offices; that they were treated and considered by defendant as an expense of the expanded sheet metal branch of its business.

Defendant's reasons for establishing these branch offices and making these expenditures were, in brief, that the use of expanded sheet metal in reinforced concrete construction was then in an experimental stage; that other materials were in existence and used in competition with it; that architects and engineers were doubtful as to the strength and efficiency of expanded sheet metal; that, in order to introduce it, guaranties of its strength and efficiency were necessary; that architects and engineers would not accept a guaranty from defendant for expanded sheet metal alone, but required guaranties covering the completed structure; that, in view of this situation and these difficulties, these branch offices were established for the purpose of taking construction contracts and engaging in the construction of buildings from time to time, in which expanded sheet metal was used for reinforcing purposes. All this was done for the purpose of promoting and introducing expanded sheet metal and overcoming objections made to its use, and the item in question represented the excess of expenditures over receipts in that department of defendant's business.

These, in substance, are the main facts found by the master. He is of opinion that these expenditures were legitimate, stand on the same basis as advertising, employing salesmen, erection of sample buildings, are to be regarded as a reasonable expense incident to the sale by defendant of the infringing product, and should be deducted from its gross receipts.

In this conclusion of the master I concur. It may be true that there was no distinct agreement between defendant and the managers of these branch offices that defendant should bear the loss and the managers take the entire profits. It is undoubtedly true that, at the time and prior to the hearing before the master, this item was regarded by defendant in the light of bad debts and actual losses in business. In fact, there is testimony that the Expanded Metal Fireproofing Company, in which name Mr. Ramsey conducted a branch office, had become a bankrupt early in 1907 (see Pitkin's testimony, Printed Record,

p. 226). This testimony was presented and claim made by defendant for this item as early as 1910. Complainant employed Mr. Ernst, an able public accountant, who spent several months examining defendant's books. After this examination he testified at length, criticizing in other respects the statements submitted by defendant, and, as a result of his criticisms, some corrections were made therein. He did not, however, criticize this item. Complainant's silence and acquiescence during this period is not consistent with its vigorous contention, made two years later, that these expenditures are wholly unwarranted and groundless.

It may be true, as is now contended, that defendant's business methods were unwise; that, being an Ohio corporation, it had no right to guarantee construction contracts made by a branch office in which its own capital was not invested, or that its expenditures and losses on account thereof were unreasonable and unnecessarily large. The fact remains that such expenditures were made and such losses were incurred, and it is immaterial whether they were made or incurred under a contract to bear the losses, or whether the money was expended or advanced to these branch offices and thereby lost. Defendant is required to account only for the profits actually made by its use of the infringing process. Complainant is not entitled to recover profits which the infringer might or should have made, had it conducted its business in a different manner. Criticism of this item reduces itself to an assertion that defendant's action was illegal; that it was unwise and unnecessary; that, had it acted otherwise, its profits would have been larger, and its losses would have been less; but this does not show that defendant made greater profits than the master has found, or that defendant did not make or sustain these expenditures or losses in a good-faith effort to promote and develop the use and sale of the infringing product in building construction.

For these reasons complainant's exceptions will be overruled.

[5] 2. I am of opinion that the master did not err in refusing to allow defendant credit for the item of $33,684.68, interest on capital invested. The reasons for disallowing this item are so well stated by the master (pages 23–26) that I deem it necessary only to say that I concur as well in his reasoning as in his conclusion. The Circuit Court of Appeals of this Circuit in Kissinger-Ison Co. v. Bradford Belting Co., 123 Fed. 91–94, 59 C. C. A. 221, applies the rule of Rubber Co. v. Goodyear, 9 Wall. 789, 19 L. Ed. 566, and Seabury v. Am Ende, 152 U. S. 561, 14 Sup. Ct. 683, 38 L. Ed. 553, in the same way as the master. In my opinion, the reasoning of Mr. Justice Swayne in Rubber Co. v. Goodyear, supra, admits of no other construction. The Court of Appeals of the Seventh Circuit, it is true, in Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 C. C. A. 486, allows an item of this nature, interpreting these same cases as authority for so doing. This it seems to me is wrong, and in conflict with Kissinger-Ison Co. v. Bradford Belting Co., supra. Supporting the master's conclusion, also, is the reasoning of Callaghan v. Myers, 128 U. S. 663, 9 Sup. Ct. 177, 32 L. Ed. 547, in which an allowance from earnings to members of a partnership, who had performed services for the firm

in connection with its business, was disallowed on the ground that such payments were in part to be regarded as profits and not for services.

[6] 3. Defendant's further contention that the master should not have allowed its entire profit on the product made by the infringing process, but only the gains or advantages of its use over the Golding and Durkee process, sometimes called the "old" process, or the use of the "corrugated" process, presents a problem not easy to solve. The process covered by complainant's patent was used exclusively in producing the products; no other patent or process was used. Upon these facts, nothing else appearing, the infringer is liable for the entire profits. This, we understand, is not denied by defendant.

In defendant's brief, however, it is urged that complainant's patent was for a process, and not for a product; that its patent did not cover expanded sheet metal as a product, but only a process for making it; and that, therefore, the defendant was at liberty to make expanded sheet metal by any process which did not infringe complainant's process. This, of course, is true. In this situation it is said the correct measure of damages is the gains or advantages which the infringer derived from using the patented process in comparison with the use of any other means or process open to the public and adequate to enable him to obtain an equally beneficial result. This is undoubtedly the law.

The question is: Which rule should, on the facts here present, be adopted and applied? Upon an examination of the cases cited, and a weighing of all considerations making for and against defendant's position, I have reached the conclusion that the master's finding should be sustained. The master states (pages 11–18) his findings of fact and his reasons for his conclusions, to which reference is made.

Defendant asserts that two other processes were open to it—one being the "old" process, covered by the Golding and Durkee patent, which had expired in 1902; and the other, called in the record the "corrugated" process, developed or invented by H. E. White, defendant's engineer. The Golding and Durkee process was open to defendant, but the master finds that it was not adequate to enable defendant to obtain an equally beneficial result. Defendant evidently was of the same opinion; otherwise, it would undoubtedly have used it. The master finds that the product produced by the Golding and Durkee process was not the same product as that produced by the infringing process; in other words, that the product of the infringing process could not have been made and produced by the Golding and Durkee process. The difference in the two products is set forth so fully in the master's report and in Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, that I deem it unnecessary to restate it. It is sufficient to say that I concur in the master's conclusion.

The master's conclusion in this respect should also be sustained for a further reason. No evidence was offered showing the cost of producing expanded sheet metal by the Golding and Durkee process. This the defendant concedes (see Defendant's Brief, p. 56). Prima facie complainant had made a showing which entitled it to recover all the profits on the infringing product; the burden was upon the defendant to show the existence of another process, and the difference between the cost of

producing the product by it and by the infringing process. For this reason, also, the master's finding should be sustained. Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222; Schmertz Wire Glass Co. v. Western Glass Co. (D. C.) 203 Fed. 1006; Western Glass Co. v. Schmertz Wire Glass Co., 226 Fed. 730, 141 C. C. A. 486.

The "corrugated" process was devised by H. E. White, an engineer in the employ of the defendant, late in 1903 or early in 1904. At that time the defendant was preparing to engage in the business of making expanded sheet metal, and White testifies that he devised this process for the purpose of avoiding infringement. At that time the Golding and Durkee patent had expired, and the only other process in existence and subject to infringement was complainant's process. In 1904 the "corrugated" process was used only in an experimental way, evidently with a view to perfecting it. In 1905 a machine was set up and used for expanding sheet metal by this process. It was, however, used only for two or three weeks, and only 8 or 10 tons of metal expanded by it. In 1906 a few sheets only were expanded. In October, 1909, after the injunction was awarded in this case, it was put into use by defendant, and continuously used until January, 1912, during which period 2,207 tons of metal were expanded. In January, 1912, after complainant's patent had expired, defendant then shifted back to complainant's process, and thereafter discontinued and abandoned the use of the "corrugated" process.

The master finds that the product produced by the "'corrugated" process is essentially different, and that the infringing product could not have been produced by it. This essential difference, he finds, is that the strands of the meshes are stretched in the complainant's process, and that the strands in the "corrugated" process are not stretched, but merely bent. This finding is much criticized. It is said that the stretching of strands was present in the Golding and Durkee process; that it was held not to be a patentable feature of any process by the United States Supreme Court, in its opinion in Expanded Metal Company v. Bradford, supra; that stretching was a disadvantage, and not a benefit, and was, in fact, obviated by annealing expanded sheet metal thus made before offering it for sale. Undoubtedly the strands are stretched in all three processes; but what the master had in mind, no doubt, was the stretching in an elongated manner, so as to keep the expanded metal as produced equal in length to the sheet from which it was being cut. This was a manifest advance of complainant's process over the Golding and Durkee process. On behalf of defendant, it is further said that expanded sheet metal, made by the "corrugated" process, is indistinguishable from that made by complainant's process; that only an expert could tell the difference, and he only with the aid of a microscope; and that, in fact, defendant's product made by this process went into the same stock with its other product, and was sold and accepted by customers indiscriminately.

[7] If my decision were to rest on the differences between the two products, or the question of whether or not the corrugated process was adequate to produce the same product as is produced by complainant's

process, it would be difficult to sustain the master's conclusion. Other considerations, however, are present, which bring me to the same conclusion as the master. I am of opinion that a process yet in the experimental stage, and developed for the purpose only of avoiding infringement, made at or after the appropriation by the infringer of the other's process, and covered by a patent to itself—that is, used experimentally and occasionally only during the infringing period, or only under compulsion of an injunction, and abandoned as soon as the infringer is at liberty to change back—does not make a case of another existing process, or means, open to the public and to the defendant, or constitute a basis of comparison in determining the gains and advantages from the use of the infringing process over other processes.

In Walker on Patents (5th Ed.) § 725, it is said that the other article or process to be used as a basis of comparison must have been known or in existence prior to the date of the patent which is infringed; in other words, that the standard of comparison must have been known in the art prior to the complainant's invention. In Turrill v. Illinois Central R. R. Co. (C. C.) 20 Fed. 912, it is explicitly stated that the process or article to be used as a basis for comparison must have been open to the public at the date of the patent which is infringed. Many excellent reasons are advanced in the opinion in support of this conclusion. The judgment in this case was affirmed by the United States Supreme Court in Illinois Central R. R. Co. v. Turrill, 110 U. S. 502, 4 Sup. Ct. 5, 28 L. Ed. 154. In Sessions v. Romadka, 145 U. S. 29, 45, 12 Sup. Ct. 799, 803, (36 L. Ed. 609), Mr. Justice Brown says:

"This court has, however, repeatedly held that in estimating damages in the absence of a royalty it is proper to consider the savings of the defendant in the use of the patented device over what was known and in general use for the same purpose anterior to the date of the patent."

An examination of McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 464, 465, 12 Sup. Ct. 40, 35 L. Ed. 817, convinces me that it is not in conflict with this statement of the law.

Defendant contends that any article or process available to an infringing defendant at any time may be used as a basis of comparison. Strong reasons are advanced why the date of complainant's patent should not be taken in determining the process open or available to the public or defendant. Whether these reasons should prevail over the reasoning of the learned judge in Turrill v. Illinois Central R. R. Co., supra, I deem it unnecessary to express an opinion. I am of opinion, however, from an examination of all the cases cited, that the other available process must have been in existence and open to public use in its completed form at the time the infringer appropriates a patented process; he should not be permitted to avail himself of inventions developed by himself or others after he has appropriated another's property for the purpose of mitigating or avoiding the damage thus inflicted on another.

Much reliance is placed by defendant on Columbia Wire Co. v. Kokomo Steel & Wire Co. (7 C. C. A.) 194 Fed. 108, 114 C. C. A. 186. This case, it is said, holds that another process developed after the

wrongful appropriation and during the period of infringement, may be used as a standard of comparison. I do not so understand it, nor was that question involved in the case. The article used as a basis was in existence at the beginning of the infringement. In the opinion it is said, and the master's finding was, that an infringer is only to pay for the advantages of the patented machine over machines that were open to his use at the time of the unlawful appropriation, and not to pay for the advantages of the patented machine over machines that were open at the date of the patent. The question of whether the infringer would be permitted to avail himself of developments in the art subsequent to his unlawful appropriation as a defense in an accounting is expressly stated not to be involved. The reasoning of the opinion (194 Fed. 110, 114 C. C. A. 188) induces the belief that, if the latter question had been before the court, the holding would have been that the infringer is entitled to no more than had been found by the master, namely, that machines open at the time of the unlawful appropriation could be made available as a basis of comparison.

This understanding of the case is supported by the later decision in the same circuit in Schmertz Wire Glass Co. v. Western Glass Co. (D. C.) 203 Fed. 1006, opinion by Sanborn, District Judge, affirmed on appeal, 226 Fed. 730, 141 C. C. A. 486. Note especially middle paragraph, 203 Fed. 1009; second paragraph, 226 Fed. 736, 737, 141 C. C. A. 492, 493. All of defendant's exceptions will therefore be overruled.

[8] Complainant's remaining exception (3) is that the master erred in overruling its motion to reopen the proofs to permit further examination of defendant's books and call witnesses on the question of whether credit should be given for the item of $90,417.66, or any part thereof, alleged expense of branch offices. It also has submitted on this hearing a motion, supported by affidavits and exhibits, asking the same relief.

The hearing before the master was begun in September, 1909. All the testimony was completed May 22, 1913. Complainant had been given full access to defendant's books and records. After defendant had submitted its statements, as required, and its officers had been fully examined and cross-examined with respect thereto, complainant caused a competent expert accountant to make an examination at length of defendant's books and records. Very few errors or inaccuracies were found by him in the statements previously submitted by the defendant, and no criticism was made by him of this item or any part of it.

The case was argued, and briefs filed and submitted to the master for decision, June 24, 1914. The master's draft report was sent to counsel in February, 1915. The final hearing before the master on the draft report was had June 29, 1915. It was at this hearing that the complainant first submitted its motion and made its request to reopen the case. The request then made was that leave be given for a further examination of defendant's books, and to call further witnesses, if necessary, upon the allowability of the item of $90,417.66 for expenses of marketing produce in branch offices. Manifestly the master did not abuse

his discretion in refusing this request, made at this late date. This exception will therefore be overruled.

[9] Complainant's motion, however, involves different considerations. It represents that all or some part of this item of $90,417.66 has been recovered or reimbursed to the defendant since the making up by the master of his report, or, at least, since the taking of the testimony before the master. If this be true, it would be manifestly unjust to permit the defendant to retain it, for this item was deducted from the profits made by the defendant only on the hypothesis that it was a loss sustained in the conduct of these branch offices. If subsequent events have proved that all or a part of it was not a loss, but, on the contrary, all or some part of this item has been collected from the managers of the branch offices, or from persons owing the branch offices, the money thus collected is, in equity and good conscience, the money of the complainant; in fact, an action for money had and received by the defendant for the complainant's use might, on these facts, be maintained at common law. Certainly in a court of equity the defendant will be regarded, as to such collections, if any, as a trustee for the complainant. On this hearing defendant agreed to this contention, denying only that any reimbursements had been made to it. (Mr. Neave's Reply Brief, p. 7, paragraph beginning "Pages 44–75.") The affidavits and exhibits accompanying this motion make it probable that a part of these losses have since been collected back by defendant. Some of the collections apparently cover operations of a date subsequent to the period of infringement. In view, therefore, of complainant's contention, and the prima facie showing made by it, I am of opinion that a further inquiry should be made in this cause on this subject. The report should not be set aside or reopened, or a further inquiry made as to any matters determined thereby, for as to all such matters complainant has had its day in court. The inquiry to be made will be strictly limited to an ascertainment as to whether or not the defendant has received or collected from any source all or any part of the item of $90,417.66, for which it obtained credit on profits derived from the infringing process as losses incurred in connection with its branch offices. This course is in accord with the practice pursued in the following cases: United States Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 C. C. A. 614; Westinghouse Mfg. Co. v. Wagner Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222; Dowagiac Mfg. Co. v. Minnesota Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398.

A decree will be entered in conformity with the conclusions herein expressed.

NATIONAL BANK OF BAKERSFIELD et al. v. MOORE (two cases).*

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 2957.

1. CHATTEL MORTGAGES ⟸186—VALIDITY—NOTICE.
Under Civ. Code Cal. § 2955, declaring that mortgages may be made on all growing crops and upon any and all kinds of personal property except the stock in trade of a merchant, a chattel mortgage on a merchant's stock in trade, though recorded, imports no constructive notice to the world, and though valid between the parties is invalid as to creditors of the mortgagor and subsequent purchasers for value in good faith.

2. CHATTEL MORTGAGES ⟸191—POSSESSION—MODE OF TAKING POSSESSION.
In view of Civ. Code Cal. § 3440, declaring that every transfer of personal property and every lien thereon other than a mortgage when allowed by law, if made by a person having at the time the possession and control of the property and not accompanied by an immediate delivery and followed by an actual and continued change of possession, is conclusively presumed to be fraudulent and therefore void, a bank which, after receiving chattel mortgages on a merchant's stock of goods for some time withheld them from record and then recorded them, cannot, where even after recordation the business was continued in the name of the merchant, be deemed to have taken possession of the stock, though it was arranged that one of the merchant's employés should keep a record of all property sold or brought in.

3. CHATTEL MORTGAGES ⟸196—VALIDITY—WITHHOLDING FROM RECORD.
Under Civ. Code Cal. § 2957, declaring that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless it is made in good faith and without design to hinder, delay, or defraud creditors, and unless it is recorded as a grant of real property, the recordation provision was made to excuse the want of immediate delivery, and where a bank for a considerable period withheld chattel mortgages from record, not placing them on record until it discovered that the mortgagor was in difficulties, such chattel mortgages are invalid as to creditors of the mortgagor, regardless of whether they became creditors before or after its execution.

4. BANKRUPTCY ⟸184(2)—INVALID TRANSFERS—AUTHORITY OF TRUSTEES.
Under Bankruptcy Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. 1916, § 9631), declaring that the trustee shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the trustee in bankruptcy must be deemed vested with the status of a lien creditor, though there were no such creditors at the time the petition in bankruptcy was filed, and hence is entitled to attack chattel mortgages not recorded by the mortgagee until discovery that the debtor was in failing circumstances.

5. BANKRUPTCY ⟸184(2)—INVALID TRANSFERS—AUTHORITY OF TRUSTEES.
Under Bankruptcy Act July 1, 1898, § 60b (Comp. St. 1916, § 9644), providing that, if at the time of recording a transfer, if by law recordation is required, and being within four months before the petition in bankruptcy, or after the filing thereof, and before adjudication, the bankrupt be insolvent and the transfer operates as a preference, and the person receiving it shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the trustee, a trustee in bankruptcy as the representative of general creditors may attack as preferential chattel mortgages given by the bankrupt, where under the state law they were required to be recorded,

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

*Rehearing denied February 11, 1918.

and they were not recorded until within four months of the filing of the petition.

6. BANKRUPTCY ⊂⊃303(3)—PREFERENCES—EVIDENCE—SUFFICIENCY.
Where the trustee in bankruptcy attacked chattel mortgages as preferential, evidence *held* to show that before their recordation, which was essential to validity, the mortgagee was charged with notice of facts at least sufficient to put him on inquiry which would have disclosed that he was obtaining a preference.

7. BANKRUPTCY ⊂⊃188(3)—TITLE OF TRUSTEE—STATUTE.
Under Bankruptcy Act July 1, 1898, §§ 67d, 67e (Comp. St. 1916, § 9651), declaring that liens given or accepted in good faith and not in contemplation of or in fraud of the act which have been recorded according to law, if record be necessary, shall not be affected by the act, but that all conveyances in fraud of creditors, etc., shall be null and void, a creditor, who withheld chattel mortgages from record until he discovered that the debtor was in failing circumstances cannot, having acted deliberately and the statute requiring the recordation of such mortgages as a condition to their validity, assert an equitable lien on the property.

8. EQUITY ⊂⊃267—PLEADING—AMENDMENT.
The allowance of an amendment to a bill is a question within the discretion of the court.

9. BANKRUPTCY ⊂⊃303(3)—PREFERENCES—EVIDENCE.
In a suit by a trustee in bankruptcy to set aside as preferential a deed of trust executed by a bankrupt, evidence *held* sufficient to show that the trust deed was preferential.

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

Suits by William H. Moore, Jr., as trustee of the estate of Alfred W. Bannister, a bankrupt, against the National Bank of Bakersfield, a corporation organized and existing under and by virtue of the laws of the United States, and others. From decrees for complainant, defendants appeal. Affirmed.

The appeals herein embrace two cases which were tried together and may be conveniently disposed of in one opinion. The suits were brought by Moore, as trustee in bankruptcy of the estate of Bannister, bankrupt, against the defendant bank to set aside a number of chattel mortgages and a deed of trust made by Bannister for the benefit of the bank. The District Court decreed that the several conveyances were of no effect, and that preferences in favor of the bank had been created. The bank appeals. The first case is referred to as B–94, the second as A–32.

B–94.

The evidence tends to show these facts: Bannister was in the business of buying and selling hay and grain at and about Bakersfield, Cal., with a warehouse in Bakersfield and one at Wyble Siding, near Bakersfield. In November, 1914, Bannister commenced to do business with the defendant bank, and he and the cashier, Russell, had an understanding whereby Bannister could borrow money from the bank as he might need it, and that the bank would take chattel mortgages on personal property belonging to Bannister, and that the mortgages would be held without recording, unless in the opinion of the bank some necessity should arise which would make it seem proper for the bank to put the instruments on record. Such an arrangement had formerly existed between Bannister and the bank with which Mr. Russell had formerly been connected. Bannister borrowed $2,500 in November, 1914; $1,000 on December 1, 1914; $1,500 December 9, 1914; $1,500 on December 21, 1914; $1,500 on January 4, 1915; and $1,000 on January 5, 1915. Each of these

loans was secured by a chattel mortgage upon the hay or hay and grain in the mortgagor's warehouses, but none of the mortgages was ever recorded. On December 21, 1914, as additional security for the note for $1,500 made December 21, 1914, Bannister gave a chattel mortgage upon a corrugated iron warehouse at Wyble Siding, and on January 5, 1915, to secure the loan for $1,000 made on that day, he made a mortgage upon his automobile. On January 12, 1915, Bannister borrowed $1,500 additional from the bank and gave a mortgage upon 200 tons of grain and hay in his warehouse at Wyble Siding, and on the same day, to secure all the notes that he had previously given, he made a blanket mortgage on all the hay and grain in his two warehouses. This blanket mortgage covered practically all of the stock in trade that Bannister then had, and all that was remaining of the original property which had been covered by the previously given unrecorded chattel mortgages. The two mortgages given January 12, 1915, and the two mortgages covering the Stutz automobile and the corrugated iron warehouse were recorded on the afternoon of April 23, 1915. The bankrupt continued to sell goods covered by the chattel mortgages, and replaced the same by new goods purchased, and sales were carried on as in the ordinary course of business, with the result that there was confusion of such mortgaged goods as were remaining with new goods bought and substituted for the goods sold from the mortgaged stock. This course of business was known to the bank between January 12th and April 23, 1915, but the bank made no objection, and creditors other than the bank did not know of the existence of the chattel mortgages. On April 21, 1915, bankrupt's home in Los Angeles was attached. The bank heard of his having financial trouble, and on April 23d put its mortgages on record.

Petition in bankruptcy was filed May 5, 1915. Subsequent to April 23, 1915, the date of the recording of the mortgages, the bank received $9,881.13, of which $500 was paid May 4th, and $500 on May 5th, and the balance on May 6th, and afterwards. The entire $9,881.13 was received by the bank from the proceeds of the sale of a portion of mortgaged hay and grain, and other hay and grain commingled with the mortgaged stock. The proceeds were placed to bankrupt's credit and checks were given by him to the bank to cover the amounts.

A–32.

In this suit the court declared the deed of trust to be null and void. The instrument was dated April 8, 1915, executed by bankrupt, and conveyed to Russell and another, as trustees for the National Bank of Bakersfield, defendant herein, certain real property in Kern county, Cal., and was made to protect loans of $10,000 made by the bank to Bannister. The deed was recorded April 23d of the same day that the chattel mortgages referred to in the preceding case were put on record. The evidence shows that Bannister was a large stockholder in the Los Angeles Hay Storage Company, a corporation. The corporation was embarrassed, and about April 7th it was suggested to Bannister that the corporation should go into bankruptcy. On April 8th Bannister told the defendant bank of the financial troubles of the hay company, and the bank knew that Bannister was a large stockholder in that corporation.

Wm. J. Hunsaker, E. W. Britt, and G. Harold Janeway, all of Los Angeles, Cal., for appellants.

Lucius K. Chase and Ernest U. Schroeter, both of Los Angeles, Cal., for appellee.

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

HUNT, Circuit Judge (after stating the facts as above). Appellant's position as presented by the assignment of errors is that there is no showing of the amount of proved claims; that the evidence fails to show that when the mortgages and deed of trust were made or put on

record the bank had reasonable cause to believe that the transfers would operate to effect preferences; that the bank had an equitable lien upon the property covered by the chattel mortgages arising out of the fact that it held prior mortgages securing all the notes except the one covered by the blanket mortgage.

[1] Inasmuch as the hay and grain in the warehouses constituted the stock in trade of Bannister, a hay and grain merchant, the mortgages covering such property were made without authority of the law of California. Section 2955 of the Civil Code of California provides:

"Mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except the following: * * * 3. The stock in trade of a merchant."

[2] The stock in trade, the hay and grain, not being lawfully subject to mortgage, the recording of such a mortgage would impart no constructive notice to the world. This was the holding of the Supreme Court of California in Bank of Ukiah v. Moore, 106 Cal. 679, 39 Pac. 1071. As between the parties and as against all others except creditors of the mortgagor, and subsequent purchasers for value in good faith, such a mortgage could be upheld. Perkins v. Maier & Zobelein Brewing Co., 133 Cal. 498, 65 Pac. 1030. But we are here concerned with the interests of creditors of the mortgagor. It is said that the bank took possession of the property on April 23d, when the mortgages were put on record. Upon the question of possession the cashier testified that on April 23d, he arranged with Mrs. Fitzpatrick, who had been and was then employed by Bannister, to come to the warehouse to keep a record of everything that went in and out; that Bannister knew she was there; that she reported daily, but the practice was to hold some cash to keep the business going; that Bannister assisted in sales of property at the warehouse and paid by check; that after April 24th the bank credited the receipts to Bannister's account to straighten out his account and as a matter of bookkeeping; that shortly before the 24th the chattels covered by the mortgages were about as they were afterwards; that sales made after April 24th were reported to Mrs. Fitzpatrick, and in certain instances shipped in the name of the bank. Bannister himself testified that he commenced to work at the warehouse on April 24th, was in possession thereof until May 5th, and carried on the business as it had previously been conducted, and with the same employés; that no signs were changed; that he shipped goods in his name after the 24th of April, and that the first shipment made by the bank after the recording of the mortgages was on May 6, 1915; that he paid to the bank $8,881.13 from the sale of the mortgaged hay and grain.

We are inclined to believe that where possession is relied upon to sustain a transfer which will be held binding as against creditors, it should be of a character more open and visible than is claimed by the bank in this instance. Center v. Kelton, 20 Cal. App. 611, 129 Pac. 960. Section 3440 of the Civil Code of California provides that:

"Every transfer of personal property * * * and every lien thereon, other than a mortgage, when allowed by law * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed

by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer."

There really was no immediate delivery and no actual and continued change of the possession of the chattels mortgaged. In Center v. Kelton, supra, the court referred to many California decisions applying the principle of section 3440 quoted above, and, after writing of the object of the statute as requiring notice to the world of the transfer of personal property in order that creditors may be justly protected, said:

"It may be said, also, that the statute does not impose any great hardship upon the parties in case of a transfer made in good faith. Ordinarily, there should be little difficulty in effecting an 'immediate delivery' and an 'actual and continuous change of possession.' But, however honest the sale may be, and whatever hardship may be inflicted upon the vendee, this furnishes no sufficient reason for disregarding the plain provisions of the statute or setting at naught a wholesome and salutary rule for the promotion of personal honesty and commercial security."

Let us turn now to another viewpoint.

[3] The record shows that between the time of the execution and the recording of the mortgages the bankrupt incurred a number of debts. These debts were never secured, and were contracted while the mortgages were held by the bank, with no notice whatever to creditors other than the bank. Under section 2957 of the Civil Code of California, a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless it is made in good faith and without design to hinder, delay, or defraud creditors, and unless it is recorded as grant of real property. In Ruggles v. Cannedy, 127 Cal. 291, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 647, the Supreme Court of the state held that a chattel mortgage withheld from record beyond a reasonable time necessary for its being put on record is void as against creditors. Debts were there contracted between the execution and recording of the mortgages. The reasoning of the court was that recording a chattel mortgage is meant to be a substitute for "immediate delivery" and "change of possession," and that the law contemplates immediate recording or recording within a reasonable time. The court said:

"A mortgage without immediate delivery would create a secret lien, admittedly void against creditors. Is a mortgage without immediate recordation any less a secret lien, or any less an evil to be avoided? Prior to the amendment to section 2955 of the Civil Code, * * * if a person had desired to borrow money upon his farming implements he would have been compelled to transfer possession immediately under section 3440 of the Civil Code. By the amendment these implements are placed in the list of those upon which statutory chattel mortgages may be given. * * * We conclude upon this question that our law requires immediate recordation in lieu of immediate delivery, and that when such recordation is not effected the mortgage 'is void as against creditors of the mortgagor.' The penalty for a failure to record promptly in the case of a mortgage is identical with the penalty under section 3440 for a failure to delivery promptly in the case of a sale. In either case

the failure results in a legal fraud against those whom the statute enumerates and protects. Section 3440 excepts a 'mortgage when allowed by law' from the requirement of immediate delivery, because, and only because, the recordation takes the place of delivery. It certainly cannot be said that it was the design of the Legislature to exclude the articles of personal property affected by such mortgages from the operation of the laws forbidding secret liens."

The court, through Judge Henshaw, continuing its learned discussion of the policy of the recording laws of the state, said that it had been decided:

"(1) That neither in the case of a sale nor of a mortgage would a delayed delivery validate the contract against creditors; and (2) that it was not necessary that these creditors should have acquired rights by judgment or attachment before delivery of the chattel sold or mortgaged to warrant their setting aside the transfer. Our recordation laws, admittedly being but a substitute for such immediate delivery, certainly have not changed the principles here announced, and should not be said to have changed the rule which elsewhere finds abundant support."

This case was approved in Hopper v. Keys, 152 Cal. 488, 92 Pac. 1019. The court defined creditors as those to whom, from time to time, the debtor became obligated. There too, it was contended that, even though an unrecorded mortgage is void in the instance of creditors, still only such creditors could take advantage of the law as by judgment and levy had acquired a lien upon the property before recordation. But the court held that under the statute of the state, immediate recordation being exacted, or immediate delivery being required, the result of a failure to record was to render the contract absolutely void as to creditors. In re Mission Fixture & Mantel Co. (D. C.) 180 Fed. 263. In this last case, where the statute of the state of Washington requiring the recordation of chattel mortgages was considered, Judge Donworth said that a creditor within the contemplation of the statute was one to whom the debtor was obligated, even though the inception of the obligation antedated the making of the chattel mortgage. And in Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073, it was held that the statute in using the word "creditors" did not mean to distinguish between a creditor who became such before one who became a creditor after the execution of the mortgage. See, also, Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533.

[4] The attitude of the trustee in bankruptcy under section 47a of the Bankruptcy Act as amended June 25, 1910, is next necessary to be inquired into. U. S. Comp. St. 1916, § 9631. In Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846, it was held by this court that the object of the amendment cited is to vest in the trustee for the interest of all creditors the potential rights and remedies of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. We there said:

"The trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt; but the amendment by opera-

tion of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings."

In Scandinavian-American Bank v. Sabin, 227 Fed. 581 (142 C. C. A. 211), Judge Morrow, writing for the court, said that:

"The trustee is not limited to such objections to a transaction between the bankrupt and a creditor as the bankrupt might have had, but he may make any objection that a creditor holding a lien might make."

The trustee in the interest of the general creditors may therefore contest any claim of lien that a judgment creditor might contest if bankruptcy had not intervened. In re Lane Lumber Co., 217 Fed. 550, 133 C. C. A. 402. In Re Pittsburg Big Muddy Coal Co., 215 Fed. 705, 132 C. C. A. 81, the Court of Appeals for the Seventh Circuit held that under the amendment the trustee could make such a contest whether there were or were not any such creditors when the petition in bankruptcy was filed, and regarded the trustee as having the status of a creditor holding a lien by legal or equitable process as of the time when the petition in bankruptcy is filed. And we hold accordingly. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275.

[5, 6] But if we could go no farther than to say that the mortgages are regarded as invalid as against creditors until recorded, but as having validity thereafter, still the appellants could not prevail. Section 60b of the Bankruptcy Act (Comp. St. 1916, § 9644) provides that, if at the time of recording a transfer, if by law recordation is required, and being within four months before the petition in bankruptcy, or after the filing thereof and before the adjudication, the bankrupt be insolvent, and the transfer then operates as a preference, and the person receiving it shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the trustee.

In Bunch v. Maloney, 233 Fed. 967, 147 C. C. A. 641, the Court of Appeals for the Eighth Circuit held that where there is a state statute providing that an unfiled or unrecorded transfer shall be void as to creditors, the trustee in bankruptcy, "as the representative of general creditors, may invoke the remedy of section 60b, regardless of the local construction of the statute making a procedural distinction between creditors with a lien and those without." We are of the opinion that the defendant bank cannot successfully contend that it did not have reasonable cause to believe in April, 1915, before the mortgages were recorded, that by recording and enforcing them a preference would be effected in its favor. It is not to be seriously questioned that bankrupt was insolvent in April, 1915. It is true that in his schedules he included assets in the amount of $59,157, but a single item of this, $17,492, a claim against the Los Angeles Hay Storage Company, had no value, and certain pieces of property were listed at valuations much in excess of their actual value. It also appears that his liabilities, placed at $46,756 did not include $9,200 of $10,500 due by him to the National Bank of Bakersfield, and did not include certain other obligations of his aggregating approximately $6,000. Mr. Russell had had occa-

sion to examine the books of bankrupt between January and April; he knew Bannister's house had been attached, and when he put the mortgages on record, after he learned that Bannister was in financial difficulties through the embarrassment of the Los Angeles Hay Storage Company, he intended, of course, to obtain an advantage for the bank. The circumstances were clearly such as put him upon inquiry. In re Dorr, 196 Fed. 292, 116 C. C. A. 112.

[7] The defendants' contention that the bank has an equitable lien is also without substantial merit. Not stopping to recite the facts again, it is enough to say that the bankrupt continued to carry on business by selling parts of the mortgaged goods, and out of the proceeds bought other goods of like character, and also to pay part of his debt to the bank, and to defray the expenses of his business. When he sold part of the grain and hay, undoubtedly he applied the receipts from the sales to the bank in order to reduce his debt to it; and when he bought new hay or grain, he seems to have put it in with that which had previously been mortgaged. To sustain the bank in a claim of equitable lien would be to allow the debt due to the bank to be decreased, and the security to be added to. But beyond this the bank is not in a position to claim an equitable lien, which can precede the title of the trustee, for notwithstanding the knowledge which its officers had of the situation it deliberately kept the existence of the mortgages secret, and refrained from putting them upon record. Sections 67d and 67e of the Bankruptcy Act (Comp. St. 1916, § 9651); Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789; Scandinavian-American Bank v. Sabin, supra; Fourth Street National Bank v. Millbourne Mills Co., Trustee, 172 Fed. 177, 96 C. C. A. 629, 30 L. R. A. (N. S.) 552.

[8] We find no error in the ruling of the court in allowing amendment to the original bill. The matter was one within the discretion of the court.

A–32.

[9] The principal question involved in this matter is whether the bank received a preference by receiving and recording the trust deed referred to, dated April 8 and recorded April 23, 1915. There was ample information conveyed to the bank to cause its officers to believe that the effect of the taking of the trust deed would be to create a preference in favor of the bank. Bannister was unquestionably insolvent when he made the deed, and under the conditions which existed the bank must be held to have had reasonable ground for believing that the taking of the trust deed would effect a preference in its favor.

In B–94 the decree, after holding the chattel mortgages to be void, and that payments of $1,000 made by Bannister to the bank between April 23 and May 5, 1915, were preferences, recited that, no moral turpitude on the part of the bank being found, it could file its unsecured general claim against the estate of Bannister, bankrupt, within 60 days after entry of final judgment for the amount unpaid upon the promissory notes referred to in the purported chattel mortgages. In A–32 the trust deed was decreed to be null and void, and the gran-

tees in the trust deed were directed to reconvey the property to the trustee of the bankrupt.

These decrees are affirmed.

KETTERER v. ARMOUR & CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 11.

1. TORTS ⟸8—INVASION OF PERSONAL RIGHTS—LIABILITY—"PERSONAL SECURITY."

   One of the absolute rights which every person possesses is that of personal security, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation, and every wrongful invasion of such right of personal security gives rise to a liability in tort for the damage done.

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

2. FOOD ⟸25—SALES—WARRANTIES.

   While at common law, if there is no express warranty of the quality of the goods sold and no fraud, the maxim of caveat emptor applies, and no warranty is implied by law, the rule is otherwise with respect to an article sold directly for consumption, as food, and the seller is liable for the consequences where he knew, or by the exercise of reasonable care might have known, that it was dangerous.

3. FOOD ⟸25—SALES—LIABILITY.

   While ordinarily a manufacturer or vendor is not liable to third parties who have no contractual relations with him, the rule is otherwise with respect to one dealing with imminently dangerous articles as unwholesome food; and, where a manufacturer of food from diseased pork disposed of it to a dealer, and the dealer in turn sold it to one in whose family plaintiff was employed as a domestic, plaintiff may, having suffered injury from eating the unwholesome food recover against the manufacturer, as though there were no contractual relations between them.

4. FOOD ⟸25—MANUFACTURER—DEFENSE.

   Where a packer engaged in interstate commerce negligently manufactured food from diseased pork, the fact that it had been inspected and passed by United States inspectors provided for by Comp. St. 1916, §§ 8681–8716, does not relieve the packer from liability; the purpose of the inspection being to impose additional safeguards, instead of freeing packers from liability for negligence.

5. NEGLIGENCE ⟸30—CARE—ORDINARY CARE.

   Where it appears that everybody engaged in a particular business conducts it in a certain way, such standard of conduct will be accepted as the standard of ordinary care of prudent men engaged in that particular business.

6. NEGLIGENCE ⟸56(1)—LIABILITY—PROXIMATE CAUSE.

   There is no liability for a negligent act unless the negligent act is the proximate cause of the injury, and to establish proximate cause, it is necessary that there be a causal connection between the negligent act and the injury.

7. FOOD ⟸25—ACTIONS—EVIDENCE—SUFFICIENCY.

   In an action by plaintiff who contracted trichinosis after eating a product manufactured by defendant from diseased pork, evidence *held* insufficient to show that defendant was negligent in its inspection and sale of the product, or that its negligence, if any, was the proximate cause of

the injury; it appearing that the pork was marked, "Inspected and Passed" by the United States Inspectors, who were conversant with the mode of inspection.

8. Food ⊂⊃25—Actions—Evidence—Sufficiency.

In action for injuries received by plaintiff, who ate food manufactured by defendant from pork which was infected with trichinæ, evidence *held* insufficient to show that defendant in its preparation of the product was guilty of negligence; it appearing that if it had submitted the pork to a temperature sufficient to kill the parasites, it would have destroyed its food value.

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

Action by Sophie Ketterer against Armour & Co. There was a judgment for defendant, the complaint being dismissed, and plaintiff brings error. Affirmed.

See, also, 200 Fed. 322.

The plaintiff is a subject of the Emperor of Germany and a resident and inhabitant of the state of New York in the Southern district thereof.

The defendant is a corporation organized and existing under the laws of the state of Illinois, and is engaged in the interstate commerce of meat and food products.

It is alleged that defendant caused to be transported from a state other than the state of New York to the city and state of New York cerain food products consisting of prepared pork or lachshinkens which had not been inspected, and had not been thoroughly cured, and which had been falsely marked as "Inspected and Passed"; that the plaintiff procured from a dealer in the city of New York some of the said pork or lachshinkens not knowing that it was unwholesome, diseased, and infected with parasites known as trichinæ, and that it was dangerous to the life, health, and safety of the consumers thereof as an article of food; that the plaintiff ate of the lachshinkens, as a result of which she became seriously sick, suffered great pain and agony; that the plaintiff's health in consequence was permanently impaired; that for a long time after her illness she was unable to perform any work whatsoever, and was compelled to expend various sums for medicine and medical treatment; and that her injuries resulted from the defendant's negligence as aforesaid. Damages were asked in the sum of $6,000.

The defendant demurred to the complaint on the theory that a manufacturer who deals with a middleman and not directly with the consumer owes the latter no duty whatever except the duty owing to all men to refrain from knowingly and willfully inflicting injury. The demurrer was overruled by Judge Noyes sitting at the time in the Circuit Court, and defendant was allowed to answer over. (D. C.) 200 Fed. 322. An answer was then put in which denied the allegations of the complaint. The case went to trial, and at the end thereof the defendant moved for a nonsuit and the direction of verdict, and both motions were denied. The jury, after being out some time, reported it could not agree, but was sent back to continue its deliberations, and after a time returned a verdict in favor of the plaintiff for six cents. A motion was then made on behalf of defendant to set aside the verdict as being contrary to the law and the evidence, and to dismiss the complaint on the ground that the evidence failed to establish a cause of action. This motion was granted, and the plaintiff brought the case on writ of error to this court.

Chas. Dushkind, of New York City, for plaintiff in error.

Breed, Abbott & Morgan, of New York City, and A. R. Urion, W. C. Kirk, and A. F. Reichman, all of Chicago, Ill., for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is not an action upon a contract either express or implied. The basis of the complaint is the negligence of the defendant, and the action is in tort. It is alleged that the defendant negligently failed to perform its duty to make or cause to be made certain inspections for the discovery or detection of certain infection, disease, or parasites in the carcasses of hogs so that such carcasses might be eliminated from those sold for human consumption as food, or from those used in the prepared food products sold for human consumption. It is also alleged that it failed to have a certain food product, the lachshinkens, which it prepared, sold, and caused to be transported in interstate commerce, thoroughly cured, and thereby imperiled and endangered the life and health of the plaintiff, a consumer thereof.

A lachshinken is made up of two or more loins of pork put up in a casing in the form of a heavy bologna, and is cured and smoked and sold to the trade as a prepared food ready for consumption. It was not sold to the plaintiff, but to one Heimerdinger in whose family she was employed as a domestic. Heimerdinger purchased the product from a dealer who purchased it from defendant. The members of Heimerdinger's family, including the plaintiff, partook of it, and all who partook of it became seriously ill. The disease was diagnosed by the physicians as trichinosis, the nature of the disease being determined, not merely upon objective symptoms, but upon a scientific blood test, which proved unmistakably the character of the disease. Trichinosis is a disease that can be contracted only by eating pork or ham from hogs infected with a certain parasite known as trichinæ. The claim is that the lachshinkens which the plaintiff ate were infected with trichinæ, and that the defendant is responsible, as it put them on the market and sold them without making the necessary examination to determine whether the pork was infected with trichinæ.

[1] One of the absolute rights which every person possesses and is entitled to enjoy, whether out of society or in it, is that of personal security, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation; and more specifically as to the right to health Blackstone defines it as the right to "the preservation of a man's health from such practices as may prejudice or annoy it." 1 Blackstone, p. 134. It is elementary that every wrongful violation of a right of personal security which causes damage gives rise to a liability to make compensation for the damage done, and is a tort. In the present case the action is not based on any contract for no privity of contract exists between plaintiff and defendant. The plaintiff bought nothing from defendant, and bought nothing from the dealer to whom defendant sold the product which he had prepared. But that fact does not necessarily preclude a right of recovery under the circumstances of this case.

Blackstone in his Commentaries, vol. 3, p. 165, says that in contracts for provisions it is always implied that they are wholesome, and that if they be not, an action on the case lies for deceit. In referring to this it is said in American & English Encyclopedia of Law, vol. 15, p. 1237, that:

"No authority is cited for this proposition, and it is believed that the English cases support the rule that at common law there is no implied warranty of quality, fitness, or wholesomeness in the sale of provisions, even when sold by a dealer for immediate domestic use, except in cases where such warranty would be implied from the facts and circumstances of the sale, independently of the fact that the thing sold was an article for domestic consumption."

In 35 Cyc. 406, the statement is that:

"There is no implied warranty of the quality of provisions when they are sold merely as merchandise, as for instance when the articles are sold to a middleman, or are sold to a dealer for the purpose of resale, especially where the seller himself is not a regular dealer, it being held that in such transactions the rule of caveat emptor applies. The rule prevails even when the seller knows that the buyer intends to resell to the consumer. But there is at least a warranty that the articles shall be merchantable. It is, however, the general rule that where the sale is for immediate consumption there is an implied warranty that the food is wholesome and fit for the purpose, irrespective of the seller's knowledge of defects therein."

[2] The general rule of the common law is undoubtedly that upon a sale of goods, if there be no express warranty of the quality of the goods sold and no fraud, the maxim caveat emptor applies, and no warranty is implied by law. Howard v. Emerson, 110 Mass. 320, 14 Am. Rep. 608. It was contended in that case that when articles of food are sold for immediate domestic use, the general rule does not apply, and that there is an implied warranty or representation that they are sound and fit for food. The court said:

"But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding, which enters into the contract, that the provisions are sound. The relation of the buyer to the seller and the circumstances of the sale may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer; and we think the rule is settled that in the sale of provisions, in the course of general commercial transactions, the maxim caveat emptor applies, and there is no implied warranty or representation of quality or fitness. Emerson v. Brigham, 10 Mass. 197 [6 Am. Dec. 109]; Winsor v. Lombard, 18 Pick. [Mass.] 57; Hart v. Wright, 17 Wend. [N. Y.] 267; Wright v. Hart, 18 Wend. [N. Y.] 449; Moses v. Mead, 1 Denio [N. Y.] 378, [43 Am. Dec. 676]; Burnby v. Bollett, 16 M. & W. 644."

In Craft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139 (1893), the court held that a keeper of a meat market is bound to use due care to see that the meats sold are fit for human consumption, and he impliedly warrants that they are fit for the purpose for which they are sold, and if he sells food that is dangerous to those who eat it he is liable for the consequences if he knew it to be dangerous or by proper care could have known of its condition.

In Wiedeman v. Keller, 171 Ill. 93, 98, 49 N. E. 210, 211 (1897) the court said:

"As a general rule, we think the decided weight of authority in the United States is that in all sales of meats or provisions for immediate domestic use by a retail dealer there is an implied warranty of fitness and wholesomeness for consumption. There is, however, no implied warranty of soundness or wholesomeness arising from the sale of meats or provisions to a dealer or middleman who buys on the market, not for consumption, but for sale to others. Nor would there be any liability, in a sale for immediate domestic use,

where the vendor was not a regular dealer. * * * In this case, however, the appellee was a regular retail dealer, and as such he sold the meat to appellant for domestic use, and, under the law as it seems to be settled in this country, as the meat turned out to be unwholesome, he was liable, although he was not aware that it was diseased when he sold it to appellant."

In Salmon v. Libby, 219 Ill. 421, 76 N. E. 573 (1905) a declaration was held good which alleged that the defendant prepared and put up in a package and sold to the trade certain mincemeat, which passed through the hands of a wholesale dealer, a retail dealer, and came finally to be made into a pie of which the plaintiff's testator ate; that defendant negligently and improperly prepared and manufactured the mincemeat; that as a result it became unfit for food and poisonous and destructive of life when used as food, and plaintiff's testator lawfully partook of the same, was poisoned, and lost his life in consequence.

In Park v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202, L. R. A. 1915C, 179 (1914), the court held that a manufacturer who prepares food for human consumption and places it in the hands of a dealer for sale is responsible in damages to the widow of a consumer who procures such food from the dealer and loses his life by partaking of such food. The court said that a manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically, he must know it is fit or take the consequences if it proves destructive. In that case the deceased came to his death from ptomaine poisoning resulting from eating a pie manufactured by defendant, who sold it to a retail grocer who in turn sold it to the deceased.

We do not find it necessary in this case to determine, and we therefore do not decide, what, if any, difference exists in the liability of the manufacturer of food products who sells to a dealer and of a dealer who sells to a customer. We may assume, for the purpose of this case, that the defendant in selling lachshinken as a food product ready for consumption would be responsible if he knew it was unwholesome or if by proper care he could have known of its condition.

This brings us to consider whether the defendant's liability would extend to one who did not buy it either from the defendant or from a dealer to whom the defendant had sold it, but who had nevertheless eaten of it and been infected by it.

[3] The general rule is that a manufacturer or vendor is not liable to third parties who have no contractual relations with him. See Winterbottom v. Wright, 10 M. & W. 109, which is the leading case on the subject and has since been followed by the courts in England and the United States in numerous decisions. But as is pointed out by Judge Cooley in his work on Torts (3d Ed.) vol. 2, p. 1489, there are exceptions to the rule which are as well defined and settled as the rule itself. One of these exceptions is that a person who deals with an imminently dangerous article owes a public duty to all to whom it may come to exercise care in proportion to the peril involved. And he enumerates, in illustration of such articles, poisonous drugs, patent

medicines containing ingredients likely to produce injury, and unwholesome food.

And in Huset v. J. I. Case Threshing Machine Co., 57 C. C. A. 237, 242, 120 Fed. 865, 870 (1903) Judge Sanborn, after stating the general rule as above pointed out, declares that there are three exceptions to it. "The first is," he says, "that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence."

The leading American case is Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455 (1852). That case related, however, to a sale of a drug, and it was held that when a dealer in drugs and medicines carelessly labels a deadly poison as a harmless medicine and sends it so labeled into market, he is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label; that such liability arises not out of contract or privity between the dealer and the person injured, but out of the duty which the law imposes upon the former to avoid acts in their nature dangerous to the lives of others. And in Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324 (1889), a proprietor of a patent medicine who sold to a druggist for resale to any who wished it was held liable to one who bought it of the druggist and used it according to the prescription on the bottle. The court said it could see no difference whether the medicine was directly sold to the plaintiff by the proprietor or by an intermediate party to whom the proprietor had sold it in the first instance for the purpose of being sold again.

In such cases as the above, whether the sale is of poisonous drugs or unwholesome food, the liability reaches to any person whom it might be reasonably foreseen would be injuriously affected by it. Malone v. Jones, 91 Kan. 815, 818, 139 Pac. 387, L. R. A. 1915A, 328 (1914); s. c., 92 Kan. 708, 142 Pac. 274, L. R. A. 1915A, 331 (1914). In Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715, a caterer who furnished unwholesome food partaken by a guest was held liable for the injurious consequences. It was said in that case that the furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties.

In Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932 (1903) the court declared that one who sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to any person who is, without fault on his part, injured thereby. The rule, it is said, does not rest on any principle that the original act of delivering the article is wrongful, and that every one is responsible for the natural consequences of his wrongful act.

In Skinn v. Reutter, 135 Mich. 57, 97 N. W. 152, 63 L. R. A. 743, 106 Am. St. Rep. 384 (1903), the court held that a person who sold hogs to

a dealer knowing them to be afflicted with a dangerous and infectious disease was liable to a third person, who purchased them of the dealer and placed them with other hogs, for the value not only of the hogs purchased, but also of those which died from the contagion, where neither the original nor subsequent purchaser knew or had notice of their diseased condition.

In Bergen v. Standard Oil Co., 126 Ky. 155, 159, 103 S. W. 245, 11 L. R. A. (N. S.) 238 (1909) the court said that when a manufacturer or furnisher of an article is negligent in its composition, construction, or sale, so that injury results, not to the vendee, but to a stranger, the general rule is that the seller is not liable unless either the article is an imminently dangerous one, or the seller has knowledge of its defects, and that they are such as to endanger life or property without notice or warning of the defects.

In Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923 (1908), a case in the Court of Errors and Appeals, Chancellor Pitney writing for the court said:

"Upon both reason and authority we are clearly of the opinion that the declaration before us sets up a good cause of action. The fact that the defendant was the manufacturer, presumably having knowledge or opportunity for knowledge of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers under circumstances such that neither dealer nor consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchasers that they were fit for food and beneficial to the human body; that in the ordinary course of business there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing, in reliance upon the representation, and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten and poisonous to the human body, whereby the plaintiff was injured, make a case that renders the defendant liable for the damages sustained by the plaintiff thereby."

We have no difficulty in holding that if the defendant upon the facts disclosed would be liable to Heimerdinger who purchased the product from a dealer, it would also be liable to this plaintiff who as a domestic employed in Heimerdinger's home partook of it.

[4] This brings us to inquire whether the fact that the United States government has established a system of meat inspection has relieved the defendant from its responsibility in the matter.

Congress has passed acts providing for the inspection of meat and meat food products for use in interstate and foreign commerce, and it has provided for the inspection of cattle and meats at packing houses for the purpose of preventing traffic in diseased and unwholesome meats. See U. S. Compiled Statutes 1916, Ann., vol. 8, §§ 8681–8716. And it is provided in section 8681 that the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged, or labeled as "Inspected and Passed." The inspection thus authorized is in charge of the Bureau of Animal Industry of the Department of Agriculture of the United States. And at the time of the trial of the case the chief of the Bureau testified that he had approximately 900 inspectors under his charge, some of whom were assigned to all plants of the defendants

where food was prepared for interstate commerce. And such products after inspection were marked "Inspected and Passed." And the lachshinkens which Heimerdinger purchased were so marked.

The defendant asserts that the control and supervision which the statute confers on the federal government is to all intents and purposes exclusive of any right, power, or opportunity on the part of the owner of slaughtering and packing establishments to make other or additional inspections. Under the regulations prescribed by the Secretary of Agriculture in accordance with the authority conferred upon him by the statute the packer is forbidden to make an inspection prior to the government's inspection. The inspection begins with the live animal, and continues through the entire process of slaughtering, packing, and processing to the final package in which the meat or meat product is shipped, the package not being released for shipment until the federal inspectors have put the federal stamp "United States Inspected and Passed" thereon. The inspection extends through all departments of the plant, including the curing processes, packing, and shipping. The testimony shows that the defendant's plant is absolutely under the control of the government inspectors, there being at the time of the trial between 40 and 50 inspectors in its plants of whom 20 or 25 were veterinaries and the remainder were meat inspectors. Does the government's certificate "United States Inspected and Passed" relieve the packer from any common-law responsibility?

The Circuit Court of Appeals in the Fifth Circuit in O'Connor v. Armour Packing Co., 158 Fed. 241, 85 C. C. A. 459, 15 L. R. A. (N. S.) 812, 14 Ann. Cas. 66 (1908), declared that the object of the federal statutes requiring inspection of cattle and meats at packing houses was to provide additional safeguards against the traffic in spoiled or diseased cattle and meats. "They should not be so construed or applied," the court said, "as to deprive any one injured or damaged by the negligence or wrongdoing of a dealer in or a vendor of cattle or meats [of] any remedy which he had under laws existing when the statutes were enacted." This case was followed in Catani v. Swift & Co., 251 Pa. 52, 62, 95 Atl. 931, L. R. A. 1917B, 1272 (1915), the court holding that the statutes do not relieve the packer from liability for damages where he has made no inspection nor taken any steps to ascertain for himself whether the meat sold by him is fit for food. "The common-law duty," said the court, "to sell only wholesome food still remains, and the burden of discharging this duty has not been shifted to government inspectors." We share in that opinion and hold that the inspection by government officials of the cattle, meat, and meat products as required by the Acts of Congress does not relieve the packers from any liability for negligence on their part to any one injured thereby.

[5-7] The defendant made no inspection of its food products to ascertain whether any of them were infected with trichinæ. And because it made no such inspection it is alleged that it failed to exercise that degree of care which the law demands of those who prepare and sell such products for food consumption. The testimony shows that between 1 and 2 per cent. of hogs slaughtered are so infected. The testimony also shows that the presence of trichinæ in pork can only be ascertained, if at all, by microscopical tests.

It also appears that the government at the time this food product was prepared and sold did not make inspections for the purpose of discovering the presence of trichinæ in hogs, and that such inspection had not been made since 1905, some six years prior to the sale which occasioned the injuries this suit is brought to redress. The Chief of the Bureau of Animal Industry testified as follows:

"Q. But, as a matter of fact, has the defendant company been permitted by the government inspectors to ship for transportation in interstate commerce the carcasses of hogs, or swine, or any of the meat food products prepared from them, since 1905, without any examination or inspection by the government inspectors looking toward the discovery of the presence of trichinæ? A. That question refers to trichinæ inspection, does it not? Q. Yes, trichinæ. A. Yes; the answer is yes. Q. Do the inspections that are usually made by the government inspectors cover inspections required and necessary in order to discover trichinæ? A. No, sir. Q. Is it necessary to make a special inspection or an inspection different from the usual inspection in order to discover the presence of trichinæ? A. Yes, sir. Q. In what respect does the inspection looking for the discovery of trichinæ differ from the usual inspections made by the government inspectors? A. Ordinarily, the presence of disease can usually be determined by detecting the lesions with the naked eye, by the manipulation of the different parts or organs; for inspection of trichinæ it is necessary to examine with a microscope all sections of the meat, to determine the presence or absence of it."

It also appears that the reason why the government does not examine for trichinæ is that the only method of inspection for trichinæ is by microscopical examination, and that such an examination will not necessarily disclose the presence of trichinæ in the carcass, even though there may be trichinæ therein. It only discloses whether trichinæ is present in the particular sample, and there may be trichinæ in the carcass and none in the sample. The chief of the Bureau testified as follows:

"Q. Well, then, it is a fact, is it not, that a single examination does not necessarily disclose the presence of trichinæ, even though there may be trichinæ present? A. There may be trichinæ in the carcass, but not in that particular sample. Q. Is it not a fact, Doctor, that a considerable number of examinations may be made without disclosing the presence of trichinæ? A. Yes, sir. Q. Is it not true that as many as eight or ten different examinations may be made from different parts of the carcass without disclosing the presence of trichinæ and additional examinations disclose the presence of trichinæ? A. Yes; in lightly infected cases, that might be the case. Q. The trichinæ localizes itself in certain parts of the body, does it not? A. To a great degree. Q. And just what that part is you cannot tell without testing the various parts of the body? A. I was going to say, there are usually muscles or regions where they are most generally found, and from those sections we take the samples for inspection, but, of course, they wander or may wander, into almost any portion of the body, but there are usually seats where we look for them. * * * Q. The examination for trichinæ by the microscopic test is not by any means an infallible test, is it? A. No; it is not."

Another expert, said to be the foremost authority in the United States on the subject of trichinosis, testified that the microscopical test cannot be accepted as a guaranty that the pork so examined is free from trichinæ. The following is an excerpt from his testimony:

"Q. Would you say that in the case of the pork loin just mentioned that microscopical tests of four or five pieces of meat cut from various parts of this loin would offer a reasonably certain method of detecting whether or not

it contained trichinæ? A. I would personally not be willing to certify that that pork loin was free from trichinæ. Q. Would a larger number of samples from this pork loin offer a more reasonable method, or basis, of determining this fact? A. You might examine 100 specimens from that same pork loin, and it is conceivably possible that trichinæ might be present but you would not find them. Q. Will you explain the reason for that? A. Well, though the parasites might be in the pork loin, we might find sections of infection where very few of them would be present, and in some parts none would be evident. We might find a number of trichinæ in the diaphragm, for instance, or in the tongue or in some other muscle, and yet relatively few of the parasites in the loin. The distribution of the trichinæ in the body is not necessarily uniform, and therefore an examination of any one portion cannot be taken as a safe standard for examination of the entire carcass."

The chief of the Bureau of Animal Industry was questioned as to the policy of not inspecting for trichinæ, and his testimony is deserving of attention.

"Q. Do you think, Doctor, that because a certain test is not altogether absolute, you would make no test at all, even though you could minimize the danger? A. That is probably a matter of opinion as to whether more could be accomplished by making it or not. Q. Would you do away with vaccination, if vaccination is not absolute protection? A. No. Q. Well, would you do away with disinfectants, if disinfectants were not absolutely preventive? A. No; the question in my mind has been whether microscopic inspection might induce people to regard it as an absolute protection, and therefore not take other precaution, such as cooking, to completely avoid danger. Q. Would it not be the safer course to minimize the danger and give this additional protection to the people, instead of making no tests at all? A. That has been a question in our minds—as to whether it would not induce more cases of trichinæ by more people partaking of uncooked pork than of cooking it. Q. Do you not think the proper course would be to minimize the danger by making these inspections, and then to take this extra precaution by advising them that the pork should be cooked? A. That, I think, is a very hard question to answer, as practice alone, I presume, could determine whether it would or would not. Q. Would you do away with any preventive or precautionary measure if it was not absolutely safe, even though you could minimize the danger? A. It is probably a safer way to do away with a measure which is supposed to protect and which does not. Personally, I should not eat any raw pork, whether it was microscopically inspected or not; and if we could only convince all the people of the same thing, the whole matter would be solved."

The testimony disclosed that, while in Germany inspection for trichinæ is made, the result has not been very assuring. There were reported in that country between 1881 and 1898, 6,329 cases of trichinosis with 319 deaths. Of these cases and deaths 2,042 cases and 112 deaths were due to meat which had been inspected and passed as free from trichinæ. Counsel would have the court believe that these figures show the practical inefficiency of such examinations, and that approximately as many deaths occurred from the eating of meat which had been microscopically inspected and passed as free from trichinæ as had occurred from the eating of meat which had not been so examined. But the testimony of the expert was that the infection by trichinæ of hogs is greater in the United States than in Germany, and that microscopical inspection carried out by properly trained persons would reduce very greatly the chances of placing trichinous pork on the market, although such an examination could not be accepted as a guaranty that pork so examined is free from trichinæ. He also testified that he

regarded the method pursued by the Bureau of Animal Industry as a reasonably safe and practical method of insuring wholesome meat.

The inspection made by the government of the United States extends only to establishments which ship their products in interstate commerce and not to dealers who sell their goods within the state in which they are prepared. Many of the states have laws of their own governing the inspection of meat food products, and the chief of the Bureau of Animal Industry testified that he did not know of any one of them having microscopic inspections. He also testified that he did not know of a single individual or firm in the country engaged in preparing pork for consumption as a food product that made inspections for trichinæ, although he had heard that there was one establishment which did it and of another which was preparing to do it. He was asked: "Is it not a fact, Doctor, that the general use and practically universal practice is, on the part of those engaged in the business of slaughtering and preparing hogs for sale and consumption for human food, not to examine for trichinæ?" And he answered in the affirmative.

A general custom of the persons or corporations which manufacture meat products to be sold for food to conduct the business in a given way affords the most satisfactory evidence in support of the conclusion that the defendant conducted its business with ordinary care. When it appears that everybody engaged in a particular business conducts it in a certain way, we conclude that the defendant in conducting his business in the way that everybody else in the like business does has measured up to the standard demanded by the law and exercised the ordinary care of prudent men engaged in the business. See Thompson on Negligence, § 31, vol. 1. No one is held by the law to a higher degree of care than the average in the trade or business in which he is engaged.

And as there might have been a number of microscopical inspections made without discovering the trichinæ, which might still have been present and caused the very injury of which complaint is made, the failure to make tests cannot be held to be the direct and proximate cause of the injury complained of, and without which it would not have occurred. There is no liability for a negligent act unless the negligent act is the proximate cause of the injury.' And to establish proximate cause it is necessary that there be a causal connection between the negligent act and the injury. The act must have been such that without it the injury would not have happened. 29 Cyc. 489.

[8] But it is said that, even if the defendant was not under obligations to make microscopical inspections for trichinæ the plaintiff is still entitled to maintain this action because of defendant's negligence in curing the meat. This claim is based on the proposition that lachshinken is a prepared meat food product, cured and made ready for consumption in its prepared form, and that a thorough cure kills trichinæ parasites and renders the meat safe and harmless for human food, and that, inasmuch as the lachshinken which defendant sold in the instance complained of contained trichinæ, it must have been improperly cured. The evidence makes it clear, so far as the question of curing the lachshinken is concerned, that a cure sufficient to kill trichinæ would be much too strong, as it would make the meat inedible and destroy it as an article of food. And the undisputed evidence shows that lach-

shinken is made by all manufacturers to all intents and purposes in exactly the same way. The lachshinken which the plaintiff ate was made in the same way that defendant has always made its lachshinken, and if it had been subjected to a temperature of 160 degrees Fahrenheit which would have been necessary to kill trichinæ, it would not have been accepted by the trade. The government of United States knew the character and kind of cure to which the lachshinken was subjected, and yet it stamped it as "Inspected and Passed," and recognized it as a proper and legitimate article of interstate commerce and as a safe and wholesome product for human consumption.

The record discloses no proof of negligence to go to the jury. The court committed no error in setting aside the verdict and in directing judgment to be entered dismissing the complaint.

Judgment affirmed.

In re GANNON.

(Circuit Court of Appeals, Second Circuit. December 11, 1917.)

No. 62.

BANKRUPTCY ⇐143(11)—PROPERTY VESTING IN TRUSTEE—INSURANCE POLICY—"SURRENDER, VALUE."

A special industrial insurance policy issued to a bankrupt contained a promise by insurer to pay to the executors, administrators, or assigns of the insured the amount of the policy, but contained a provision that the insurer might pay the amount of the policy to any relative by blood or connection by marriage of the insured, or any person appearing to the insurer to be equitably entitled to the same from having incurred an expense on behalf of the insured. Bankr. Act July 1, 1898, c. 541, § 70a, subds. 3, 5, 30 Stat. 565 (Comp. St. 1916, § 9654), invest the trustee of a bankrupt with title to all the property of the bankrupt which is not exempt, and all property which prior to the filing of the petition he could have transferred, or which might have been sold under judicial process, provided that, when a bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or his personal representatives, he may, within 30 days after the cash surrender value has been ascertained, pay or secure to the trustee the sum so stated and hold the policy free from claims of creditors. The insurer, while authorized to purchase its policies, made no practice of purchasing them, and in response to an inquiry offered to pay a fixed sum. The offer was not accepted, and on trial the testimony of the representative of the insurer indicated that it was not certain whether it would purchase such policy. *Held*, that while, under the act, policies will be deemed to have a surrender value and pass to the trustee whenever the bankrupt by his own efforts can obtain from the insurer any cash on cancellation of the policy, the amount determined in accordance with a fixed method of compensation, yet, as it did not appear that the insurer would purchase the policy in question, it cannot be deemed to have any surrender value payable to the bankrupt, and so did not pass to the trustee.

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

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 John J. Gannon. An order of the referee directing the bankrupt's surrender of a life insurance policy, or in the alternative payment of the cash surrender value, having been reversed on petition to review (241 Fed. 733), Theodore H. Friend, Jr., as trustee in bankruptcy, petitions to revise. Affirmed.

The order involved was entered in that court on April 27, 1917, and it reversed the order of the referee in bankruptcy directing the bankrupt to deliver to the trustee a policy of insurance on his life, or pay to the trustee the sum of $156.75.

Theodore H. Friend, of New York City, for trustee and reviewing creditor.

William R. Hill, of New York City, for bankrupt.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge. The question in this case involves the right of a trustee in bankruptcy to a special industrial policy of insurance issued by the Prudential Insurance Company of America for $500 and is dated December 24, 1894. The promise of the policy is "to pay * * * unto the executors, administrators or assigns" of the insured the amount of the policy which "is issued and accepted subject to the following restrictions, conditions, and agreements * * *" printed thereon, the second of which reads as follows:

"Second. The company may pay the sum of money insured hereby to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose, and the production by the company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

The trustee claims the policy under section 70a, subdivisions 3 and 5, of the Bankruptcy Act. That section invests the trustee of a bankrupt with title to all property of the bankrupt which is not exempt, and all—

"(3) Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person. * * * (5) Property which prior to the filing of his petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. * * *"

The District Judge thought that the trustee was not entitled to the policy, because by its terms it is not payable to the bankrupt, his estate, or personal representatives, in the sense of the statute, and he points out that:

"The policy is thus not payable absolutely to the executors or administrators of the insured, but, in the event that expenses have been incurred on behalf of the insured, the policy is payable to the executors and administrators only at the discretion of the company."

The right of the trustee to life insurance policies wherein the bankrupt, his estate, or personal representative is the beneficiary, and to policies wherein the bankrupt has reserved the right to change the beneficiary at will, have been more or less troublesome questions, which have caused the courts to disagree as to the meaning of the language of the bankruptcy act relating thereto.

In Holden v. Stratton, 198 U. S. 202, 214, 25 Sup. Ct. 656, 49 L. Ed. 1018, Mr. Justice White, now Chief Justice, called attention to the contrariety of opinion which existed in the lower federal courts as to the meaning to be attached to the words "cash surrender value" as found in subdivision 5 above set forth. He pointed out that some courts hold that the words mean a surrender value expressly stipulated by the contract of insurance to be paid, while other courts hold that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. He declared that the latter theory harmonized with the present practice under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), and added that "as the question is not necessarily here involved, we do not expressly decide it."

In Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, a bankrupt at the time of adjudication had three life insurance policies payable to him at his death, his executors, administrators, or assigns, none of the policies contained any provision whereby upon default the company bound itself to pay a "cash surrender value" to any person. But it appeared from the testimony that as a matter of fact policies of the character of those in controversy had under the practice of the company cash surrender values, if offered for surrender within six months from the date of nonpayment of any premium. The District Court (131 Fed. 972) held that the policies had no cash surrender value within the meaning of section 70 of the Bankruptcy Act. That court said:

"There is no pretense that this custom of the insurer [the willingness of the company to pay money for the surrender of such policies] formed a part of the contract between the parties, or that the insured could enforce the payment of a surrender value, or the payment of anything, on the surrendering of the policy. In short, the insurer might be willing to pay a surrender value and might not. Such payment would be optional with it."

Again the court said:

"The association might be willing to pay one day, entirely unwilling the next. Is this the 'cash surrender value' spoken of in the Bankruptcy Law? This court thinks not."

The Supreme Court affirmed the decision of the Circuit Court of Appeals (142 Fed. 445, 73 C. C. A. 561), which reversed the District Court, and held that the provisions in section 70a of the Bankruptcy Act are not confined to policies in which the cash surrender value is expressly stated, but that they permit the redemption by the bankrupt

of policies having a cash surrender value by the concession or practice of the company issuing the same. Mr. Justice McKenna, who wrote the opinion, stated that:

"It was an actual benefit for which the statute provided, and not the manner in which it should be evidenced. And we do not think it rested upon chance concession. It rested upon the interest of the companies and a practice to which no exception has been shown. And that a provision enacted for the benefit of debtors should recognize an interest so substantial and which had such assurance was perfectly natural. What possible difference could it make whether the surrender value was stipulated in the policy or universally recognized by the companies?"

In Burlingham v. Crouse, 228 U. S. 459, 472, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, the court declared that it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise, to leave to the insured the benefit of his life insurance.

In Cohen v. Sammuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. —, decided by the Supreme Court this month and not yet officially reported, the bankrupt at the time of the adjudication held five life insurance policies. The trustee moved before the referee to require the bankrupt to deliver the policies to him or to pay him the cash surrender value as of the date of the adjudication. The policies were payable to certain relatives of the bankrupt as beneficiaries, and it was provided in each that the bankrupt reserved the absolute right to change the beneficiary without the latter's consent. The motions of the trustee were denied by the referee which action was affirmed by the District Court, and on appeal to this court we affirmed the ruling of the District Court. 237 Fed. 796, 151 C. C. A. 38. But the Supreme Court, while it stated that it felt the strength of the considerations which led to the conclusion which we reached, reversed the judgment. The decision seems to be based upon the fact that at the time of adjudication the policies had a cash surrender value which the companies were willing to pay to the bankrupt, who had in all of them the absolute right to change the beneficiaries. And the court pointed out that under section 70a, subdivision 3, the trustee is vested by operation of law with all powers which the bankrupt might have exercised for his own benefit, as well as all property that the bankrupt could transfer, and "especially as to insurance policies which have a cash surrender value payable to himself, his estate, or personal representative." And the court added:

"It is true the policies here are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets and, it might be a refuge for fraud."

In the present case the policy is not in all respects like any which has been before the Supreme Court, and we must decide the question involved as best we can, in view of the language of the statute and of the decisions of the highest tribunal in so far as they have construed it.

The phrase "surrender value" we think must now be held to cover any and every policy which the insured by his own efforts, unassisted by any beneficiary or assignee, can obtain from the insurer in cash and

in cancellation of the policy at the date of the petition filed; the amount being determined in accordance with a fixed and definite method of compensation, uniform in all cases. The amount which can be thus obtained is the cash surrender value of the policy. It makes no difference whether the amount he can obtain is secured to him by a statute, or rests upon the mere willingness of the company to buy out the policy at the particular time. The material and important fact is that at the time of the adjudication the policy had a value which the company was willing to pay and which the bankrupt by his own act could obtain.

The theory of the law is that the creditors of a bankrupt are entitled to everything that a bankrupt could get out of the policy by his own act at the time he was put into bankruptcy. Any other construction would seem to make the policy a sacred property, of which the bankrupt could avail himself, while the creditors could not. It appears that while the policy herein involved did not expressly provide that the insurance company would pay the insured the cash surrender value upon the delivery of the policy to it for cancellation, yet a law of New Jersey (the company being there incorporated) had been passed which permitted it to purchase policies which it had issued. It appears that this company had not made a rule that it would, in all cases when so requested, pay the cash surrender value of its policies. It does not appear in this case that at the time of adjudication the company was willing to pay the cash surrender value of the policy herein involved. The most that appears is that the adjudication was on April 18, 1916, and that on the 9th of May the same year, in reply to an inquiry, the manager of the company wrote the trustee:

"We are willing on application to consider the purchase of the policy. If the premiums have been paid to date, the amount that we would be able to pay would be about $156.75, or the policy may be exchanged for a paid-up policy of $217, which would be more advantageous than a cash settlement. In case it is decided to accept either of the above offers, the matter should be taken up with the agent who collects the premiums, or our local superintendent, and the same will receive attention in the regular way. There are no cash dividends payable on the above policy; it being one of our special adult policies, which was issued at a reduced rate of premium, and upon which no cash dividend is payable. There is also no cash loan value attached to this policy."

This amounted to an offer to pay $156.75 for the surrender of the policy, on the application of the insured. But on the hearing before the referee, when the writer of the letter was examined in reference to it, the following occurred:

"Q. But in this letter of yours, dated May 9th, you say the company is willing on the application of the assured to consider the purchase of the policy? A. Yes. Q. As I take it, on that consideration you may desire to purchase, or you may not? A. Yes, because when we received those letters we did not know all the circumstances; we did not know the circumstances, for instance, of this bankrupt."

The offer to purchase was not accepted when made, and there is nothing in the record which shows certainly that the company would have purchased the policy at the time of the adjudication in bankruptcy, if it had been requested by the bankrupt. As there is no law which compels the company to pay the cash surrender value, and no

custom or usage on the part of this company to pay is shown, and as it is not established, as it seems to the majority of the court, that the company in this particular case would have taken over the policy and paid the cash surrender value, if the bankrupt had so requested at the time he was adjudicated a bankrupt, we should be going further than the Supreme Court has as yet gone if we should hold that this policy nevertheless had a cash surrender value at the date of the adjudication, which the bankrupt could then have reduced into his possession, and that the policy is accordingly vested in the trustee.

The order of the District Judge is affirmed.

NATIONAL SURETY CO. v. BLUMAUER et al.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 2967.

1. INDEMNITY ⟸12—CONTRACTS—CONTINUANCE.

Defendants, to enable a state bank to obtain a bond for county deposits, signed an agreement of indemnity. The original bond, running to the treasurer, which ran for one year, was conditioned to secure deposits of county moneys. Thereafter one of the defendants, who signed the indemnity agreement and was an officer of the bank, paid a renewal premium, and the bond was renewed for another period of one year. The indemnity agreement declared that no act or omission of the surety in modifying, amending, limiting, or extending the bond should affect the indemnitors' liability. A new treasurer having been elected, the surety, at the request of the same officer of the bank who paid the first renewal premium, issued a new bond, naming the new incumbent as treasurer, and such treasurer executed a release of liability up to the date of the issuance of such bond. Thereafter, while the second bond was in force, the bank failed, and the surety was compelled to pay a loss suffered by such treasurer on account of the deposit of county funds. *Held* that, as the purpose of the bond was to enable the bank to secure the deposit of county funds, and as the indemnitors knew that fact, their agreement of indemnity must be deemed in force at the time the loss was incurred; the change in treasurers not affecting their liability, as they in no way guaranteed the fidelity of the treasurer, and it being obvious that the parties treated the new bond as a continuation of the original.

2. INDEMNITY ⟸3—CONTRACTS—PUBLIC POLICY.

An agreement by indemnitors, who to hold a surety harmless on account of a bond conditioned upon repayment of county funds deposited with a bank, which agreement bound themselves, their heirs and assigns, until the surety should have executed a release under seal, is not contrary to public policy.

3. HUSBAND AND WIFE ⟸268(6), 270(5)—COMMUNITY ESTATE—LIABILITY.

Where officers and stockholders of a bank entered into an agreement of indemnity to save a surety harmless on account of a bond given to secure a deposit of county funds, such agreement is one of the community under the laws of Washington, and therefore the wives of the indemnitors were proper parties in an action thereon.

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

Action by the National Surety Company, a corporation, against Isaac Blumauer and others. There was a judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions to grant new trial.

Action for judgment upon an indemnity bond. At the conclusion of plaintiff's evidence the court dismissed the plaintiff's action and entered judgment against the National Surety Company, plaintiff in error here. By writ of error the surety company brings the case for review. The facts are as follows:

The defendants in error, to be called defendants, owned all except 12 shares of the capital stock of the State Bank of Tenino, which failed on September 17, 1914. Blumauer was president, Hays cashier, Mentzer vice president and director, and Campbell assistant cashier and director. Defendant Elizabeth E. Mentzer is the wife of T. F. Mentzer, Jessie E. Campbell is the wife of A. D. Campbell, and Eva Copping was the wife of David Copping, who died, but who, before death, conveyed his property to his wife. Defendants Blumauer, Hays, and Ora J. Hays, his wife, defaulted in the action. Thus the defendants proper herein are Mentzer and wife, Campbell and wife, and Mrs. Copping.

Prior to June 22, 1911, the bank applied to the surety company to become surety for the bank on a bond required by the laws of Washington to be taken by the county treasurer to secure the bank deposits of county funds. The application named the obligee to whom the bond was to run as "Treasurer, Thurston County, Washington." The bond was requested as of June 22, 1911, to terminate June 22, 1912. Applicants agreed to pay $25 premium annually, and stated that the officers who were to give continuous personal attention to the affairs of the bank were Blumauer, president, Mentzer, vice president, and Hays, cashier. With this application was an agreement between the bank, through its president and cashier, and the surety company, wherein it is recited that the company is about to execute for the depository the bond described in the application, which is made part of the agreement, and, in consideration of $1, the depository agrees with the company that the answers made in the application are true, and for the purpose of inducing the company to execute the bond without demanding collateral security from the depository, that the depository will pay to the company the premiums agreed in the application, and will at all times "indemnify and keep indemnified the company," and save it harmless against all demands and liabilities which it should sustain in consequence of having executed the bond. The depository bond was dated June 22, 1911, and was signed by the bank by its president and cashier, and by the surety company. It binds the bank as principal and the surety company as surety unto "Robert Marr, individually and as county treasurer of the county of Thurston, state of Washington," in the sum of $5,000. The condition is that whereas, Marr, as treasurer, "at the special instance and request" of the bank, has deposited or may hereafter deposit with the bank certain moneys, etc., for which "the said treasurer as such may be responsible," if the bank shall pay all the checks of the treasurer and hold harmless the above-named Robert Marr, individually and as such treasurer, from loss by reason of the deposit of funds, then the obligation is to be void; provided, however, that the surety company shall not be liable, except for loss of moneys belonging "to the said Robert Marr, treasurer, and which shall have been deposited with the aforesaid principal by the said Robert Marr, as treasurer aforesaid, or to his credit as such treasurer." It is further provided that the surety company shall have the right to end its suretyship under the bond by giving notice to the obligee, etc. The indemnity agreement, dated June 22, 1911, recites that whereas, "the undersigned" had requested the surety company to sign and execute a bond for $5,000 in behalf of the bank "in favor of the treasurer of Thurston county, Washington, effective June 22, 1911, covering deposits of the said treasurer in said bank, reference to which bond or undertaking is hereby made for the purpose of certainty, and a copy of which instrument is or may be hereto attached." It is agreed that, in consideration of the premises and of $1, the indemnitors will pay an

annual premium of $25, as the compensation to the surety company "for the accommodation afforded the undersigned by the execution of said instrument by the company"; that they will keep harmless the surety company against loss which may occur by reason of having executed the bond; that the surety company may take such steps as it may deem necessary to obtain its release under the bond or under any other instrument within the meaning of "section fifth" hereof. Section fifth is as follows: "That no act or omission of the company in notifying, amending, limiting, or extending the instrument so executed by the company shall in any wise affect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the company may alter, change, or modify, amend, limit, or extend said instrument, and may execute renewal thereof, or other and new obligations in its place or in lieu thereof and without notice to us being expressly waived, and in any such case, we and each of us shall be liable to the company as fully and to the same extent on account of any such altered, changed, modified, limited, or extended instrument or such renewals thereof, or other or new obligations in its place or in lieu thereof, whenever and as often as made, as fully as if such instrument were described at length herein." The seventh clause of the agreement binds not only the signers jointly and severally, but their respective heirs, executors, administrators, successors, and assigns (as the case may be), until the surety company shall have executed a release under its corporate seal. The eighth paragraph makes the covenants and collateral security or indemnity, if any, available by and on behalf of the surety company for its benefit, "as well concerning any or all former or subsequent bonds or undertakings executed for us, * * * as concerning the bond or undertaking such covenants, collateral securities, or indemnity shall have been made, deposited, or given." The indemnity was signed by Blumauer, Mentzer, Hays, Campbell, and Copping as individuals, and by the bank by Blumauer, as president, and Hays, as cashier.

When the depository bond and indemnity agreement were delivered, the $25 premium was paid to the surety company. Marr's term as treasurer expired by law on January 8, 1913. Prior to June 22, 1912, when the first year of the bond which had been given would have expired, the bank, acting through Hays, who was one of the indemnitors, paid the surety company $25 for a second year's premium on the bond, to continue the bond until June 22, 1913. But on January 8, 1913, a new treasurer, W. H. Britt, succeeded Marr. Before June 22, 1913, or the date of the expiration of the second year of the bond the bank, again acting through Hays, vice president, paid the surety company $25 premium for the purpose of extending the bond to June 22, 1914. Prior to June 22, 1914, the bank, again acting through Hays, paid to the surety company the premium of $25 "for the renewal of the depository bond," and advised the surety company that the county treasurer was Mr. Britt, who had succeeded Mr. Marr, and requested the surety company, if necessary, to make an indorsement to that effect, and, if necessary to issue a new bond, to do so and forward it. The surety company replied by inclosing a new bond duly executed in favor of W. H. Britt, county treasurer, effective June 22, 1914, and asking that the bank sign a new application, and that the treasurer send a release covering the former bond. Mr. Britt, as treasurer, delivered to the surety company a release, stating that as surety on the depository bond, dated June 22, 1911, in behalf of the bank, in favor of Robert Marr, treasurer of Thurston county, it was released from further liability thereon, "from and after the 22d day of June, 1914." A new application, signed by the bank, by Blumauer, president, and Hays, cashier, was also made for bond to issue from June 22, 1914, to June 22, 1915.

These additional circumstances are more or less relevant:

Mr. Marr as treasurer, opened his account with the bank on June 20, 1911, and closed it on January 8, 1913, on which day he retired as treasurer and took from the bank a certificate of deposit for $9,974.16. This certificate was never cashed, and on January 15, 1913, when Mr. Britt opened his official account, he deposited this identical certificate with the bank, and on September 17, 1914, he had a balance on deposit of $12,823,58. When the bank failed the treasurer demanded that the surety company should pay its lia-

bility on its bond, amounting to $4,327.87. The surety company demanded that the defendants pay this, but defendants refused, and thereafter, on December 30, 1914, the surety company paid to the treasurer of the county $4,327.87.

C. B. White, of Seattle, Wash., and John D. Fletcher and Robert E. Evans, both of Tacoma, Wash., for plaintiff in error.

Preston M. Troy and Robert F. Sturdevant, both of Olympia, Wash., and Charles O. Bates and Charles T. Peterson, both of Tacoma, Wash., for defendants in error.

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

HUNT, Circuit Judge (after stating the facts as above). [1] The vital question in the case is whether the indemnity agreement was effective in September, 1914, when the bank failed. The answer can only be had by arriving at the actual intent of the parties, as it is to be deduced from every part of their agreement.

It is very clear that the purpose of the bank was to secure to itself the advantage of being made a depository of public funds which might come into the hands of the county treasurer. To carry out the purpose, the bank, through its president and cashier, applied to the surety company for a bond, which by the state was necessary to be given by a depository of public moneys. The obligee was to be the treasurer of the county. The surety company agreed to make the necessary bond, provided the defendants would personally indemnify it against loss of any money belonging to the county which would be deposited in the bank by the county treasurer. The defendants, except Mrs. Campbell, Mrs. Mentzer, and Mrs. Copping, made the indemnifying instrument, and the bank executed the bond, obligating the bank as principal and the surety company as surety unto Marr, individually and as county treasurer. The recitals in the bond refer distinctly to the deposit and custody of funds for which the treasurer would be responsible, and plainly it was executed with reference to moneys to come to the treasurer. The indemnifying agreement also on its face shows that the defendants had asked the surety company to execute a bond in favor of the treasurer of the county to cover the deposits of the treasurer. The indemnitors agreed, by the fifth section of their agreement, that the surety company might extend the bond and renew it, or make new obligation in its place or in lieu thereof, and withhold notice, and that their obligation would still remain "as fully as if such instrument were described at length herein," and would remain until the surety company should execute a release.

The payment of the first premium carried the bond to June 22, 1912, and the payment of the second premium was to carry out the purpose of the indemnitors to have the bond continue for another year or until June 22, 1913. In the meanwhile it happened that on January 8, 1913, a new treasurer came in. However, the bank remained the depository, and no new indemnity agreement was entered into by the indemnitors, and no new bond was executed by the bank; nor did the surety company execute a release to the indemnitors; nor does it appear that the in-

demnitors then made any claim that they had been released from the indemnity agreement. When another annual payment was forthcoming, and just prior to June 22, 1913, the bank again paid the surety company $25 annual premium for the purpose of extending the bond from June 22, 1913, until June 22, 1914. The correspondence between Hays, vice president of the bank, and Britt, the treasurer of the county, is ample evidence that the officers of the bank, who were also indemnitors in the agreement, paid this annual premium in order to continue the bond given by the surety company for the year to end June 22, 1914. All this was done without change in the status of the bank as a depository of public funds, and with the result that the bank and the indemnitors received the same character of benefits under the bond as continued from June 22, 1913, to June 22, 1914, that they had enjoyed under the previous indemnity agreements and bonds.

The bank and the surety company both understood that a new bond, dated June 22, 1914, was made to take the place of the one that had been issued to Mr. Britt's predecessor as treasurer. Mr. Britt, as treasurer, gave the bank, for the surety company, a release of the original bond, to be effective from and after June 22, 1914; but the indemnity agreement remained without suggestion that it ceased to be of effect. There was ample evidence to say that it was the intent that the bank should remain the depository, and that the indemnity agreement should continue; that the surety company's liability should continue without interruption, and that the last bond was not to change the several relationships or to interrupt them. This is confirmed by referring to the express agreement of the indemnitors that the surety company could extend the bond it had executed, or make a renewal thereof, or another or new obligation in its place and without notice, and in such case the indemnitors would still be liable. It is our opinion that under this agreement the indemnitors having received the benefit of the new or substituted bond after June 22, 1914, in the fact that the bank continued to be a depository, the release of the surety company on the original bond as effective of that date, did not terminate the indemnity agreement.

Again, it was immaterial to the indemnitors whether Marr or Britt was treasurer, for they did not undertake that the person who was treasurer would be faithful and honest; their agreement was that the bank (which was controlled, managed, and almost entirely owned by them) would pay the checks which the county treasurer might draw against any deposits which he made in the bank. The fact that the indemnitors continued to pay the premiums as they had agreed to do is proof of their desire that the bank should continue as a depository, and the indemnitors having agreed that the bond given by the surety company could be extended or that a new bond could be given in its place, and that the indemnitors would be bound until the surety company should release it, we believe that the several renewals and the bond given in lieu of the one for 1914, should be held as within their covenants. Hart v. Messenger, 46 N. Y. 256.

[2] The indemnitors make the point that the clause of their agreement wherein they bind themselves, their heirs and assigns, until the

surety company shall have executed a release under seal, is not enforceable, because contrary to public policy. We fail to see the applicability of such a doctrine to this case.

[3] The contention of the surety company that the liability is one of community, and that therefore the wives of the indemnitors were proper parties, is sustained by the decisions of the Supreme Court of Washington in Horton v. Donohoe Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435, and Way v. Lyric Theatre Co., 79 Wash. 275, 140 Pac. 320.

The court having erred in dismissing plaintiff's action, the judgment is reversed, and the cause remanded, with directions to grant a new trial.

UNITED STATES v. BLACK et al.

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

No. 4839.

1. SIGNATURES ⟸5—SUFFICIENCY—USE OF MARK—"SUBSCRIPTION."
Under Comp. Laws Okl. 1909, § 2965, which provides that "signature or subscription includes mark when the person cannot write, his name being written near it, and written by a person who writes his own name as a witness," as construed by the Supreme Court of Arkansas before it was copied from the statutes of that state into those of Oklahoma, a deed signed by mark is valid, although the subscribing witness is not the person who wrote the name.

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

2. INDIANS ⟸15(1)—LANDS—VALIDITY OF DEED—APPROVAL BY PROBATE COURT—"COURT HAVING JURISDICTION OF SETTLEMENT OF ESTATE."
Act May 27, 1908, c. 199, § 9, 35 Stat. 315, provides: "The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." Rev. Laws Okl. 1910, § 1823, provides that the county courts "shall always be open and in session for the transaction of all probate business in their respective counties." *Held*, that the approval of a deed executed by a full-blood heir of a deceased allottee by the judge of the county court having jurisdiction over the allottee's estate at any place within the county, although not at the county seat, was an approval by the court, within the statute, and valid, especially where the order was subsequently entered of record at the county seat.

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

Suit in equity by the United States against George E. Black and others. Decree for defendants, and the United States appeals. Affirmed.

Archibald Bonds, Sp. Asst. U. S. Atty., of Muskogee, Okl., Lewis C. Lawson, of Holdenville, Okl., and R. C. Allen, Creek National

Atty., and J. C. Davis, Asst. Creek National Atty., both of Muskogee, Okl. (W. P. McGinnis, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Preston C. West, of Tulsa, Okl. (Roger S. Sherman, A. A. Davidson, and J. P. O'Meara, all of Tulsa, Okl., on the brief), for appellees.

Before HOOK, SMITH, and STONE, Circuit Judges.

SMITH, Circuit Judge. A bill of complaint was filed in this case which covers over 30 printed pages. The whole case turns upon its sufficiency. It is manifest that we cannot set this bill out in full, but must abbreviate it in this opinion. The defendant filed a motion to dismiss for want of equity, and also for want of jurisdiction. This motion was sustained, and the case dismissed, and the original plaintiff brought the case here by appeal.

We will briefly state the facts as gathered from the bill: About 1893, Tom Lucas, a white man and noncitizen of the Creek Nation, was married to one Mollie, maiden surname not shown, a full-blood Creek Indian. To this marriage was born one son, Sam Lucas. Both Mrs. Lucas and her son Sam were enrolled; the former as 7884, and the latter as 7885. One hundred and sixty acres of land were selected in behalf of and allotted to Sam Lucas about June 30, 1902. Later, about October 6, 1902, and before the issuance of any trust patent to him, Sam Lucas departed this life, leaving as his sole heir his mother, Mollie Lucas. About April 14, 1903, a patent was issued on said land in the name of Sam Lucas as grantee. Prior to his death his father and mother had been divorced in 1895, and at some time thereafter, which does not accurately appear, said Mollie Lucas married Albert Harjo. On March 29, 1912, Mollie Harjo and said Tom Lucas, who seems to have been assumed to have been an heir of Sam Lucas, signed, or attempted to sign, a deed of said land to John W. Carter, in consideration of $800, with a reservation of the oil and gas upon the south 80 acres. It is claimed the deed was invalid because:

"The said Mollie Harjo is a full-blood Creek Indian woman, and was duly enrolled as a full-blood Creek Indian and member of said Creek tribe upon the approved rolls of said tribe; that she has always lived and resided in said Creek Nation, and among the members of said tribe, and grew to womanhood under the influences of said tribe, and under its usages, customs, and traditions; that she possesses no educational qualifications whatever, and can neither read, write, speak, nor understand the English language, and can neither read nor write the language of her own tribe, or write her own name, but is obliged, for these reasons to make her signature by mark to any written instrument; that the said Mollie Harjo is wholly illiterate, and is very unintelligent, and has but little conception of the value of property, and especially real estate, and has very little knowledge of the way and manner of transacting business, and is now, and ever since the death of said Sam Lucas and prior thereto has been, mentally incompetent and incapable of managing and controlling her own affairs, and especially matters pertaining to said lands or the disposition thereof, and of knowing the true value of said lands;" that said deed purports to have been signed by Mollie Harjo by her mark, witnessed by James A. Long and Albert Harjo, the vendor's husband; that James A. Long also took the acknowledgment; that he was jointly interested in said purchase with said John W. Carter of said lands, and both he and the husband of Mollie Harjo were disqualified as witnesses.

The same day, namely, the 29th of March, 1912, the deed was presented to the county court in session, and it made an order which recites in its caption that it was made in the county court, the state of Oklahoma, county of Hughes, and contained the following:

"It is ordered, adjudged, and decreed by the county court of Hughes county, in the state of Oklahoma, that the said deed executed this day by Mollie Harjo, née Lucas, conveying to John W. Carter the said allotment of Sam Lucas, deceased, be and the same hereby is approved, ratified, and confirmed, with the reservation as to oil and gas mentioned in said deed." This was signed: "P. W. Gardner, County Judge of Hughes County, State of Oklahoma."

On the 24th of April, 1913, the said Mollie Harjo gave a quitclaim deed to J. B. Turner of all the land inherited from Sam Lucas, which it is alleged was intended to convey her oil and gas right reserved by deed previously referred to. This deed was in consideration of $100, which, it is alleged, was an inadequate consideration. It was signed by the mark of Mollie Harjo, witnessed by Mitchell Compier and Albert Harjo, and was acknowledged before J. Ross Bailey, county judge of Hughes county. J. Ross Bailey, county judge of Hughes county, Oklahoma, signed upon the face of said deed:

"Approved by me.
"J. Ross Bailey, County Judge, Hughes County, Oklahoma."

Judge Bailey also signed an order which states in the caption that it is in the county court of Hughes county, state of Oklahoma, in the matter of approval of quitclaim deed from Mollie Harjo, née Lucas, to J. B. Turner, and after numerous recitals of the facts concludes:

"It is therefore ordered, adjudged, and decreed by this court that the sale of the remaining interest of said Mollie Harjo, née Lucas, in and to the property herein described to J. B. Turner, be and the same is in all things hereby approved and confirmed.
"J. Ross Bailey, County Judge of Hughes County, Oklahoma."

It is alleged:

"That said pretended approval upon the face of said deed by said county judge, and the pretended approval of said county court, aforesaid, were signed, and said approvals attempted to be performed, simply by the said J. Ross Bailey, on the 24th day of April, 1913, at the town of Atwood, in said county of Hughes, Oklahoma, and not by the county court of said Hughes county; that said deed to said Turner and said pretended approval were presented to the said J. Ross Bailey by said J. B. Turner at said town of Atwood on said date, and the same were then and there signed by said J. Ross Bailey; that said town of Atwood is not a court town of said Hughes county, state of Oklahoma, and was not a county court town of said Hughes county on the 24th day of April, 1913, or at any other time, either prior or subsequent thereto, * * * and such was not the act or approval of said county court; that said deed to said Turner has never been approved by the county court of said Hughes county."

On the 22d of April, 1915, said Mollie Harjo and her husband, Albert Harjo, undertook to sell and convey to F. S. Freeland and Albert Duemcke all the oil, gas, and petroleum in and underlying the south half of the property in controversy, and presented their deed to the county court for approval. On May 4, 1915, said court, J. Ross Bailey presiding, refused to approve said deed, and directed George E. Black, attorney for the persons objecting to such approval, to draw an order

to that effect, but that said George E. Black presented said order for approval by the judge, pretending that the same was drawn in accordance with directions theretofore given him; that the said J. Ross Bailey, without having read said order, and without knowing the terms thereof, signed the same, with the intention of showing simply his disapproval of said deed to said Freeland and Duemcke; that it contained a provision:

"That this court on the ——— day of April, 1913, approved a deed of conveyance executed by Mollie Harjo to one J. B. Turner, of Holdenville, Oklahoma, upon the said south half of the northeast quarter of section four, township 18 north, range 7 east; and the court further finds that the said Mollie Harjo, who executed said deed to said Turner, conveying all of her interest in said land, is the same person as the grantor in the deed now presented to the court for the approval; and the court further finds that the order of approval of the deed executed and delivered to said Turner was by this court, and that the order was made after the submission of testimony to the court, and after the court found from such testimony that the deed was given for fair consideration; and the court now finds and holds his action in approving said deed of conveyance to the said Turner was legal under the law, and is hereby reaffirmed and is approved."

The bill alleges:

"At the time said order was so signed by the said J. Ross Bailey as aforesaid, the said county court of said Hughes county nor the said J. Ross Bailey, as the judge thereof, had no power, authority, or jurisdiction to approve, or attempt to approve, said deed to said J. B. Turner; that said pretended order, wherein the same purports to reaffirm or to approve said deed to said Turner, is absolutely null and void; * * * that, had the said J. Ross Bailey have known that said order embraced any provisions for the reaffirmation or approval of said deed to said Turner before signing the same, the said J. Ross Bailey would have refused to sign same, but, having no knowledge that said matter was contained in said order, he signed said order, intending thereby simply to disapprove said deed to said Freeland and Duemcke, and for no other purpose."

All three of these orders of approval recite that they were made upon the petition of Mollie Harjo.

The government claims that it has the right to maintain this action under the authority of Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820, Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, and United States v. Gray, 119 C. C. A. 529, 201 Fed. 291. And see Deming Investment Co. v. United States, 224 U. S. 471, 32 Sup. Ct. 549, 56 L. Ed. 847; and in this court United States v. Allen, 103 C. C. A. 1, 179 Fed. 13, and United States v. Owen, 106 C. C. A. 668, 184 Fed. 990; Bowling v. United States, 111 C. C. A. 561, 191 Fed. 19; Wright v. United States, 115 C. C. A. 673, 196 Fed. 1007; United States v. Noble, 116 C. C. A. 654, 197 Fed. 292; United States v. La Roque, 117 C. C. A. 349, 198 Fed. 645; United States v. Fitzgerald, 119 C. C. A. 533, 201 Fed. 295; and United States v. Joyce, 240 Fed. 610, 154 C. C. A. 653.

The defendants include various direct and remote grantees of the title by the vendees of Mollie Harjo, but whether they are innocent purchasers or not is not alleged, and does not, of course, anywhere appear.

In Sunday v. Mallory, 150 C. C. A. 408, 237 Fed. 526, it was held that, where a Cherokee died after enrollment and before allotment, his land went to his heirs free from all restrictions; but not only was the law as to the Cherokees somewhat different from the law as to the Creeks, but in this case allotment had taken place before the death of Sam Lucas. We have therefore concluded to pass upon this case upon other grounds, leaving the question as to whether the rule in Sunday v. Mallory is applicable to the facts here to another time, if it should ever arise, when it becomes necessary to pass upon it.

Under section 6 of the Supplemental Creek Agreement (32 Stat. 500, 501, c. 1323) Mollie Harjo was the sole heir of Sam Lucas; but, as already stated, it was assumed, apparently by all parties, at the time of the deed of March 29, 1912, that the land descended to her and her former husband, the father of Sam Lucas, namely, Tom Lucas.

[1] We shall inquire, first: Did Mollie Harjo legally sign the deed to John W. Carter of March 29, 1912, and did she so sign the J. B. Turner deed of April 24, 1913? That she in fact put her mark to both of said deeds as her signature is neither disputed nor denied in the bill. The laws of Oklahoma in force at the time (Snyder's Compiled Laws of Oklahoma 1909) contained in section 2965:

"'Signature' or 'subscription' includes mark, when the person cannot write, his name being written near it, and written by a person who writes his own name as a witness."

Mansfield's Digest of the Laws of Arkansas, § 6344, contains the following:

"Signature or subscription includes mark, when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness."

In view of the well-known history of Arkansas and Oklahoma, and their relations and the identity of the language, it is not difficult to conclude that the statute of Oklahoma quoted was taken from Arkansas. It is elementary that the adoption of a statute adopts the construction already put upon the statute by the court of last resort of the state from which it came. Long before the admission of Oklahoma the Supreme Court of Arkansas had repeatedly construed this statute, and held that if a person signed by his mark and without the person who signs his name signing as a witness, and even when no one signs as a witness at all, the signature was still valid, if proved. Ex parte Miller, 49 Ark. 18, 3 S. W. 883, 4 Am. St. Rep. 17; Davis v. Semmes, 51 Ark. 48, 9 S. W. 434. This construction must be deemed to have been adopted by Oklahoma when it adopted this statute; and, the bill failing to negative that Mrs. Harjo attached her mark to these instruments, we must conclude that she properly executed both these deeds, notwithstanding the allegations as to defects in the witnesses.

It is alleged that Jas. A. Long, who took the acknowledgment of the Carter deed, was interested in the purchase with the vendee; but no acknowledgment was necessary as between the grantor and grantee. Section 1195 of Snyder's Compiled Laws of Oklahoma 1909. We therefore find the Carter and Turner deeds were both properly exe-

cuted, and no attack is made upon the approval of the Carter deed by the county court.

[2] In chapter 199 of the Acts of the 60th Congress (35 Stat. 312, 315), it is provided:

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

It will be observed that this section first removes all restrictions upon the alienation of such lands as those here in question, and in the same breath replaced them with a restriction upon a full-blooded heir, by requiring that his deed, to be valid, must be approved by the court having jurisdiction of the settlement of the estate of the deceased allottee. If the John W. Carter deed was valid, it still reserved the oil and gas upon the south 80 acres; so we turn to the question as to the validity of the approval of the Turner deed. No argument that it was meant thereby to only convey the oil and gas can be effectual, as it was a deed absolute in form, and conveyed all the right, title, and interest of Mollie Harjo in and to the land.

It is conceded that the county court of Hughes county, Okl., was the court having jurisdiction of the settlement of the estate of Sam Lucas. That was the court, therefore, which must approve the deed or deeds of Mollie Harjo. The laws of Oklahoma then in force, but subsequently embraced in the Revised Laws of Oklahoma, provide as follows:

"Sec. 1823. In each county, commencing on the first Mondays of January, April, July and October of each year, except as otherwise herein provided, county court shall convene at the county seat and continue in session so long as business may require: Provided, that said courts shall always be open and in session for the transaction of all probate business in their respective counties."

This court is also always open for the trial of those cases triable under justice of the peace procedure and for the purpose of taking and entering judgments by confession. Wilson v. State, 3 Okl. Cr. 714, 109 Pac. 289. The mere name "county court" conveys but little as to its jurisdiction. In many states such courts exercise the taxing power, and in many exercise or did exercise the functions now generally intrusted to boards of supervisors or commissioners, and substantially all exercise limited judicial functions.

It must be borne in mind that "the court having jurisdiction of the settlement of the estate" of Sam Lucas was always in session. We have no desire to conflict with, much less to overrule, those cases which draw a correct distinction between a court and the judge thereof, and limit the power of courts to act in vacation; but the law says there shall be no vacation in the county court in probate matters, consequently the "court having jurisdiction of the settlement of the estate" of Sam Lucas is always in session. Where? At the county seat or some court seat where there is no judge, or where the judge is, although it be away from the county seat or some court seat? We have concluded the latter is meant, and that this deed was approved by the

county court when the county judge approved it within the county, and especially so where the order is subsequently entered of record at a court seat, which we understand was done here. We therefore conclude the approval of the deed to Turner at Atwood was valid. See Lee County v. Nelson, 4 G. Greene (Iowa) 348.

Mollie Harjo having complied with the only restriction placed upon her by the statute, and there being no sufficient allegation of the facts of fraud or the like, the petition failed to state a cause of action for equitable relief, and the motion to dismiss was properly sustained, and the decree of the District Court is affirmed.

WINSTON v. BROWN et al.

(Circuit Court of Appeals, Fifth Circuit. January 11, 1918.)

No. 3073.

1. EQUITY ⟸66—MUTUALITY OF REMEDY—EQUITABLE MAXIMS.
The duty of specific performance, which courts of equity enforce, is a reciprocal one, and the maxim, "He who seeks equity must do equity," is peculiarly applicable; therefore specific performance will ordinarily be refused in favor of a party against whom specific performance of his obligations under a contract is for any cause impossible.

2. SPECIFIC PERFORMANCE ⟸13—POSSIBILITY OF PERFORMANCE—DENIAL.
Specific performance of a contract to exchange lands for certain other property, which obligated the defendants to assume mortgages on the lands they were to receive, will not be granted, where at the time of rendition of the decree mortgages on the lands which complainant was to transfer had been foreclosed, and he had lost all rights therein; it being purely a question of surmise whether, if defendants had complied with their agreement to pay interest on the mortgages, foreclosure could have been avoided.

Appeal from the District Court of the United States for the Western District of Texas; Gordon Russell, Judge.

Suit by William C. Winston against Orson P. Brown and others. From a decree for defendants, complainant appeals. Affirmed.

William C. Reid and James M. Hervey, both of Roswell, N. M., for appellant.

A. H. Culwell, of El Paso, Tex., for appellees.

Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

WALKER, Circuit Judge. The appellant, William C. Winston (who will be called the plaintiff), by bill filed on the equity side of the court, sought the specific performance of a contract entered into in March, 1913, between him and the appellee, Orson P. Brown (who will be called the defendant). That contract embodied the following features or

provisions: The plaintiff agreed to convey or have conveyed to the defendant three tracts of land in New Mexico, one a 250-acre tract near Dexter, known as the "Macey Place," upon which there was a mortgage securing a note for $8,000 and interest, payable to a third person, another a 200-acre tract, part of a place known as the "Joe Carper Place," upon which there was a $4,500 mortgage, embracing the 200 acres and other land, and the third a 300-acre tract; to furnish an abstract of title showing merchantable titles to the properties to be conveyed; to pay the interest on the two mortgages mentioned to the date of the contract; to assume $2,700 of the $4,500 mortgage indebtedness; and to assume and pay a $3,200 note made by the defendant to the Bank of Douglas. In consideration of the agreements of the plaintiff the defendant agreed to transfer to the plaintiff shares of stock in a named Mexican corporation, representing and entitling the defendant to 50,504 acres of land in the state of Chihuahua, Mexico, to assume the $8,000 mortgage and $1,800 of the $4,500 mortgage, and to execute a $1,600 note to the plaintiff, to be secured by a mortgage on the 250-acre tract, and to be due at the same time the $3,200 note to the Bank of Douglas was due. The contract stated that the valuations at which the defendant was to receive the two mortgaged tracts were $35,750 and $20,000, respectively, and that the valuation at which he was to receive the other tract was $8,000. Neither the $8,000 mortgage nor the $4,500 mortgage was paid by the plaintiff or the defendant, and each of those mortgages was foreclosed, and the land covered thereby was bought at the foreclosure sales by strangers to this suit. At the time the decree dismissing the plaintiff's bill was rendered, the plaintiff could not convey title to either of those tracts. It is not claimed in his behalf that, after the foreclosures, he had any interest or estate in the lands so sold, or any right to redeem or reacquire them.

[1] It is apparent from the above statement that, at the time the decree appealed from was rendered, the specific enforcement of the contract, in so far as it imposed obligations upon the plaintiff, was impossible. The foreclosures mentioned deprived the plaintiff of the power to do the things he undertook to do in consideration of the undertakings of the defendant, which are sought to be specifically enforced. A result of granting the relief prayed would be that the plaintiff would get the property for which he traded, while the defendant would fail to get the greater part in value of that which he was to receive in the exchange contracted for. The duty of specific performance, which courts of equity enforce, is a reciprocal one. The maxim, "He who seeks equity must do equity," is peculiarly applicable where one party to a contract asks that another party thereto be coerced to perform specifically. The general rule is to refuse such relief in favor of a party against whom the specific performance of his obligations under the contract is, for any cause, impossible. Ordinarily a party will be left to his remedy at law, where the circumstances are such that only a fragment of the contract in question is capable of specific performance. Brashier v. Gratz, 6 Wheat. 528, 5 L. Ed. 322; Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. Ed. 955; Holgate v. Eaton, 116 U. S.

33, 6 Sup. Ct. 224, 29 L. Ed. 538; Slaughter v. La Compagnie Française des Cables Tel. (C. C.) 113 Fed. 21.

[2] In behalf of the plaintiff it is contended that, the contract having been capable of performance on both sides when, by its terms, performance was due, the fact that the plaintiff's inability to perform was a result of the defendant's default brought the case within a recognized exception to the rule above stated. Assuming the existence of such an exception, we think a sufficient answer to the contention is that it was not made to appear that the plaintiff's loss of two of the three properties the defendant was to get was due wholly to the latter's default. The contract did not obligate the defendant to do all that was required to make it sure that the two mortgages mentioned would not be foreclosed. The plaintiff agreed to pay the interest which had accrued on the mortgage debts at the date of the contract, and to take care of $2,700 of the $4,500 principal secured by one of the mortgages. Each of the mortgages would have remained subject to foreclosure, even if the defendant had complied with his obligations with reference to them. It would be mere surmise to conclude that performance by the defendant would have enabled the plaintiff to comply with his obligations under the contract, and would have insured his doing so, or that the holders of the mortgages would have insisted on the foreclosure of them if the plaintiff had paid the interest accrued at the date of the contract, though the subsequently accruing interest and the principal were not promptly paid. The conclusion is that the existence of some ground for conjecturing that the foreclosures might not have occurred if the defendant had complied with the obligations imposed upon him by the contract—this being as much as the evidence properly can be regarded as disclosing—is not enough to make inapplicable to the case the general rule that the kind of relief which is sought is denied to a plaintiff who is unable to perform his part of the contract.

Discussion of other disclosed facts that might be relied on to support the action of the court in dismissing the bill is not deemed necessary. The decree is affirmed.

R. R. THOMPSON ESTATE CO. v. WEINHARD et al.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1918.)

No. 3040.

CORPORATIONS ⊂⊃244(6)—SALE OF STOCK—ASSUMPTION OF CORPORATE DEBTS.

A corporation, owning all of the common stock and most of the preferred stock of a hotel company, sold it to defendant under an agreement whereby defendant was to apply the purchase price to the payment of the hotel company's indebtedness and was to advance to the seller corporation on its note a further sum, which it was also to apply to the hotel company's liabilities. The seller company agreed to guarantee, indemnify, and save defendant harmless against the payment of any further debts and liabilities; the purpose being, as recited, that defendant should obtain title to the hotel company's property and assets free and clear of all indebtedness. The indebtedness of the hotel company considerably exceeded the purchase price of the stock, as well as the further amount advanced on the note of the seller corporation, and defendant paid all of the liabilities of the hotel company, except a note held by plaintiffs' testator. The seller corporation becoming insolvent, defendant proved as a claim against its estate all of the excess liabilities, which claim included the note held by plaintiffs' testator. *Held*, that defendant assumed the entire indebtedness of the hotel company by implication, this conclusion being strengthened by the conduct of defendant, and hence plaintiffs might recover against it.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by Louise Weinhard and others, executrices and executors of the last will and testament of Henry Weinhard, deceased, against the R. R. Thompson Estate Company, a corporation. There was a judgment for plaintiffs (242 Fed. 315), and defendant brings error. Affirmed.

Bauer & Greene and A. H. McCurtain, all of Portland, Or., for plaintiff in error.

Sidney Teiser and Julius Silvestone, both of Portland, Or., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This action was brought in the court below by the legal representatives of Henry Weinhard, deceased, to recover from the Thompson Estate Company, the plaintiff in error here, the amount due on a certain promissory note for $4,500, with interest, executed March 6, 1912, at Portland, Or., to the plaintiffs in the action, by the Multnomah Hotel Company, Philip Gevurtz, and I. Gevurtz & Sons, a corporation. The case was tried before the court without a jury by stipulation of the parties, resulting in findings and a judgment for the plaintiffs, and comes here by writ of error sued out by the defendant. There is no dispute about the facts, which are substantially as follows:

The Thompson Estate Company was the owner of the Multnomah Hotel in Portland, and leased it to the Multnomah Hotel Company, of

which Philip Gevurtz was president, practically all of the stock of which company, both common and preferred, was owned by a corporation known as I. Gevurtz & Sons, of which he was also president. The hotel company having become financially involved, I. Gevurtz & Sons, on January 10, 1913, gave to the Thompson Estate Company, the owner of the hotel building, an option to purchase all of the common and preferred stock of the hotel company, for the sum of $175,000, which option expressly provided in effect that the Thompson Estate Company should have the right to apply the $175,000, or such portion thereof as should be necessary, to the payment of the indebtedness of the hotel company, and further that any and all other of its indebtedness or liabilities that might exist at the time of the transfer of the stock of the hotel company to the Thompson Estate Company should be paid by the I. Gevurtz & Sons corporation, and that, in the event the latter corporation should be unable to pay such indebtedness as it became due, the Thompson Estate Company should advance the money necessary for such purpose to the extent of $35,000, upon the execution to it of the promissory note of I. Gevurtz & Sons for such sum as should be so required, with interest at the rate of 6 per cent. per annum, payable six months from the 1st day of January, 1913 (with a condition not necessary to be stated), and with the further agreement on the part of the latter corporation that it would "warrant and guarantee" the Thompson Estate Company against any and all indebtedness and liabilities of the hotel company over and above the aggregate amounts of the $175,000 and $35,000, and would indemnify the Thompson Estate Company "against all further claims or demands, actions, damages, liabilities, suits, fines, liens, contracts, or indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm, or corporation, arising out of and incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of possession"—"it being the intention," the agreement proceeded, "that in selling all of the common and preferred stock of the corporation (I. Gevurtz & Sons) to said the R. R. Thompson Estate Company for the sum of $175,000 as aforesaid, the said Thompson Estate Company shall thereby obtain good title to all of the property and assets of said Multnomah Hotel Company, free and clear of all claims, demands, liabilities, liens, or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens, or indebtedness shall be assumed and paid by said I. Gevurtz & Sons, and the advance by the R. R. Thompson Estate Company of the additional sum of $35,000 shall only be as a matter of accommodation to I. Gevurtz & Sons, and shall not be in acknowledgment of any assumption by said Thompson Estate Company of any further liabilities or for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of the common and preferred stock."

The option was duly exercised and consummated, including the execution to the Thompson Estate Company by the I. Gevurtz & Sons corporation, of the guaranty, and its note for $35,000. The evidence showed that the indebtedness of the hotel company far exceeded the

aggregate amount of the $175,000 and $35,000, all of which excess, except the amount due on the Weinhard note sued on, was paid by the Thompson Estate Company.

The evidence further shows that the I. Gevurtz & Sons corporation having been adjudged a bankrupt, the Thompson Estate Company presented a claim against the estate of the bankrupt which included the entire liabilities of the hotel company, including the demand of the plaintiffs on the note here sued on, basing its claim upon the $35,000 promissory note of I. Gevurtz & Sons, the agreement and sale of the stock of the hotel company, and the guaranty and indemnity by I. Gevurtz & Sons against the payment of any and all indebtedness and liability of the hotel company, which claim was held by the referee in the bankruptcy proceedings to be provable, and upon which claim the Thompson Estate Company has actually received from the trustee of the estate of the bankrupt a dividend of 23 per cent. upon all such indebtedness, including the claim which plaintiffs are now seeking to recover.

We agree with the court below that the contract of the parties must be considered as a whole, and, in the light of their acts under and in pursuance of it, that the Thompson Estate Company assumed the entire indebtedness of the hotel company, looking to the indemnity evidenced by the warranty obligation given by the I. Gevurtz & Sons corporation to reimburse it for any excess of liabilities over the $210,000 it might be obliged to pay in order to clear the hotel property of the debts incurred by the hotel company. Surely no better evidence of that understanding on the part of the Thompson Estate Company of the arrangement in question could be had than the fact that it retained in its possession the fund arising from the $35,000 note executed to it by the I. Gevurtz & Sons corporation, and by its presentation of its claim against the bankrupt estate of that corporation, including the amounts paid out by the claimant under and in pursuance of the indemnity agreement, and including in the claim as one of its own liabilities the note here sued on, on which it has actually received, according to the record, from the trustee of the estate of the bankrupt, 23 per cent. thereof.

We think, as did the court below, that the facts and circumstances that have been stated created a duty and implied a promise on the part of the Thompson Estate Company to pay to the instant creditor of the hotel company similar to that it recognized in paying the other creditors of that company, which conclusion is in accord with the doctrine of the decisions of the Supreme Court of Oregon in the cases of Feldman v. McGuire, 34 Or. 310, 55 Pac. 872, and Parker v. Jeffery, 26 Or. 186, 194, 37 Pac. 712, as we understand them.

The judgment is affirmed.

In re ARMANN.

(Circuit Court of Appeals, Second Circuit. January 18, 1918.)

No. 84.

1. BANKRUPTCY ⟸444—PETITION TO REVISE—EXTENSION OF TIME.
Where an extension of time for filing a petition to revise was obtained, such petition may be considered, though not filed within the 10-day period prescribed by court rule 38 (235 Fed. xi, 148 C. C. A. xi).

2. BANKRUPTCY ⟸446—PETITIONS TO REVISE—SCOPE OF REVIEW.
On petition to revise, the appellate court is restricted to questions of law, and determinations of fact cannot be reconsidered.

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 Charles Armann. Petition by Lucius E. Judson, trustee, to revise an order of the District Court. Order affirmed.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

PER CURIAM. [1] This is a petition to revise by the trustee in bankruptcy under section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9608]), which we lately dismissed (247 Fed. 483, — C. C. A. —), because the record showed that it had not been taken within 10 days after entry of the order, as required by our rule 38 (235 Fed. xi, 148 C. C. A. xi). The petitioner subsequently obtained leave to show, and has shown, that by mistake an entry of the District Court extending his time had been omitted from the record. This requires us to dispose of the petition on its merits.

[2] Our authority to revise is restricted to questions of law, and both the referee and the District Judge having found as matter of fact that the creditor had no reasonable cause to believe that a preference was intended by the transfer to him, the conclusion of law that it was not voidable under section 60b, and that the fund in the possession of the trustee should be paid over to the creditor, is obviously right. If we had jurisdiction to pass upon the fact, we should agree with the court below upon that question also.

The order is affirmed.

COX v. NEW ENGLAND EQUITABLE INS. CO.

In re MOORE & PAYNE.

(Circuit Court of Appeals, Eighth Circuit. November 28, 1917.)

No. 4807.

BANKRUPCY ⟸345—PRIORITY OF CLAIMS—EQUITABLE LIEN.

A firm of contractors for a government building gave a bond conditioned, as required by statute, to pay all claims for materials and labor, and in order to obtain the surety agreed that, in case of its default, all sums then or thereafter due on its contract should be the property of the surety, to be credited on any indebtedness arising out of the obligation. They completed the building, but left claims for labor and materials unpaid. The government, without knowledge of such claims, made the final payment to the contractors, who paid it on an indebtedness to a bank, from which it was recovered by their trustee in bankruptcy. *Held* that, the fund having been traced and recovered, the surety, which had settled the claims covered by its bond, was entitled to an equitable lien thereon, and to priority of payment over general creditors.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

In the matter of Moore & Payne, bankrupts. From an order awarding to the New England Equitable Insurance Company priority in a fund recovered by the trustee, Norman Cox, trustee, appeals. Affirmed.

George J. Grayston and A. E. Spencer, both of Joplin, Mo., for appellant.

D. A. Murphy, of Nevada, Mo. (John T. Harding and S. F. Harris, both of Kansas City, Mo., and Hugh Dabbs, of Joplin, Mo., on the brief), for appellee.

Before SMITH and STONE, Circuit Judges.

SMITH, Circuit Judge. In 1912 the government let a contract to Moore & Payne, a copartnership of Missouri, for the construction of a post office building at Bonham, Tex., for $46,145. The contract provided for payments upon the contract as prescribed in the specifications. The specifications provided:

"*Payments.*—Payment of 90 per cent. of the value of the work executed and satisfactorily in place, as ascertained by the supervising architect, acting through the superintendent, will be made monthly, and payment of the 10 per cent. retained will be made after the final acceptance by the duly authorized representative of the Treasury Department of all materials and workmanship embraced in the contract; but payment will not be made until every part of the work to the point for which payment is claimed is satisfactorily supplied and executed in every particular and all defects remedied to the satisfaction of the supervising architect."

Moore & Payne gave a bond in the sum of $23,000, with the appellee as surety, conditioned as required by chapter 778 of the Acts of the

58th Congress, 33 Stat. 811 (section 6923 of the United States Compiled Statutes 1916), as follows:

"Now, if the said Moore & Payne * * * shall promptly make payments to all persons supplying labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue."

To procure this bond Moore & Payne made application to the appellee and therein stipulated:

"And the undersigned does further agree, in the event of any breach or default of the provisions of the contract or contracts hereinbefore mentioned, that the surety, as surety upon the aforesaid bond or bonds, shall be subrogated to all rights and properties of the undersigned as principal in said contract, and that deferred payments, and any and all moneys and properties that may be due and payable to the undersigned, at the time of such breach or default, or that may thereafter become due and payable to the undersigned on account of said contract or contracts, shall become the property of the surety, to be credited upon any claim that may be made upon the surety under the bond or bonds above mentioned."

The contract was performed by Moore & Payne, but they left persons supplying labor and materials upon the post office wholly unpaid to the amount of about $9,000, which appellee compromised for $8,182.28. About June 12, 1914, the government made final payment to Moore & Payne to the amount of about $5,345.63. They then owed the Citizens' State Bank of Joplin, Mo., about $8,000. They deposited the money received from the government with it, and checked the same out in small amounts down to about $5,000. They gave a check for $1,000 to the Citizens' State Bank of Joplin, Mo., to apply upon their account. Subsequently the bank credited $4,000 more upon the indebtedness of Moore & Payne, and later the latter gave their check for that amount. On October 3, 1914, Moore & Payne were adjudged bankrupts, and appellant, Norman Cox, was appointed and qualified as trustee. He brought suit against the Citizens' State Bank to recover the sum of $5,000. The petition was in three counts, the first two to recover the amounts of the checks for $1,000 and $4,000 as unlawful preferences. The third count was upon the right of the persons supplying labor and materials and the appellee to be subrogated to the rights of the persons supplying labor and materials against said fund. This resulted in a judgment in favor of the plaintiff upon the first two counts of the petition for $5,175. It is perhaps worthy of notice that the attorneys for Cox, trustee, in that case, were the attorneys for the appellee in this case in the court below, and the attorneys for the Citizens' State Bank in that case were the attorneys for appellant below.

On September 2, 1915, the appellee filed a petition for enforcement of lien priority with the referee, in which it was alleged that subsequent to the trial of the case of Norman Cox, Trustee, v. Citizens' State Bank of Joplin, and for the purpose of avoiding further litigation, he compromised said judgment with the Citizens' State Bank for the sum of $4,500; "that this petitioner in law and equity and good conscience is entitled to said fund by reason of its rights of subroga-

tion, and by reason of its lien thereon existing by virtue of said assignment, executed by the bankrupt, and by virtue of said assignment from said laborers and materialmen." The case was tried before J. C. Ammerman, referee, who denied the petition of the New England Equitable Insurance Company for lien priority, and allowed it the sum of $8,182.28 as a general creditor against the estate. The case was taken before the District Court upon an application for review, where the finding of the referee was reversed, and the fund collected from the Citizens' State Bank of $4,500 was ordered turned over to the appellee, and the trustee in bankruptcy appeals from that decision.

There is no dispute as to the identity of this money in the hands of the trustee with the money derived from the government. The government paid the contractors without the knowledge of the surety upon their bond, and without knowledge upon the part of the government or the surety of the existence of the claims of materialmen and laborers. The contractors deposited the money with the Citizens' State Bank of Joplin. It was sued by the trustee of the contractors, who recovered the fund. It is now contended the bank and other general creditors ought to receive a part of it as against the materialmen and laborers upon the government building and the appellee, who, under a written contract, paid their claims and took assignments of them.

There has been considerable discussion of the question as to when, if ever, the claim of the appellee attached as a lien to the funds, and on the question of subrogation, and as to whether the materialmen and laborers had any lien which would support subrogation, and even as to whether there is a fund in existence. We are of the opinion that the $4,500 now in the hands of the trustee is clearly the identical fund paid by the government to the contractors, and if the appellee had a lien upon it while the government had it, such lien has not been lost, as the fund is fully and accurately traced to the hands of Cox, trustee. So far as the questions of subrogation are concerned, the doctrine on that subject "is not founded on contract, but has its origin in a sense of natural justice." Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286; American National Bank v. Fidelity & Deposit Co., 129 Ga. 126, 58 S. E. 867, 12 Ann. Cas. 666.

But we have reached the conclusion that, aside from a specific consideration of any of these questions, except the tracing, existence, and identity of the fund, the surety company is entitled to an equitable lien upon the fund for all sums paid for labor and materials upon the Bonham building. Hardaway v. National Surety Co., 211 U. S. 552, 561, 29 Sup. Ct. 202, 53 L. Ed. 321; Hardaway & Prowell v. National Surety Co., 80 C. C. A. 283, 291, 150 Fed. 465, 473; Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; Id., 74 C. C. A. 484, 143 Fed. 810; Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; Columbia Digger Co. v. Sparks, 142 C. C. A. 304, 227 Fed. 780; Columbia Digger Co. v. Rector (D. C.) 215 Fed. 618; In re Scofield Co., 131 C. C. A. 353, 215 Fed. 45. See Alfred Richards Brick Co. v. Rothwell, 18 App. D. C. 516; Kiessig v. Allspaugh, 91 Cal. 231, 27 Pac. 655, 13 L.

R. A. 418. Without passing upon the question whether there is any conflict between this holding and that of the Supreme Court of Iowa in Hipwell v. National Surety Co., 130 Iowa, 656, 105 N. W. 318, if there is a conflict, that case could not be followed by this court in view of the great weight of federal authority on the subject.

The decree of the District Court was correct, and it is affirmed.

T. W. JENKINS & CO. v. ANAHEIM SUGAR CO.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1918.)

No. 3014.

1. PLEADING ⟸34(3)—DEMURRER—PRESUMPTIONS.
On demurrer to a complaint seeking damages for defendant's breach of contract to furnish plaintiff sugar for its needs in August of a particular year, it will, where the complaint alleged knowledge on the part of defendant as to how plaintiff's business was conducted, be presumed that the parties made their agreement with regard to such knowledge as alleged.

2. CONTRACTS ⟸10(4)—VALIDITY—ENFORCEMENT.
Plaintiff, a wholesale grocer, agreed to buy all the sugar it would require during the month of August from defendant at a fixed price, it being expressly agreed that defendant, the manufacturer, guaranteed the price up to the time of refusal against decline only to the base of price charged by the manufacturer to certain buyers. Ordinarily plaintiff required for its trade about 4,800 bags of sugar for the month of August and that fact was known to defendant. Sugar greatly increased in price, and defendant declined to furnish the amount desired. *Held*, that the contract was valid and not lacking mutuality, for, in view of the guaranty with respect to the base of price, it is apparent plaintiff agreed to purchase an ascertainable amount of sugar.

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

Action by T. W. Jenkins & Co., a corporation, against the Anaheim Sugar Company, a corporation. Defendant's demurrer having been sustained, and the action dismissed (237 Fed. 278), plaintiff brings error. Reversed and remanded, with directions.

This was an action upon a contract by Jenkins & Co., plaintiff below, an Oregon corporation, wholesale grocers, and engaged in buying and selling and dealing in sugar, against the Anaheim Sugar Company, a California corporation, engaged in manufacturing and refining sugar. The contract is as follows:

"San Francisco, Calif., June 13, 1914.

"A contract is hereby entered into between Anaheim Sugar Company, party of the first part, and T. W. Jenkins & Co., party of second part, to wit: Party of first part sells and party of second part buys August requirements bags fine granulated beet sugar at $4.20 per bag less 2% cash 8 days, f. o. b. San Francisco, August shipment. It being understood and agreed that party

of the first part guarantees the price up to time of refusal against decline only to the base of C. & H. and Western Sugar Refining Co."

Plaintiff alleges that the contract price was less than the prevailing market price in San Francisco when the contract was entered into, and that the price was fixed by defendant in consideration of the plaintiff's agreement with defendant that it would buy "exclusively from defendant all * * * granulated beet sugar required in its business during the month of August, 1914." It is alleged that the plaintiff relied upon the agreement, and made no other arrangements for its August requirements; that thereafter, in August, plaintiff required in its business and ordered 4,800 bags of sugar, and there was shipped and delivered from time to time during August by defendant to plaintiff 600 bags of sugar and no more; that it had many thousand customers to whom it sold sugar and merchandise and that much of its business was wholesaling to customers sugar in bag lots; that the method of dealing in sugar was this: Plaintiff would contract with a sugar producer or refiner for the sale to it, covering a specified period, of such sugar as it would require for its sale to its customers, and plaintiff would thereupon receive from and solicit from its customers orders for sugar in bag lots at a stipulated price, based on the contract price between plaintiff and the producer or refiner, delivery to be made to its customers at a future time agreed upon between the plaintiff and its customers at the time of sale, all of which was well known to the defendant when the contract herein involved was made. It is alleged that defendant in its business usually and ordinarily required in August of each year sugar in excess of 4,800 bags, and that, relying upon the contract, plaintiff solicited and received from many of its customers orders for 4,800 bags of sugar, which it intended to deliver to said customers from the sugar to be delivered under the terms of the contract; that when the contract was entered into defendant knew the nature of plaintiff's business and the manner in which it was conducted, and what plaintiff's requirements for sugar would be during the term of the contract entered into with plaintiff; that because of the refusal of defendant to deliver 4,200 bags of sugar plaintiff lost its profits on the resale thereof, and had to buy in the open market sugar in excess of the price stipulated for with defendant and was damaged in the sum of $13,020.

By demurrer these questions were presented: Does the complaint state facts sufficient to constitute a cause of action, and (2) is the complaint uncertain, ambiguous, or unintelligible? The District Court sustained the demurrer, plaintiff declined to amend, and judgment was entered, dismissing the action, whereupon plaintiff sued out writ of error.

Beach, Simon & Nelson, of Portland, Or., and Allen & Weyl, of Los Angeles, Cal., for plaintiff in error.

Gray, Barker & Bowen, of Los Angeles, Cal., for defendant in error.

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

HUNT, Circuit Judge (after stating the facts as above). [1, 2] The District Court was of the opinion that the contract as entered into was not supported by sufficient consideration to make it valid; that it lacks mutuality, in that defendant under any circumstances could be compelled to furnish the sugar covered by the contract, but that plaintiff could not be compelled by defendant to order and accept any sugar thereunder. In support of this view the learned judge distinguishes between cases which uphold contracts binding one party to sell and the other party to buy all of the requirements of the latter's established business as to a given commodity, and those where the contract is be-

tween parties, one of whom is in the business, not of manufacturing the commodity involved, but only of selling the same at wholesale; that is to say, where the purchase and use of the commodity becomes not an incident to the principal business of the buyer, but is his main business, a contract of the general character of the one here in question will be held invalid as unilateral and void for want of mutuality.

The difference between a contract which does not obligate a buyer to take any specified quantity of the seller's product and one where in consideration of the seller's promise to sell the buyer promises to buy all the produce it may require for its own use for a definite period of time is substantial. In the one instance there would be no consideration, while in the other there would be a mutual obligation to perform which is a consideration for the promise of each. A mere option to buy is readily distinguishable from an agreement to buy all to be required. Suppose, for instance, the plaintiff herein had bought sugar from any other sugar dealer for sale to its customers during August, it must be that if loss had occurred, action in damages for breach of contract would have been sustainable, and damages could have been ascertained by extrinsic evidence. Failure in the contract to fix any requirements on the part of the Jenkins Company for August, 1914, does not seem to us to call for a nullification of the contract upon the ground of want of mutuality. The complaint charges that the contract was made with the knowledge on the part of the defendant of how plaintiff's business was conducted, and that plaintiff made contracts with customers for sale and delivery of sugar to be acquired under the contract with defendant, and knowing what the probable requirements of plaintiff would be. We think that upon demurrer the presumption is that the parties made their agreement with regard to the knowledge as alleged, and that the defendant intended to sell and deliver the quantity of sugar which the plaintiff needed for its August business.

In Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529, the court considered a contract wherein the "requirements" for a specified season were included, and, after treating the word "requirements" as having been used to express the needs of the parties, said:

"If the word 'requirements,' as here used, is so interpreted as to mean that appellee was only to furnish such coal as appellant should require it to furnish, then it might be said that appellant was not bound to require any coal unless it chose, and that, therefore, there was a want of mutuality in the contract. But the rule is that where the terms of a contract are susceptible of two significations, that will be adopted which gives some operation to the contract, rather than that which renders it inoperative. * * * A contract should be construed in such a way as to make the obligations imposed by its terms mutually binding upon the parties, unless such construction is wholly negatived by the language used. * * * It cannot be said that appellant was not bound by the contract. It had no right to purchase coal elsewhere for use in its business, unless, in case of a decline in the price, appellee should conclude to release it from further liability."

This decision is referred to in Cold Blast Trans. Co. v. Kansas City, etc., Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696. In the latter

case the court had before it an offer to deliver an unascertained quantity of goods at a stated price and acceptance thereof, but no agreement to purchase the requirements or any portion thereof, and in a very forceful discussion, Judge Sanborn, for the court, held that such a contract was void and unenforceable because of indefiniteness and for a lack of mutuality of obligation. We do not understand, however, that the court went so far as to express the opinion that all contracts for future supply during a limited time, of articles which shall be required or needed, are invalid. Indeed, the court said:

"An accepted offer to furnish or deliver such articles of personal property as shall be needed, required or consumed by the established business of the acceptor during a limited time is binding and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer." Golden Cycle Manufacturing Co. v. Rapson, etc., Co., 188 Fed. 179, 112 C. C. A. 95; Sterling Coal Co. v. Silver Springs, 162 Fed. 848, 89 C. C. A. 520.

Crane v. Crane, 105 Fed. 869, 45 C. C. A. 96, cited by the appellee in support of the position of the District Court, involved material points of difference from the case made by the complaint under examination. The contract examined in that case left the plaintiff at liberty to buy the lumber he desired elsewhere if the prices of such lumber were more favorable to him, and it did not appear from the complaint that the vendor had knowledge of the purchaser's requirements. These points of distinction are well brought out in Grand Prairie Gravel Co. v. Wills Co. (Tex. Civ. App.) 188 S. W. 680.

In Lima Locomotive & Machine Co. v. National Steel Castings Co., 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713, the Court of Appeals for the Sixth Circuit, speaking through Judge Lurton, held that where the plaintiff accepted a proposition made by defendant to furnish all deliveries as plaintiff should require for a part of the year at prices mentioned, the plaintiff was under obligation to take from the defendant all the steel castings which it required in its business, and the contract was held not void for want of mutuality. See, also, Marx v. American Malting Co., 169 Fed. 582, 95 C. C. A. 80; Manhattan Oil Co. v. Richardson, 113 Fed. 923, 51 C. C. A. 553; Ramey Lumber Co. v. Shroeder Lumber Co., 237 Fed. 39, 150 C. C. A. 241; Russell v. Excelsior, 120 Ill. App. 23; McIntyre Lumber Co. v. Jackson Lumber Co., 165 Ala. 268, 51 South. 768, 138 Am. St. Rep. 66; Consolidated Coal Co. v. Jones & Adams Co., 232 Ill. 326, 83 N. E. 851.

It does not seem that necessarily there is a substantial basis for a distinction between the needs or requirements of a wholesale dealer in sugar and a manufacturer who uses sugar. Ascertainment of the requirements of the one may be as capable of estimation as the other. The temptation to speculate may be greater on the part of the dealer than of the manufacturer, but if the contract is honestly entered into the law ought not to refuse to enforce its terms for any such reason as possible misuse of its purposes. The presumption is in favor of integrity of conduct. Furthermore, in the present case, defendant knew of probable requirements, and by the terms of the contract temptation

to cut down requirements because of falling market was reduced, in that it was expressly agreed that the Anaheim Sugar Company, manufacturer, guaranteed the price up to time of refusal against decline only to the base of price charged by the manufacturer to certain buyers.

Our construction of the several averments of the complaint is that Jenkins & Co., dealer, agreed to confine its purchases to the sugar company, manufacturer; that its normal requirements were alone involved, and that they were known approximately by the manufacturing company; that there was a safeguard against inducement to eliminate requirements should prices fall, by stipulating for protection in the event of such contingency.

It follows that the court should have overruled the demurrer and required the defendant to answer.

We must reverse the judgment and remand the case, with directions to overrule the demurrer.

EDDY et al. v. KRAMER et al.

EDDY v. MATHER et al.

(District Court, E. D. Pennsylvania. February 5, 1918.)

Nos. 1513, 1515.

1. PATENTS ⟸287—INFRINGEMENT BY CORPORATION—LIABILITY OF DIRECTORS.
Directors of a corporation by whose direction acts of infringement are committed by subordinate officers or agents are liable individually therefor.

2. PATENTS ⟸62—ANTICIPATION—EVIDENCE TO ESTABLISH.
The uncorroborated testimony of witnesses as to the date when they saw alleged anticipating articles and their description *held* insufficient to establish anticipation.

3. PATENTS ⟸58—ANTICIPATION—BURDEN AND MEASURE OF PROOF.
The burden of proving anticipation by clear and satisfactory evidence rests upon the defendant alleging it, and every reasonable doubt should be resolved against him.

4. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PAD FOR DAILY DATE SIGNS.
The Eddy patents, No. 1,153,543 and No. 1,153,545, each for a pad for daily date signs, were not anticipated, and while not pioneer add sufficient to the prior act to disclose invention; also *held* infringed.

In Equity. Suits by James Francis Eddy and the Dando Printing & Publishing Company against Henry F. C. Kramer, Joseph De Lone, and Frank Hobson, individually and trading as the Quaker City Calendar Company, and the De Lone Ehmling Company, Incorporated, and by James Francis Eddy against Charles E. Mather, Victor Mather, and Gilbert Mather, copartners trading as Mather & Co. On final hearing. Decrees for complainants.

Ward W. Pierson, of Philadelphia, Pa., and Russell Everett, of Newark, N. J., for plaintiffs.

Arno P. Mowitz and Fenton & Blount, all of Philadelphia, Pa., for defendants.

DAVIS, District Judge. James Francis Eddy and Dando Printing & Publishing Company filed their bills against the defendants in the above-stated causes, charging them with infringing the three claims of United States patent No. 1,153,543, and the first claim of United States patent No. 1,153,545. The three claims of the first-mentioned patent are as follows:

"1. The hereindescribed pad for daily date signs, comprising in combination a plurality of leaves, a cap consisting of a piece of sheet material bent longitudinally into channel form with its intermediate portion lying upon the top edges of said leaves and its opposite parallel side flanges lying one in front of and the other behind the upper part of said leaves, the rear flange of the cap having a tongue depending therefrom substantially in the plane of the flange adapted to be exposed for entering a supporting slot by flexing the leaves and cross-pins extending through said cap flanges and leaves adjacent the opposite ends thereof connecting said flanges and supporting said leaves.

"2. The hereindescribed pad for daily date signs, comprising in combination a plurality of leaves, a cap consisting of a piece of sheet material bent longitudinally into channel form with its intermediate portion lying upon the top edges of said leaves and its opposite parallel side flanges lying one in front of and the other behind the upper part of said leaves, the rear flange of the cap having a tongue depending therefrom substantially in the plane of the flange adapted to be exposed for entering a supporting slot by flexing the leaves and having an edge portion adjacent said tongue adapted to engage the wall of the slot as a stop, and cross-pins extending through said cap flanges and leaves adjacent the opposite ends thereof connecting said flanges and supporting said leaves.

"3. The hereindescribed pad for daily date signs, comprising in combination a plurality of leaves, a cap consisting of a piece of sheet material bent longitudinally into channel form with its intermediate portion lying upon the top edges of said leaves and its opposite parallel side flanges lying one in front of and the other behind the upper part of said leaves, said cap extending substantially the entire length of the top edges of the leaves and having a tongue depending from the free edge of its rear flange adapted to be exposed for entering a supporting slot by flexing the leaves and having adjacent said tongue edge portions of said rear flange adapted to seat on the wall of the slot, and cross-pins extending through said cap flange and leaves between the ends thereof and said seat portions of the rear flange connecting said flanges and supporting said leaves."

The claim of the second patent is:

"The hereindescribed pad for daily date signs, comprising in combination with a plurality of leaves, a cap having opposite parallel flanges one in front of said leaves and the other behind them and an intermediate portion at the top edges of said leaves holding said flanges in spaced relation, said flanges including pairs of opposite ears at the ends of the cap and the rear flange including a depending tongue between the ears and separated therefrom, said tongue being adapted to hook over a strip or the like while said ears lie against its front, and cross-pins extending one through the opposite ears of each pair and the leaves of the pad so as to connect the cap flanges and support the leaves while leaving the tongue free to be exposed for entering a supporting slot by flexing the leaves."

The defendants urge that the bills should be dismissed for technical reasons:

1. The bill against Mather & Co. should be dismissed for lack of proof of any alleged infringing act committed between the issue of the patents, September 14, 1915, and the filing of the bill, December 31, 1915. The evidence is that Mather & Co. on April 22, 1915, ordered calendars from the Quaker City Calendar Company, and those

calendars, except a few which were sent Mather & Co., were sent direct to customers of Mather & Co. by the Quaker City Calendar Company. The said surplus calendars, not sent out by the Quaker City Calendar Company to customers of Mather & Co., were delivered to Mather & Co. "some time during December, 1915," and some of those few were used by Mather & Co., being hung upon the walls of their office on December 29, 1915, just how much prior to that date does not appear. The Quaker City Calendar Company in sending said calendars to customers of Mather & Co. were acting as their agent, and Mather & Co. are liable for the said acts of their agent. These calendars were for the year 1916, and were sent out some time during December, 1915, and on or before December 29, 1915, on order of April 22, 1915. The presumption is that they were sent out some time before December 29, 1915. The surplus were delivered to Mather & Co., "sometime during December, 1915," and on or before December 29th. It follows that Mather & Co. did sell said calendars, and used some before December 31, 1915, the date the bill was filed against Mather & Co.

2. Individuals composing a corporation defendant, charged to infringe, are not liable in their individual capacity for torts of the corporation, and the bill should be dismissed as to all the codefendants, except the De Lone Ehmling Company.

[1] This statement may be the law as to the subordinate agents or mere employés of an infringing corporation, but it is not as to directors:

"We are of opinion, therefore, that by the general principles of law, and by analogy with other torts, a director of a corporation, who, as director by vote or otherwise specifically commands the subordinate of the corporation to engage in the manufacture and sale of an infringing article, is liable individually in an action at law for damages brought by the owner of the patent so infringed. As with other infringers, it is immaterial whether the director knew or was ignorant that the articles manufactured and sold did infringe a patent." National Cash Register Co. v. Leland, 94 Fed. 502, 511, 37 C. C. A. 372, 381; National Car-Brake Shoe Co. v. Terra Haute Car & Mfg. Co. (C. C.) 19 Fed. 515; Peters v. Union Biscuit Co. (C. C.) 120 Fed. 679, 687; Harrington v. Telegraph Co. (C. C.) 143 Fed. 329, 337.

This rule was restricted in the cases of Hutter v. De Q. Bottle Stopper Co., 128 Fed. 283, 286, 62 C. C. A. 652; Cazier v. Mackie-Lovejoy Mfg. Co., 138 Fed. 655, 656, 71 C. C. A. 104, 106, to directors who had infringed personally or had directed infringement and "acted beyond the ordinary scope of their office." In the case at bar, the defendants, De Lone and Hobson, who composed the Quaker City Calendar Company, sold the calendars to jobbers all over the country. They were individuals trading under a firm name, and composed the whole firm, and so, as individuals, actually carried on the business of selling, and are liable if the patents in question were infringed. De Lone and Hobson are two of the directors who managed the corporate defendant. They directed the business transacted by both the De Lone Ehmling Company, Incorporated, and the Quaker City Calendar Company. Under such circumstances, they are liable. National Cash Register Co. v. Leland et al., supra. "The executive officers of a

corporation, who necessarily inspire all its acts, cannot shield themselves behind an artificial, and sometimes irresponsible, creation, from the consequence of their own acts, even though performed in the name of the artificial body." Peters v. Union Biscuit Co., supra. Kramer was given the territory of Philadelphia, and sold upon a commission. He was not the ordinary employé or officer of either company. He is liable, if the patents were infringed.

3. Claim 1 of the second patent is "wholly indistinguishable in substance from the disclosure and claims of the first patent. * * * No man can have two valid patents for the same or substantially the same thing." Claim 1 of the second patent does, however, disclose some features not contained in the first patent, for instance, "pairs of opposite ears" upon the flanges "at the ends of the caps." While the tongue hooks over or behind a strip, the rear ears, located at the opposite lateral edges of said tongue, lie against the front of the strip which is gripped, as it were, between the depending tongue and the said ears. The pad is thus held more firmly, and is prevented from rocking or sagging. There is nothing like, or substantially like, this in the first patent. I am therefore unable to agree with the conclusion of counsel for defendant.

As I understand the position of the defendants there is practically no denial of the acts charged on their part which the plaintiffs claim constitute infringement. The defendants Hobson and De Lone seem to have received their idea of the structure of the calendar, which they manufactured and sold from the defendant Henry F. C. Kramer, who was employed in Philadelphia, from October to December, 1914, by the Dando Company, where the patentee, Eddy, was working. The said company upon which Eddy, who had applied for patent, had conferred the right to use all the features of his patent during the said months was manufacturing and selling the Eddy calendars. After leaving the Dando Company, Kramer, knowing that Eddy had applied for patents, went to the De Lone Ehmling Company, Incorporated, one of the above-named defendants, and "submitted to it the pad as it was, and asked them if they could make it. * * *" They said they could "and subsequently did." He then took to a tinsmith a cap from one of the calendars made by the Dando Company and sold to the Philadelphia Record and had some samples made which he turned over to the De Lone Company. These samples were given to George Fries Sons, tinworkers, who thereafter made the metal caps for the De Lone Company, which assembled the metal caps and printed leaves and backs, and sold them to the retail trade through the Quaker City Calendar Company, composed of De Lone and Hobson, and formed for said purpose.

The defendants justify their action in the manufacture and sale of the calendars in question on the ground that the claims alleged to have been infringed were anticipated; that the alleged new features do not constitute invention, being merely the results of mechanical skill, and therefore the patents are invalid.

[2, 3] In order to establish their invalidity, the defendants introduced in evidence several calendars and patents. The first was the

"Tear Kleen" calendar of the Herold Company, of Milwaukee, for the year 1915, defendants' Exhibit B, disclosing features or structures similar to those disclosed in the claims in question in the plaintiffs' patents. They introduced a circular describing the same and soliciting orders for 1915, defendants' Exhibit C, and a blotter or pad, on the back of which is a picture of the Herold calendar and the date "March, 1914." This calendar, they alleged anticipated the Eddy patents. It was pretty clearly established, that the inventions, if such they be, of the first patent, No. 1,153,543, was completed February 6, 1913, and of the second, No. 1,153,545, March 20, 1913, and that application for said patents were filed, respectively, on March 17, 1913, and October 17, 1913. The earliest date of the Herold calendar established with any certainty is contained on the blotter, March, 1914. Augustus J. Keil testified that he saw a Herold "Tear Kleen" calendar in the building of the Franklin Trust Company in the fall of 1912, and that he opened correspondence with said company early in 1913, and received a number of calendars from it, among which was one similar, so far as he could then judge, in all respects to the Herold calendar. This calendar he showed, he says, to Frank Hobson, one of the defendants. In this Hobson corroborates him. In this way, the defendants seek by the Herold calendar to anticipate and antedate the alleged invention, constituting the patents in question. The acceptance of this testimony, as a fact, is met with several difficulties. The testimony was not clear and positive, but indefinite and in some respects contradictory. It was based solely upon memory, both as to the date and as to the resemblance of the calendar, said to have been seen by them, to defendants' Exhibit B, a calendar for the year 1915. The witnesses, even if trying their best to recall exactly what they declare they saw, may be mistaken as to the very features constituting the novel ideas in the Eddy patents, for there appears to have been no special reason to call unusual attention to the calendar. After a period of more than three years, it can hardly be expected that they would be able to recall with exactness the principal features and structures of the calendar which they saw. Neither of the witnesses were experts in mechanics or patents, and had no particular reason to rivet attention upon that particular calendar. Memory after such a long time, with the best of men, is fallible, and plays such tricks upon us that it is unsafe to rely entirely upon it under such circumstances. This is especially true when possible interest, bias, or perjury is taken into account. No attempt whatever was made to corroborate the testimony of these witnesses. The defendants did not call any officer of the Franklin Trust Company to establish the fact that it received any such calendar from the Herold Company in 1912. No witness from the Herold Company or deposition of any kind from any one connected with such company, or correspondence, was offered to show when the calendar like defendants' Exhibit B was first made by that company, and no explanation was given as to why no attempt was made to corroborate these witnesses upon this important testimony. I am therefore not satisfied to accept the uncorroborated testimony of the said witnesses as to the date when they saw the Herold calendar, or

as to its resemblance to the defendants' Exhibit B. The possibility, or even probability, of mistakes is too great. Defendants' Exhibits B, C, and D may therefore be eliminated from further consideration. Anticipation must be made out clearly and satisfactorily. The law requires not conjecture, but certainty. The burden of proof rests upon the defendants, and every reasonable doubt should be resolved against them. Coffin v. Ogden, 85 U. S. (18 Wall) 120, 124, 21 L. Ed. 821; Clough v. Mfg. Co., 106 U. S. 178, 1 Sup. Ct. 198, 27 L. Ed. 138.

The defendants rely upon the British patent, No. 9,494. The basic idea of this patent is an attachable or detachable date pad to a back or mount. This doubtless led defendants' expert to say that the basic idea in the Eddy patents is a device whereby a date pad can be supported upon a suitable back, so that it can be attached or detached. In his statement, Eddy does refer to and describe the attachable and detachable character of the pad on the mount, one of the objects being "to provide means whereby the pad may be conveniently and expeditiously applied to and removed from the back." The claims, however, do not make this the basic idea. "There is no contention on behalf of the plaintiff that the claims in suit are broad or basic claims, or that the patent is a pioneer patent." The patentee sought "to obtain protection only upon the novel details of his daily date sign." The tongue in Eddy's patent is connected directly with the cap, being, in part, a continuation of the rear flange, "depending from the free edge" thereof, and is substantially in the plane thereof. In the British patent there is no cap at all. This patent does not disclose any means for holding the leaves of the pad *d* together or upon the base *o*, which function is performed by the cross-pins in the Eddy patents. The leaves are evidently held together, but whether by pins, gum, glue, or in some other way is not disclosed. The patent discloses a pad having a tongue attached to the back thereof, but discloses no other element of any combination described in the Eddy patent.

They further rely upon a Swiss patent, No. 13,889. In this patent, there is no equivalent for the rear flange of the cap, a pair of cross-pins or any means for supporting them, the ears, as in the second patent in suit, or of the tongue element depending from a rear flange, and therefore no "edge portions" or "seat portions" of the rear flange to support the pad. The Swiss patent, therefore, does not anticipate the claims of the Eddy patents.

The Hoyt patent, No. 33,074, was the other introduced by them. This does disclose a hanger, *B*, but it is hardly the equivalent of a cap consisting of a piece of sheet metal bent longitudinally into channel form with its intermediate portion lying upon the top edges of said leaves and its opposite parallel side flanges lying one in front and the other behind the upper part of said leaves. The patentee, Hoyt, had no such idea as is disclosed by the cap construction of the Eddy patents. The Hoyt patent does not disclose a cap, or the equivalent thereof, the rear flange of which has "a tongue depending therefrom substantially in the plane of the flange adapted to be exposed for entering a supporting slot by flexing the leaves."

[4] The patents of Eddy, while not pioneer, depart from and add

to the prior art in such a way and to such extent as to amount to invention. The calendars manufactured and sold by the defendants were evidently copied directly and deliberately from plaintiffs' calendars. A fair interpretation of the evidence forces this conclusion.

The four claims in question of the Eddy patents, while not differing from one another in any great degree, nevertheless differ. The words in claim 2 of patent 1,153,543, "and having an edge portion adjacent said tongue adapted to engage the wall of the slot as a stop," are not contained in claim 1. Claim 3 adds that:

"Said cap extending substantially the entire length of the top edges of the leaves * * * and having adjacent said tongue edge portions of said rear flange adapted to seat on the wall of the slot."

Claim 1 of patent No. 1,153,545, adds the ear element to the three claims of the first patent. The claims are, in my opinion, valid, Schenk v. Singer, 77 Fed. 841, 23 C. C. A. 494; Mast v. Dempster, 82 Fed. 327, 27 C. C. A. 191; Consolidated Car Heating Co. v. West End St. Ry. Co., 85 Fed. 662, 29 C. C. A. 386; Dececo v. Gilchrist, 125 Fed. 293, 60 C. C. A. 207.

Being valid, they have evidently been infringed, and defendants are liable for the damages sustained by the plaintiffs on account of said infringement.

UNITED STATES v. KAMM. SAME v. GRAHL. SAME v. THOMAS.

(District Court, E. D. Wisconsin. January 3, 1918.)

1. ALIENS ⊂=61—NATURALIZATION—ENEMY ALIENS.

In view of Rev. St. § 4067 (Act July 6, 1798, c. 66, 1 Stat. 577 [Comp. St. 1916, § 7615]), providing that, whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated or attempted by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of 14 years and upwards, who shall be within the United States and not actually naturalized, shall be liable to be restrained, secured, and removed as alien enemies, a subject of the Imperial German Government who, shortly prior to the declaration of a state of war between the United States and that government, filed his petition for naturalization, is not, where the petition, because of the requirement for 90 days' notice, was not called for hearing and determination until after the war declaration, entitled to naturalization, for Rev. St. § 2171, enacted July 30, 1813 (3 Stat. 53, c. 36), declares that no alien, who is a native citizen or subject or denizen of any country, state, or sovereignty with which the United States shall be at war at the time of his application, shall be then admitted to become a citizen, and the fact that no petition prior to application for naturalization was required until Act June 29, 1906, c. 3592, 34 Stat. 596, does not show any intention on the part of Congress that enemy aliens, who may have, prior to the declaration of a state of war, filed a petition for naturalization, shall be treated as quasi citizens, who may be granted a certificate of naturalization after declaration of hostilities.

2. ALIENS ⊂=71½ New, vol. 7 Key-No. Series—NATURALIZATION—PROCEEDINGS TO CANCEL CERTIFICATE.

Under Naturalization Act, § 15 (Comp. St. 1916, § 4374), declaring that it shall be the duty of the United States district attorneys for the re-

spective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized alien may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured, the federal District Court has jurisdiction of a proceeding to cancel a certificate of naturalization issued by a state circuit court, on the ground that the state court was without authority under Rev. St. § 2171, to admit the alien to citizenship, because he was an enemy alien and a state of war, before hearing on the petition, had been declared between the United States and the government of which he was a subject.

Petitions by the United States against Hans Kamm, Tador Grahl, and Frank Thomas to annul and vacate certificates of naturalization issued to the several defendants, which proceedings were consolidated. Certificates annulled and canceled.

H. A. Sawyer, U. S. Atty., of Milwaukee, Wis.

John F. Kluwin, of Oshkosh, Wis., W. W. Hughes, of Fond du Lac, Wis., and C. E. Armin, of Waukesha, Wis., for defendants.

GEIGER, District Judge. These three cases were argued at the same time, and by formal, though not written, stipulation of counsel in open court, are to be decided as involving uncontroverted facts presenting identity of legal questions.

The defendants, on and prior to April 6, 1917, were subjects of the Imperial German government. They resided in different judicial circuits of the state of Wisconsin, and prior to the date mentioned each had filed in the circuit court of the county of his residence a petition seeking naturalization as a citizen of the United States. The good character, the antecedent period of residence or domicile, and all other qualifications for citizenship under the laws of the United States, except as next herein noted, is conceded to each defendant. The petitions for naturalization were called for hearing and determination by the respective circuit courts after they had been pending the requisite 90 days, but after the date of the declaration of hostilities passed by Congress on April 6, 1917; and in each case the representative of the United States Naturalization Bureau appeared at the time and place of hearing, and objected to the reception of proofs or the determination thereof, solely on the ground that naturalization was barred by the provisions of section 2171 of the Statutes of the United States. The objection and protest was, in each matter, overruled, and certificates of naturalization were granted.

In due time the government filed in this court the petitions or complaints in these several cases, seeking to annul and vacate such certificates of naturalization; and the question is whether, upon the facts thus disclosed, the government is entitled to that relief.

Section 15 of the Naturalization Act reads:

"Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the cer-

tificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. * * *" (Balance of paragraph provides for notice in proceedings based upon section.)

The parties have agreed that the cases be disposed of regardless of the manner in which the ultimate questions might be raised upon pleadings or proofs—that is to say, the facts being admitted, the cases are before the court as upon an agreed statement, permitting all questions of law, whether pertaining to jurisdiction or to the merits, to be raised.

[1] The questions in the cases are:

What is the proper interpretation of section 2171, which reads as follows:

"Sec. 2171. No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States, or the territories thereof, on the 18th day of June, in the year 1812, who had, before that time, made a declaration according to law of their intention to become citizens of the United States, or who were on that day entitled to become citizens without making such declaration, may be admitted to become citizens thereof, notwithstanding they were alien enemies at the time and in the manner prescribed by the laws heretofore passed on that subject; nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien."

The question upon this section has arisen in both federal and state courts since the beginning of the present hostilities between the United States and Germany. It was under consideration by this court and the views entertained are found in the memorandum opinion published in 242 Fed. 971. The conclusion there expressed is adhered to, and any further expression to support what is there said is prompted by the wording of section 15 above quoted. That section gives the United States a right of action to annul certificates which have been "illegally procured"; and this presents the second question raised and ably argued in the present proceedings, viz. whether, if this court has properly interpreted section 2171, the certificates issued to the herein defendants, have been "illegally procured."

It was suggested (242 Fed. 971) that the language of the section should in any event receive an interpretation conforming in the highest degree with the policy plainly enunciated; that the proviso passed in 1813 to reach a situation growing out of the War of 1812, supported the view that it was intended to place an absolute prohibition upon the power of any court to naturalize subjects of an enemy country at the time when the United States are at war with that country; that the phraseology of the section, "at the time of his application," was adopted as naturally consequent upon the then routine of procedure; and it may now be noted that the last clause of the proviso indicates the congressional view that prior to "actual naturalization" no foreign subject acquired any status other than that of an alien, or an enemy alien, if a subject of a country with whom we are at war. That this was the then dominant view is further illustrated in section 4067 of the Revised Statutes of the United States (passed in 1798), defining the executive power over alien enemy subjects resident in this country. It is declared

to be all-embracing over subjects of the enemy domiciled here, and "not actually naturalized." That the executive of the United States conceives this statute to be the present definition of powers is evidenced by exercise of such powers from day to day ever since April 9, 1917, when the proclamation dealing with enemy subjects during the present war was promulgated.

It was therefore suggested that the executive was left just as free to exercise the powers of removal, internment, and exaction of security of or from those who had filed a petition for naturalization as from those who had not; and, if this be true, we can appreciate the consequences ensuing an interpretation of section 2171, upon which courts may naturalize those who had been so fortunate as to file their petitions before the outbreak of hostilities. That is to say, supposing, after the outbreak of hostilities, while petitions were pending, but prior to hearing, the executive, in the exercise of undoubted power, had taken steps permitted by section 4067, had either interned or exacted bail, or was about to remove from the country aliens, subjects of the enemy country, could the court, by proceeding with the naturalization of the petitioners and conferring citizenship, frustrate the executive will? I do not believe that any one would give to this question an affirmative answer. These considerations are proper in estimating the policy with which Congress was dealing and testify to an apparently clear conception that nothing short of actual naturalization changes either the alien, or the alien enemy status. They support the suggestion that, when the sovereign is seeking to ascertain (during the existence of war or at any time) the legal status or relation of legal allegiance of an individual, there is—between citizenship and alienage—no such intermediate thing as a quasi citizenship, quasi alienage, or a quasi enemy alienage. The individual alien enemy, because of his actual friendliness and loyalty to the sovereign of his domicile, may be dealt with, by the executive, upon considerations leaving him practically in as favorable a situation as a citizen; but in legal contemplation, and in respect of exacting consideration upon the basis of legal right, he is in no better position to insist upon it at the hands of the courts than is a less friendly or an actually hostile individual enemy subject.

Conceding, therefore, that when, in 1906, there was added, as a procedural requirement, the filing of a written petition, and thereby the meaning of "application," in section 2171, became equivocal or ambiguous, it is not sensible to ascribe to Congress an intention to classify alien enemy subjects into those who have and those who have not "petitioned" for naturalization at the commencement of war—a classification which, with equal reason, may be imposed upon section 4067, thereby limiting executive power over the former class. Both statutes proceed upon the view that the legally hostile status of the individual is the sufficient warrant for granting to the executive the one, and forbidding to the courts the exercise of the other, power, and the plain intent must have been that the power and the prohibition alike become effective, without reservation, at the instant such status attached to the individual. I am satisfied to adhere to the view (242 Fed. 971), that

these various considerations forbid interpreting section 2171 as amended in the particulars contended.

[2] This brings us to the second question, namely, whether certificates granted, as in the present cases, are "illegally procured" within the meaning of section 15 of the Naturalization Act. The question has been much discussed, and counsel have furnished to the court probably all of the adjudications bearing upon the subject. All seem to concede that it was entirely within the competency of Congress to confer upon any courts plenary powers to annul or cancel certificates tainted with fraud. But, on behalf of the defendants, it is stoutly insisted that it was not the intention of Congress—indeed, it is suggested that it was not within its competency—to endow courts of coordinate jurisdiction with the power to review each other's conclusions or judgments in matters of naturalization where the "illegality" of procurement in the initial court rested in plain diversity of judicial opinion as to the meaning of any provision of the Naturalization Law. To state it in the concrete terms of the present cases: The right of the present defendants to be naturalized depends upon the interpretation to be given to section 2171 respecting its inclusion or exclusion of those alien enemy subjects who had filed their petition prior to the outbreak of hostilities. It is said that whether it is one or the other depends upon the judicial view; both cannot be right. The wrong view, however, can result only through the exercise of power which the judicial mind expressing it may exercise. In other words, it is at most "judicial error." Therefore it is asserted that Congress never intended to create a situation fraught with such possibilities for confusion, not only confusion in the administration of the law, but the great possibilities of ever-present latent infirmities in all judgments of naturalization which may be granted.

The citations disclose the diversity of view that has arisen among judges, since the passage of the Naturalization Act of 1906, respecting the scope and true application of this section. No attempt has been made to examine the adjudications of state courts, but, on behalf of the defendants, are cited United States v. Meyer (D. C.) 170 Fed. 983; United States v. Luria (D. C.) 184 Fed. 643; United States v. Lenore (D. C.) 207 Fed. 865; United States v. Butikofer (D. C.) 228 Fed. 918; United States v. Ness (D. C.) 217 Fed. 169; United States v. Andersen (D. C.) 169 Fed. 201; United States v. Mulvey, 232 Fed. 513, 146 C. C. A. 471 (dissenting opinion, Hough, Judge); whereas the government cites United States v. Schurr (D. C.) 163 Fed. 648; United States v. Wayer (D. C.) 163 Fed. 650; United States v. Van Der Molen (D. C.) 163 Fed. 650; United States v. Nisbet (D. C.) 168 Fed. 1005; United States v. Simon (C. C.) 170 Fed. 680; United States v. Meyer (D. C.) 170 Fed. 983; United States v. Aakervik (D. C.) 180 Fed. 137; United States v. Johnson (C. C.) 181 Fed. 429; United States v. Plaistow (D. C.) 189 Fed. 1006; United States v. Nopoulos (D. C.) 225 Fed. 656; United States v. Mulvey, 232 Fed. 513, 146 C. C. A. 471; United States v. Nechman (D. C.) 183 Fed. 788. It is unnecessary that exhaustive review of these various cases be attempted. United States v. Lenore (D. C.) 207 Fed. 868, because of its ex-

haustive and vigorous discussion, is the leading citation in support of the proposition advanced by the present defendants. Judge Amidon, in referring to the causes which led to the passage of the act, found ample justification for a restricted interpretation of the term "illegally procured"—his general conclusion being that:

"Neither the debates in Congress nor the report of the investigation which was made before Congress contained any suggestion that any other evils were intended to be dealt with, or that the phrase 'illegally procured' was intended to set one court to annulling the judgments of another court of co-ordinate jurisdiction because of a difference of opinion in regard to a matter of law."

He adds:

"Two serious consequences must result from the exercise of this jurisdiction: First, it will produce a babel of conflicting judgments among courts of co-ordinate jurisdiction, and tend directly to destroy respect for the courts, and also to destroy that good will which should always exist among courts of co-ordinate jurisdiction. Second, it will tend to break down that comity which has [always] been the bond of peace between federal and state courts exercising co-ordinate jurisdiction in the same territory. Results so unfortunate can be justified only by imperative and unequivocal language."

Speaking directly to the definition of the term "illegally procured," he says:

"To say that a certificate which is issued pursuant to a full hearing in court is 'illegally procured,' if any error occurs in the proceeding, would be a wide departure from the language which courts have been accustomed to use in referring to judicial error. 'Illegally procured' imports, not an error of court, but willful misconduct on the part of the holder of the certificate or those who have acted in his behalf. The history of the statute shows that its language can be given full effect according to the mischief that was present to the thought of Congress, without opposing the whole judicial system that has hitherto obtained among courts of co-ordinate jurisdiction. I am therefore unable to follow the decisions in United States v. Mayer [D. C.] 170 Fed. 983, United States v. Plaistow [D. C.] 189 Fed. 1007, and the United States v. Schurr [D. C.] 163 Fed. 648. I concur in the view expressed in United States v. Luria [D. C.] 184 Fed. 643, 646, that '"illegally procured" does not mean that the certificate was issued through error of law.' Errors of courts, committed in the honest exercise of their jurisdiction under the Naturalization Laws, must be corrected the same as in other cases by appeal or writ of error."

Without quoting further from decisions upon either side of the proposition, it suffices to say that in practically all there was a recognition by the courts of the precise question presented here; that some accepted the views above quoted and urged by the defendants; in others, the opposing view was adopted as the only method of accomplishing a purpose as broad as the language of the section can possibly afford. The contrariety of view, though widespread, nevertheless was concerned, except in one or two cases, with the particular point of difference found in the present cases. It is interesting to note that, as a result, an effort has been made to state the contending views with a suggestion respecting where the weight of authority rests. Thus, in 2 Corpus Juris, 1039, the author says:

"While there is some difference of opinion as to the meaning of the term 'illegally procured,' the better rule seems to be that it imports a certificate issued without authority of law, and, in effect, false and spurious; not an

error of law, but subornation or some other legal means to impose on the court. When a certificate is issued as a result of the judicial hearing in a good-faith attempt to exercise the jurisdiction conferred by the act of Congress, it is not open to attack in another court of co-ordinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued. Errors of that kind can be reached only by appeal or writ of error."

A reading of the cases gives the impression that an effort to define the terms "illegally procured" has at times resulted in their conversion into words either of identical meaning or scope, or such as themselves necessitate or are susceptible of, further interpretation or definition. For example, to say that a certificate is "illegally procured," when it is issued without "authority of law," or when it is in effect "false" or "spurious," is not very helpful in the very cases before us. If section 2171 be construed one way, it can surely be said that there is no authority in law for admitting the alien enemy subjects; whereas, a different view of the section leads to the opposite result. The question whether there has been continuous residence may upon one view of the facts bring the applicant within, and another view leave him without, the authority of the law to have his application granted; and, as hereinafter shown, whether an application was heard in "open" court may, upon the facts, lead to a diversity of views.

Obviously, the term "illegally procured" was used to comprehend something in addition to fraud; and the difficulties which attend a restricted interpretation have been referred to as a preliminary to a consideration of two cases decided by the United States Supreme Court, dealing with the scope of section 15, to the end of answering the question whether the proposition urged by the defendants here, in view of the result in those two cases, can be considered any longer open to debate. These cases are Johannessen v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066, and United States v. Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853. The Johannessen Case is noteworthy in dealing with section 15, in so far as it authorizes suits to annul certificates granted on the ground of fraud, and, while recognizing the character of naturalization proceedings as judicial, leading to a judgment, self-evident of its own validity, it in like manner recognizes the power of Congress to authorize direct proceedings for their attack upon the ground of fraud and illegality; and, while the case leaves open for consideration the question respecting possibility of collateral attack in an independent suit, where it appears that upon the original hearing the precise matters were litigated upon full appearance and representation as in ordinary lawsuits, the importance of the case rests in its pronouncement that naturalization proceedings are in a class by themselves—are ex parte and not adversary in their initiation and contemplation. The court evidently did not consider—doubtless because of the contrary view long entertained, whether, if, as asserted by some courts, the proceedings are not judicial, but are delegated legislative or executive proceedings, jurisdiction for their conduct could, under the Constitution, be endowed upon the federal courts. It was held plainly that the manner or method for judicial review of the cer-

tificate of naturalization was wholly within legislative discretion within constitutional warrant. It is said:

"The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are ex parte and conducted by the applicant for his own benefit. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard."

Counsel in the present cases seem to take the view that the Johannessen Case is entirely consistent with their contention, and it is interesting, therefore, to approach a consideration of the Ginsberg Case. There a federal court entertained a proceeding to cancel a certificate of naturalization issued by a state court, upon the ground, among others, that it had ignored the provision of the Naturalization Act for a hearing in open court, etc. The trial court seems to have held upon the facts that such provision was substantially complied with, and, when the case came to the Court of Appeals, the questions involved were certified to the Supreme Court, two of them, the first and fourth, being:

"Question 1: Is the final hearing of a petition for naturalization had in open court, as required by section 9 of the Act of June 29, 1906, chapter 3592, if after the petition is first presented in open court the hearing thereof is passed to and finally held in the chambers of the judge adjoining the courtroom, on a day subsequent and at an earlier hour than that to which the court has been regularly adjourned?"

"Question 4: May certificate of citizenship be set aside and canceled in an independent suit brought under section 15 of the Act of June 29, 1906, chapter 3592, on the ground that it was illegally procured if the uncontradicted evidence at the hearing of the petition showed undisputably that the petitioner was not qualified by residence for citizenship, and that the court or judge, who heard the petition and ordered the certificate, misapplied the law and the facts?"

When we consider that these questions, not only in form, but in substance, were quite like many of the questions presented to the District and Circuit Courts of Appeal in the various cases which are above cited, and find that in some instances the judges had stated, not only the facts, but also the legal question thereby presented, in almost the identical language of these two certified questions—see, for example, the Nisbet Case (D. C.) 168 Fed. 1007, where the trial judge expresses his hesitation "before assuming authority to declare an act of a court of co-ordinate jurisdiction to be illegal for misinterpretation and misapplication of the law"—there can be no suggestion that the Circuit Court of Appeals, in certifying the questions, or that the Supreme Court in its consideration of the case, had any misapprehension of the precise conflict which had arisen among the various judges and courts, or that it was possible to treat the certified questions as calling for other than a direct response to meet that conflict.

The first question was answered in the negative; the fourth, in the affirmative; and the case supports the government's contention that, under section 15, the jurisdiction to cancel and annul certificates as "illegally procured" may be invoked whenever it is alleged, as matter of fact, that upon the granting of a certificate a court failed

to observe express directions or prohibitions, contained in the Naturalization Act, having a substantive bearing upon the qualifications or the right of the applicant, and which, had the court observed them, called for a denial of the certificate. It may be added that a more recent decision, United States v. Ness, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. Ed. —— (decided December 10, 1917), not only reaffirms this, but, when read in the light of the District and appellate court opinions (United States v. Ness, 230 Fed. 950, 145 C. C. A. 144, Ann. Cas. 1917C, 41; Id. [D. C.] 217 Fed. 169), forecloses possibility of giving to the words "illegally procured" a restricted meaning.

So, in the present cases, jurisdiction being established, the court, in exercising it, is bound to apply its views upon the matters of fact and of law presented as the basis for the relief prayed; and as section 2171 is construed to embody an express prohibition against naturalization of individuals circumstanced, as were the defendants, a judgment annulling and canceling the certificate in each case must be granted.

SCOTT v. SCOTT.

(District Court, D. Idaho, C. D. September 4, 1917.)

1. HUSBAND AND WIFE ⊜249 — "COMMUNITY PROPERTY" — PROPERTY INCLUDED.

Under Rev. Codes Idaho, § 2674 et seq., all property acquired by either spouse after marriage, excepting by gift, bequest, or descent, is "community property" including the rents and profits of separate property.

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

2. ADOPTION ⊜20—ADOPTED CHILDREN—RIGHTS OF.

Rev. St. Idaho, §§ 2552, 2553 (Rev. Codes, §§ 2707, 2708), which were in force at the time of plaintiff's adoption and continued down to the time of the death of his adoptive mother, respectively declare that a child, when adopted, may take the name of the person adopting, and the two thenceforth sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, and that the parents of an adopted child are from the adoption relieved of all parental duties toward and responsibility for the child adopted, and have no right over it. *Held* that, as an adopted child incurs all the liabilities of a natural child and owes the adoptive parents the same duties that he would have owed his natural parents, such adopted child should have all the rights of succession of a natural child.

3. ADOPTION ⊜21—COMMUNITY PROPERTY—SUCCESSION—"LEGITIMATE ISSUE OF HIS, HER, OR THEIR BODIES."

Rev. St. Idaho 1887, § 5712, declared that upon the death of the wife the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of disposition goes to her descendants and heirs, exclusive of her husband. Section 5713 declared that upon the death of the husband one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and

in the absence of such disposition goes to his descendants or is distributed as separate property. The two sections, as amended by Act March 13, 1907 (Laws Idaho 1907, p. 346), were incorporated in Revised Codes as section 5713, which declared that upon the death of either husband or wife one half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject, also, to the community debts; that, in case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. The Revised Statutes were in force at the time plaintiff was adopted by defendant and his wife. Defendant's wife died after the amendment of 1907, and prior to the amendatory act of Feb. 15, 1911 (Laws Idaho 1911, c. 13, § 1), which declares that upon the death of either husband or wife one half of the community property shall go to the survivors, and the other shall be subject to testamentary disposition of the deceased husband or wife in favor only of his, her, or their children or the parents of either spouse, and that in case no such testamentary disposition shall have been made by the deceased his share shall go to the survivor. *Held*, that plaintiff, though an adopted child, must, in view of the last amendatory act, and of the fact that an adopted child, under the statutes, is given all the rights and made subject to all the burdens and duties of a natural child, be deemed included in the expression the "legitimate issue of his, her, or their bodies," and so, his adoptive mother having died while that section was in force, plaintiff is entitled, there being no other issue and no testamentary disposition, to her half of the community estate.

In Equity. Bill by Warren F. Scott against Wallace Scott. On motion to dismiss. Motion denied.

Frank L. Moore, of Moscow, Idaho, and W. H. Casady, of Lewiston, Idaho, for plaintiff.

A. S. Hardy, of Grangeville, Idaho, and J. F. Ailshie, of Cœur d'Alene, Idaho, for defendant.

DIETRICH, District Judge. In October, 1889, the plaintiff, then a child six years of age, was duly adopted by the defendant Wallace Scott and his wife, Mary E. Scott, as their son, under the laws of Idaho. Mary E. Scott died intestate on March 17, 1910, at which time she and the defendant were possessed of community property of great value. There were no other children. Plaintiff has filed this bill for the purpose of having an adjudication of his claim that upon the death of his foster mother he succeeded to a one-half interest in the community property. By a motion to dismiss, the defendant raises the question whether or not, under the statutes of Idaho, an adopted child may inherit any interest in community property.

[1] Under the laws of the state, all property acquired by either spouse, after marriage, excepting by gift, bequest, or descent, is community property, including the rents and profits of the separate property. Idaho Revised Codes, § 2674 et seq. Doubtless the great bulk of the property in the state is so acquired and held. Succession to estates of deceased persons is provided for in the chapter entitled "Succession," embracing sections 5700 to 5717, inclusive, of the Revised Codes, which sections, with one exception, are identical with corresponding numbers in the Revised Statutes of 1887. By the amended

act of March 13, 1907 (Laws 1907, p. 346), sections 5712 and 5713, which at the time were the only statutory provisions relating directly to community property, were amended, and as amended were consolidated and incorporated in the Revised Codes as section 5713. In the Revised Statutes they read:

"Sec. 5712. Upon the death of the wife, the entire community property without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her, by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

"Sec. 5713. Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

And in the Revised Codes:

"Sec. 5713. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration."

In the chapter relating to succession, as found in both the Revised Statutes and the Revised Codes, there is no express reference to adopted children, or to the subject of adoption, with the single exception that, in defining the rights of an illegitimate child, it is provided that, while such child inherits from the father and mother the same as if he had been born in lawful wedlock, he does not "represent" the father or mother by inheriting from his or her kindred, unless the parents intermarry and the father acknowledges him as his child "or adopts him into his family," and further that, unless such child is so acknowledged or adopted, if he "dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law."

[2] But during the whole period from 1887 down to the present time the statutes of the state (Rev. Stat. § 2545 et seq.; Revised Codes, § 2700 et seq.) have without change provided for the adoption of children and defined their status. Accordingly any minor child may be adopted by an adult person who is at least 15 years older than the child. A married man cannot adopt without the consent of his wife, nor a married woman without the consent of her husband. Both parents, if living, and the child, if over the age of 12 years, must consent. The method of adoption is by a proceeding in the probate court, and

only if, after a hearing, the probate judge is "satisfied that the interests of the child will be promoted," is he authorized to make an order of adoption. Such order declares that the child shall thereafter "be regarded and treated in all respects as the child of the person adopting." Sections 2552 and 2553 of the Revised Statutes (sections 2707, 2708, Revised Codes) are as follows:

"Sec. 2552. A child, when adopted, may take the name of the person adopting, and the two thenceforth sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation.

"Sec. 2553. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it."

When we read together, as we must, this chapter on adoption with the chapter on succession, little room is left for doubt that an adopted child succeeds to the separate estate of the deceased parent equally with the natural child. There is a suggestion in the brief, possibly having feeble support in the decided cases, that the adoption statutes were intended to establish and define only the personal status of the child and the personal relations between it and its foster parent; but in that view I am wholly unable to concur. The language of the statute is that upon adoption the child shall "thenceforth be regarded and treated in all respects as the child of the person adopting," and it and the adoptive parent shall "sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation." The language is plain, and only by the exercise of ingenuity can we read into it a proviso excepting from the rights of such child the important right of succession. To be sure, the right of succession is not a natural right, but is one created by law; but legal relations and legal rights were the very matters with which the Legislature was concerned. No legislative act, of course, can transform an adopted child into a child by birth; but all the legal rights and obligations of the one may be conferred upon the other. And why should the court be astute to discover a way by which an important exception may be read into the general language of the statute? As suggested, there is no natural right of succession in any one, even a child by birth. Succession is a matter purely of public policy, and such policy is concerned with the well-being of the adopted child quite as much as with that of the child by birth. The one ultimate question upon which the probate court must find, before making its order of adoption, is whether the interests of the child will be promoted. The interests, not of the natural parents, or of the foster parents, but of the child, are put in the foreground. The right to be cared for out of the property of its deceased parents is of the greatest importance to the child. In the present case, the adopted child having reached maturity before his foster mother died, this consideration does not make so strong an appeal; but suppose both foster parents had died when plaintiff was only 7 or 8 years of age, would it not have seemed harsh in the extreme that he should thus be thrown helpless upon the charity of the world? In such a contingency, the law, ostensibly enacted for the benefit of the child, would have cut off his right to support

from his natural parents without putting anything in its place. The defendant here had the legal right to receive the plaintiff's wages until he reached the age of 21, and if the tables were now turned, and the defendant were poor and unable to maintain himself by work, it would be the plaintiff's legal duty, to the extent of his ability, to maintain him. Revised Codes, §§ 2695, 2697. Such rights and obligations should be reciprocal, and I am inclined to think that, in the matter of succession, considerations both of fairness and of the public interest strongly support the policy of placing the adopted child upon the same footing with the child by birth.

Now, as we have seen, prior to the amendatory act of March 13, 1907, children, either natural or adopted, did not inherit community property upon the death of the mother. It all went to the husband of the deceased without administration. If the husband died intestate, one-half would pass to his "descendants." There is more elaborate provision for the disposition of the separate property, and as to that there was no distinction between husband and wife. In the sections relating to separate property the terms "child" or "children" and "issue" are used frequently, without any apparent intention to make the slightest distinction. But, as already indicated, it is thought that, when we read with these sections the provisions covering adoption, it must be held that "child" and "issue" both include the child by adoption as well as the child by birth. Not, of course, because an adopted child can be or is the "issue" of the decedent, but because the law has expressly conferred upon him the legal status of an "issue." The man of foreign birth never becomes native born, but by due process of naturalization he acquires the status of one native born, with all his rights and obligations. It is in effect the same as if at the end of the chapter on succession there were added a section providing in substance that, wherever in the chapter the words "child" and "issue" are used, adopted children as well as children by birth are intended.

[3] We come now to a consideration of what I am inclined to think is the only serious question, and that is whether or not the Legislature, in providing by the amendment of March 13, 1907, for a new succession in the case of community property, intended to withhold all right from the adopted child to inherit from its foster mother, and to take away the right which it had theretofore enjoyed of inheriting from its foster father. Counsel are apparently agreed that by reason of the diversity in the statutory provisions involved, and the nature of the issues adjudicated, the decided cases are of little present value. Nor is there any serious difference of view touching the sentiment and influences which led to the 1907 amendment. The women of the state, reasoning that community property is the fruit of the joint effort of husband and wife, contended that the rights of both therein should be equal. It will be noted that the legislation in no wise affects the status of the community property during the existence of the community; the husband, as the legal head of the family, continues in control. But under the amendment the interest of the wife upon her death takes the form of a separate and distinct estate. If the women of the state, therefore, secured what they sought, it was not a right personally beneficial, for in effect it springs into existence only upon the wife's death.

While there may have been a measure of mere sentiment back of the movement, the women doubtless sought the legislation primarily in order that thus they might have it within their power to make provision for those in whose well-being they are naturally most deeply concerned —their children and their parents.

In support of the view that, under the amendatory provisions, adopted children do not inherit, the defendant's chief reliance is upon the supposed limitation of the phrase "issue of his, her, or their bodies." But upon reflection I am unable to attach great significance thereto. "Issue," as a matter of course, implies "issue of the body"; there is no other issue. As legal expressions the two phrases are of identical import. Would it add anything, or to any degree or in any manner change the meaning of the sections governing the descent of separate property, if wherever the word "issue" is found we append to it the phrase "of his, her, or their bodies"? To ask the question is to answer it. And that here the entire phrase was used as the equivalent only of the word "issue" is conclusively shown in the act itself, for immediately following it is the sentence: "If there be no issue of said deceased living, their," etc. It is, of course, futile to ask why the phrase "issue of the body" was used, rather than merely the word "issue." It is enough to say that they are generally understood to import the same meaning, and were manifestly so understood in drafting this act. It would be quite as reasonable to ask why the terms "child" or "children" and "issue" are used interchangeably and as synonyms in the sections relating to separate property. Why a draftsman uses one rather than another of two or more synonyms it is impossible to answer, and it is likewise unimportant to inquire.

We then have here an enactment providing that in certain contingencies the interest of the deceased in community property shall descend to his or her issue or children. Now, assuming that the language used naturally implies a child by birth, as is doubtless true of similar language employed throughout the other sections of the chapter relating to separate property, does the mere fact that the legislation is new—that it is subsequent in origin to the adoption statutes—exempt it from the operation thereof? In other words, are the rights and duties and the status of an adopted child to be measured by the law as it stood when the adoption statutes were enacted, or do they always correspond to the rights and duties and status of the child by birth, automatically changing as those of the latter change? It is thought that clearly the latter view must prevail, and that, in the absence of evidence of a contrary legislative intent, any law conferring upon a child by birth a new right or imposing upon it a new duty must be construed as conferring a like right or imposing a like duty upon the adopted child. For example, section 16 of the Revised Statutes, carried forward into the Revised Codes by the same number, provides that the term "writing" shall include "printing," and the word "oath" "affirmation." Now, suppose we find in the Revised Codes a section originating in a more recent enactment, providing that a petition in a given proceeding must be in writing, signed by the petitioner and verified by his oath. Would not a printed petition, signed

by the petitioner and verified upon his affirmation, meet all the requirements?

Defendant characterizes the amendatory act as a freak, and dwells upon the fact that in practice it turned out to be unsatisfactory and was soon changed. But the bearing of such a consideration upon the question of legislative intent is not apparent. The law was not unsatisfactory because of the rights which might accrue to adopted children in case of the intestacy of the deceased. It was the effect of the act generally upon a going business, in case of the death of the wife, and upon record titles, that gave rise to complaint, and this entirely aside from the question whether there was or was not an adopted child. The right conferred upon the child by birth was quite as troublesome as that conferred upon the adopted child, and of course was more frequently to be reckoned with, because adopted children are comparatively few. Nor am I able to perceive in the exclusion of illegitimate children any evidence of an intent to exclude children by adoption. It might very well be presumed, if it were not a matter of common knowledge, that the proposal to put husband and wife upon the same footing as to community property met with opposition. While it is difficult to argue against the principle of equality, it would not be difficult to point out the possibility of undesirable results, should the practically unlimited right of the husband as it stood under the old law be extended to the wife. Every illegitimate child was the heir of its mother; whereas, it could be the heir of the father only with his consent, expressed in a formal manner. Are not both the limitations of legitimacy and other changes of phraseology to be accounted for by assuming that they are the results of such opposition? Much is said in the briefs of defendant about the enlargement of the power of the wife, and the creation of what is referred to as a new estate for her in the community property; but it must not be overlooked that, upon the other hand, the power of the husband was substantially curtailed. The promoters of the reform secured recognition for the principle for which they strove, namely, equality of rights; but this was secured, not by granting to the wife the power which the husband then had, but by first decreasing this power and then conferring it upon her equally with him.

When the defendant, therefore, asks whether it is likely that the Legislature intended to confer upon the adopted child the right to inherit community property from its foster mother, the question may be answered by the equally pertinent question whether, without any expressed or apparent reason, it intended to reverse the settled policy of the state and take away from the adopted child the right to inherit community property from its foster father. For it must be borne in mind that if the defendant's contention here is sound, then had he died instead of his wife, the plaintiff could not have inherited from him—a right which the latter would have enjoyed under the law as it stood prior to the amendment. There are reasons founded in natural sentiment, if not in public policy, why one spouse would object to the descent of property which he or she had been instrumental in accumulating, to the illegitimate child of the other. But no reasons are apparent why either the husband or the wife would seek to withhold the right

of descent from an adopted child any more in the case of community than of separate property. The relation growing out of adoption is a known, legitimate, and respectable one, and cannot be assumed by one spouse without the consent of the other.

I am still further unable to understand how any support can be drawn from the amendatory act of February 15, 1911. It is as follows:

"Upon the death of either husband or wife, one-half of all the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, in favor only of his, her or their children or a parent of either spouse, subject also to the community debts, provided that not more than one-half of the decedent's half of the community property may be left by will to a parent or parents. In case no such testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall go to the survivor, subject to the community debts, the family allowance and the charges and expenses of administration: Provided, however, That no administration of the estate of the wife shall be necessary if she dies intestate." Session Laws 1911, p. 29, § 1.

If that act may properly be referred to at all, it would seem to militate against the defendant's position. To be sure, it implies a dissatisfaction with the 1907 amendment; but, as already suggested, that fact is in itself without present significance. The undoubted general purpose of the act of 1911 was to reduce the number of cases where community estates would be dissolved (with the consequent confusion in business and uncertainty of titles), upon the death of one member of the community. The principle of absolute equality between husband and wife is retained; but the right of succession is practically abolished, and the burden of dividing up the estate is imposed upon the husband or wife, in that his or her wishes can be given effect only by affirmative action, namely, the execution of a will. But the point is this: The defendant's contention here is that, in carving out of the community property a new estate for the wife, it is wholly improbable that she would ask for or the Legislature would grant the right to destroy the integrity of the community estate for the benefit and protection of an adopted child, and that in view of such improbability it must be held that by adopting the language "issue of the body" it was intended to deny succession to such child. But four years later, in 1911, when manifestly the Legislature was bending every effort to reduce to a minimum the confusion and uncertainty incident to the dissolution of community estates, and for that reason cut off entirely the right of succession and greatly restricted the power of testamentary disposition, there was left the power in both husband and wife to bequeath to adopted children equally with children of the blood.

In view of all of these considerations, I cannot believe that in the use of the language upon which the defendant relies, in the act of 1907, the Legislature intended to discriminate against the adopted child. To have made such discrimination would in effect have been to amend the chapter upon adoption, and if such had been the intention it would seem only natural that some reference would have been made to it, exempting the new enactment from the operation thereof. We must remember that, as they stand, the two provisions

are not inconsistent, or repugnant one to the other. It is contended only that the later legislation is independent of the earlier. In a sense, of course, they are contemporaneous expressions of the legislative will, for they are both integral parts of the Revised Codes. But, aside from the principles governing codified statutes pertaining to the same subject, I do not think I would be warranted in holding that the Legislature intended thus to make an exception to the general statutory rule of equality of rights between children by adoption and children by birth.

I have therefore concluded to deny the motion, and such will be the order.

MacARTHUR et al. v. PORT OF HAVANA DOCKS CO. et al.

(District Court, D. Maine, S. D. December 18, 1917.)

No. 776.

CORPORATIONS ⊂=574—SUIT TO RESTRAIN REORGANIZATION—PRELIMINARY INJUNCTION.

The action of the majority stockholders of a corporation, not shown to be insolvent, in forming a syndicate to effect a reorganization of the company on a basis which would give them a much larger percentage of the stock of the new company than they held in the old, while the minority stockholders would have a much smaller percentage, *held* to indicate bad faith to such an extent as to entitle the minority stockholders to a preliminary injunction to restrain further action until the case could be heard on the merits.

In Equity. Suit by John R. MacArthur and another against the Port of Havana Docks Company and others. On motion for preliminary injunction. Motion granted.

Choate, Hall & Stewart, of Boston, Mass., and Woodman & Whitehouse, of Portland, Me., for complainants.

Storey, Thorndike, Palmer & Dodge, of Boston, Mass., and Verrill, Hale, Booth & Ives, of Portland, Me., for defendants.

JOHNSON, Circuit Judge. This case came on to be heard on motion for a preliminary injunction. The complainants are minority stockholders in the Port of Havana Docks Company. The defendants, other than the defendant corporation, are the holders of a majority of stock in said corporation, and all but one of them, Mr. Diaz, are directors of said corporation.

The complainants ask that the defendant corporation and the individual defendants be enjoined from selling, transferring, and assigning the entire property, corporate rights, franchises, and privileges of the defendant corporation to the Havana Docks Corporation, incorporated under the laws of Delaware, or to any other corporation or parties whatever, and that the individual defendants be enjoined from voting their stock in favor of such sale.

The Port of Havana Docks Company was organized under the laws of the state of Maine in 1910. The capital stock of the corporation

consists of 40,000 shares of common stock and 6,000 shares of preferred stock, of the par value of $100 each. All of the capital stock, both preferred and common, has been issued and is outstanding.

The bill alleges that complainant John R. MacArthur is the owner of over 650 shares of the common stock and the beneficial owner of 500 shares of preferred stock, the legal title to the preferred stock being in the name of one James B. Reynolds; that Alvin W. Kreck, the other complainant, is the beneficial owner of 700 shares of the preferred stock and 1,500 shares of the common stock, the legal title to both preferred and common stock being in the name of said James B. Reynolds.

The bill further alleges that the individual defendants and parties affiliated with them own approximately 4,000 shares of the preferred stock and 24,000 shares of the common stock of said corporation; but it appears from the defense affidavits and statements of counsel that they own 1,350 shares of the preferred and 23,200 shares of the common stock.

The corporation, soon after its organization, became the owner by purchase from a Cuban corporation of a concession from the Cuban republic, under a presidential decree dated November 29, 1905, authorizing the building of four piers and warehouses along the water front of the city of Havana, and the right to collect charges for the use of the same at rates fixed therein.

In order to secure the capital for its work of construction, the defendant corporation authorized the issue of bonds to the amount of £800,000 sterling, dated February 1, 1911, and payable in 30 years, with interest at 5 per cent.

Dunn, Fischer & Co., a London banking company, purchased £675,000 sterling of these bonds at 85 per cent. of their face value and accrued interest. With the proceeds of the sale of these bonds two piers and warehouses upon the same were built.

The corporation began its operations about March 1, 1913, at the rates which it was entitled to charge and continued them at these rates down to September 1, 1917, when, by a presidential decree issued by the president of the republic of Cuba, it was granted the right to increase these rates 60 per cent., which increased rates it has since been charging.

The defendant corporation has never paid any dividends upon any of its capital stock, either preferred or common. It has paid the interest upon bonds which it has issued from the earnings of the corporation, except the interest due in August, 1915, which was paid by money borrowed by the corporation for the term of three years, for which scrip amounting to $82,180 was issued and is still outstanding and unpaid. The bonds provide for a sinking fund of 1½ per cent. per annum beginning in 1915; but no payment or reservation for this fund has ever been made. There should have been set aside for this fund, up to and including August 1, 1917, $150,000.

The statement of operations of the corporation for the period from March 1, 1913, to November 30, 1916, shows the excess of earnings over operating expenses, including interest on bonds and depreciation

on furniture, fixtures, and dock equipment, but not including any reservation for the sinking fund nor scrip issued to pay interest on bonds, to be $231.031.91. The net income from operations, not including the company's liabilities for sinking fund or interest on its bonds for the first seven months of the current fiscal year from February 1 to August 31, 1917, was $87,825. Upon the basis of the same tonnage for the balance of the year as was handled during the first seven months, and at the same rates, the net income from operations for the whole year would be $150,550.

No statement was furnished at the hearing of the operating income during the months of September and October, during which time the 60 per cent. additional tariff rates were in force, nor was there any evidence of the present financial condition of the corporation, except that shown by a balance sheet of November 30, 1916.

Jose Marimon, one of the defendants, in his affidavit, states that he made the purchase in the fall of 1916 of £220,000 sterling of the bonds and 23,200 shares of the common stock for the lump sum of $1,218,000, in behalf of the syndicate.

The individual defendants have caused a corporation to be organized under the laws of the state of Delaware, called the Havana Docks Corporation, which corporation has been, or is to be, capitalized as follows:

Authorized 6 per cent. first mortgage bonds.....$1,500,000.00
Preferred stock, carrying 7 per cent. dividends..... 2,500,000.00
Common stock, no par value, 50,000 shares.

A special meeting of the defendant corporation was called to be held October 24, 1917, which has been adjourned from time to time and has not yet been held. While the notice for such meeting does not state in detail the votes that are to be passed, nor the plan of reorganization contemplated, counsel for the defendants, in their brief and in argument, have stated the plan of reorganization proposed, which is as follows:

The syndicate, made up of the individual defendants, are to transfer their £220,000 sterling of bonds and 23,200 shares of the common stock of the present corporation to the new corporation, or the Delaware corporation, and receive from the new corporation 13,000 shares of its preferred stock and 36,000 shares of its common stock. The old corporation will transfer to the new all of its property, including £125,000 sterling of bonds in its treasury, subject to its debts, and the new corporation will pay therefor by issuing directly to the stockholders of the old corporation one share of its preferred stock for two shares of the preferred stock of the old corporation and one share of its common stock for two shares of the common stock of the old corporation.

The members of the syndicate who own and control a majority of the stock of the old corporation will own and control a majority of the stock of the new corporation.

Lifting the veil with which corporate action covers these transactions, the relations of the majority stockholders to them may be plainly seen. As the owners of the majority of the stock in the old cor-

poration, they will vote to sell and transfer all of its property to the new, in which they are also the majority stockholders; and as the owners of £220,000 sterling of the bonds of the old corporation and 23,200 shares of its common stock they will sell to this new corporation, controlled by them, these bonds and stock. They will, therefore, be both purchasers and sellers in these transactions, and have placed arbitrary values both upon the stock and bonds of the old corporation and upon the stock of the new corporation, in the determination of which values the minority stockholders have had no part.

The reasons advanced for this reorganization are that the defendant corporation is in failing circumstances and unable to meet its obligations; that, under the terms of the concession granted by the Cuban government, a third pier must be completed before the close of the year 1923, whose cost of construction will be at least $1,500,000; that owing to the present condition of the money market, as well as that of the corporation, it would be impossible to sell the £125,000 sterling of the bonds now in the treasury of the old corporation to obtain money with which to build this third pier; that the corporation has failed to set aside the reserve for its sinking fund to meet its issue of bonds at maturity or to provide for an amortization fund, which good business policy would require to be provided to meet the discount and expenses in the sale of bonds; that the additional tariff rates of 60 per cent. which have been granted by the president of the Cuban republic may be withdrawn at any time, and therefore cannot be relied upon as permanent future rates which may be charged by the company; that under all these circumstances some plan of reorganization is necessary to protect the capital of the corporation, which consists almost entirely of this concession, which may be lost by failure to comply with its terms.

It is not proposed, however, to dissolve the corporation and wind up its affairs because its business is unprofitable and would be conducted at a loss and it would be ruinous to the corporation and stockholders to continue it; but the plan proposed contemplates a continuance of the same business by a new corporation, which will be controlled and directed by those who now have the control and direction of the affairs of the old corporation. It is also claimed that, if any minority stockholder dissents from the plan of reorganization, his rights are fully protected by the Revised Statutes of Maine, c. 51, § 60 and following, which provide in substance that a corporation may sell and transfer all of its assets, and that a minority stockholder who dissents from the terms of the sale may, upon following the provisions of this statute, have his stock appraised and be paid the amount of said appraisal, for which he has a lien upon the assets of the corporation.

The remedy provided for a dissenting minority stockholder by the Maine statute is not exclusive, so that a court in equity is restricted thereby in affording relief by the application of equitable principles, where there has been fraud or oppressive and unfair treatment of the minority in a sale or plan of reorganization proposed by the majority stockholders of a corporation.

It would be most unjust if a minority stockholder were compelled to accept an unfair and oppressive proposition made by the majority stockholders, or, in the event of his failure to accept it, be compelled to part with his stock and forego the opportunity to share in the future earnings of the corporation.

It is not only when the proposed sale or plan of reorganization is not tainted with fraud, but also when it is not oppressive or unfair toward the minority stockholders, that it can be said that the latter have an adequate remedy under the Maine statute. If it were otherwise, instead of offering any protection to the minority stockholder against the selfish interests and cunning of the majority, the statute would prove an instrument to be used for his destruction.

The question now presented for determination is whether such oppressive and unfair treatment of the minority stockholders is threatened in this plan of reorganization that the court, considering the injury which may result to the defendants from granting a preliminary injunction and the injury which may result to the complainants from denying it, should hold property rights in statu quo until final hearing upon the bill.

The majority stockholders of a corporation occupy the position of trustees of the corporation and its stockholders, and cannot exercise the power which their majority holdings give them for their personal benefit, but must use such power for all the stockholders, the minority as well as the majority; but it is claimed that in the plan of reorganization proposed the majority stockholders are not attempting to obtain any benefit for themselves in which all the stockholders of the defendant corporation do not share, and that, if any minority stockholder is dissatisfied with or dissents from the plan, he can have the value of his stock determined by appraisal under the Maine statute.

I do not intend to enter into a discussion of the merits of the case, as now disclosed, further than may be necessary to determine whether or not there is a reasonable probability that the majority stockholders are seeking to use their power to advance their own interests at the expense of the minority stockholders in this corporation, and whether or not there is a threatened danger to the rights of the minority which, upon final hearing, may entitle them to relief.

The parties, by their affidavits in support of and in opposition to the motion for a preliminary injunction, and by testimony introduced at the hearing, have gone far into the merits of the case, and counsel have filed extensive briefs covering both the law and the facts. The plan of reorganization has been outlined by counsel in all its details, and the organization and operations of the company down to September 1, 1917, have been shown, and its financial condition upon November 30, 1916; but no information has been supplied in regard to the earnings of the company under the increased tariff rates during the months of September and October of this year, nor of the amount of cash now in its treasury and its present available assets.

I do not find, however, that the corporation is insolvent or in a failing condition, in view of the increased rates which it has been permitted to charge. The value of the concession, which constitutes the chief

asset of this corporation, lies largely in the prospect of increased earnings under the additional rates that have been granted. There seems to be no valid reason why the tonnage handled should not be as large for future years as it was in the fiscal year 1916. In that year the net earnings of the corporation from operation, exclusive of any deductions for interest on bonds or administration and general expense and the requirements of the reserve fund, were $324,958. In the statement of the auditors of the corporation, dated November 8, 1917, and annexed to the affidavit of the complainant MacArthur, the amount necessary to meet the sinking fund requirement and the interest on bonds is given as $215,000 per year. While it is true that this same statement shows that the net income from operations fell off during the first seven months of the present year, and that, on the basis of the same tonnage for the remainder of the year and at the same rates, the net earnings would be but $150,550, yet the earnings for the months of September and October under the increased rates are not given. It also appeared that there were labor troubles during last summer, so that the net earnings for May were only $1,488, and during June they fell below the operating expense to the amount of $5,257, something that had never happened before in the history of the corporation, except in March, 1913, the first month of its operations. The corporation has a practical monopoly of the docking privileges in the harbor of Havana, and it can be safely assumed that the tonnage to be handled in future years will be as great as in the year 1916. It would seem that, making all reasonable allowance for the increased cost of labor, the net income under the largely increased rates should in future years exceed that of 1916, and this future prospect is one of the large assets of the corporation.

The majority now own 22.5 per cent. of the preferred stock of the old corporation, and if the plan of reorganization is carried out they will own 54.7 per cent. of the preferred stock of the new. The minority stockholders own 77.5 per cent. of the preferred stock of the old corporation, and under the plan of reorganization they will own 9.3 per cent. of the preferred stock of the new. There will be in the treasury of the new corporation, and under the control of its majority stockholders, 36 per cent. of its preferred stock. The syndicate or majority stockholders now own 58 per cent. of the common stock of the old corporation, but if the plan of reorganization is carried out they will own 73.2 per cent. of the common stock of the new corporation. The minority own a little over 36 per cent. of the common stock of the old corporation, but under the plan of reorganization they will own a little over 14 per cent. of the new, and there would be in its treasury a little more than 12 per cent. of this common stock, under the control of the majority stockholders.

While all stockholders, under the plan of reorganization, are to be allowed to exchange their preferred and common stock in the old corporation for preferred and common stock in the new upon precisely the same terms—that is, two shares of stock, whether preferred or common, in the old, for one share of stock of the same class in the new—the great increase in the holdings of stock of the syndicate in

the new corporation will be brought about by the sale by the syndicate to the new corporation of £220,000 sterling of bonds of the old corporation at arbitrary values placed by the syndicate upon them and upon the two kinds of stock of each of the corporations, which are, for the bonds 90 per cent. of their face value, for the common and preferred stock of the old corporation $10 and $20 per share respectively, and for the common and preferred stock of the new corporation $20 and $40 per share respectively. In fixing these values the minority stockholders have had no part, and while it is true that they will be allowed to exchange their preferred and common stock in the old corporation for preferred and common stock in the new upon the basis of these values, no bonds are to be transferred by them to the new corporation.

The members of the syndicate, in the defense affidavits which have been presented, claim to have paid $1,218,000 in a lump sum for the £220,000 sterling of bonds and the 23,200 shares of the common stock of the old company held by them, and that they have incurred expenses in the way of interest and other charges in making this purchase amounting to the sum of $80,000, and $34,000 of this amount are added to this lump sum to make it equal to the combined assumed values of 13,000 shares of the preferred stock and 36,600 shares of the common stock of the new corporation.

There was no evidence in regard to the market values of these bonds or of the stock of the defendant corporation at present, but Mr. James H. Dunn, the London banker whose firm purchased £675,000 sterling of the bonds when they were issued, at 85 per cent. of their face value, and who sold to the syndicate the bonds and common stock of the old corporation now owned by them, states in his affidavit that the bonds during last summer fell as low as 50 per cent. of their face value. For their £220,000 sterling of bonds and 23,200 shares of common stock exchanged en bloc the syndicate are to receive 13,000 shares of the preferred and 36,600 shares of the common stock of the new corporation en bloc. The syndicate also owns 1,350 shares of the preferred stock of the old corporation, which they are to turn over to the new and receive therefor one-half that number, or 675 shares of its preferred stock. The minority stockholders own 4,650 shares of the preferred stock of the old corporation, which are to be exchanged for one-half that number, or 2,325 shares of preferred stock in the new. They also own 14,424 shares of the common stock of the old corporation, which are to be exchanged for one-half that number, or 7,212 shares of the common stock of the new. If the plan of reorganization is carried out the new corporation will have in its treasury £345,000 sterling of bonds of the old corporation, 9,000 shares of its preferred stock and 6,188 shares of its common stock.

The largely increased holdings of both preferred and common stock in the new corporation, which would result by this reorganization to the syndicate or majority stockholders, would arise from the exchange of their bonds and common stock of the old corporation en bloc for preferred and common stock of the new corporation en bloc.

Mr. Jose Marimon bought the bonds and stock owned by the syndi-

cate for the lump sum of $1,218,000, and it does not appear that, at the time of this purchase, any separate value was placed either upon the bonds or the stock; but under the plan of reorganization the bonds are to be exchanged at 90 per cent. of their face value and exchange at $4.86⅔, together with 23,200 shares of the common stock of the old corporation at $10 per share, for 13,000 shares of the preferred stock of the new corporation at $40 per share, and 36,600 shares of its common stock at $20 per share, the exchange to be made of bonds and stock of the old corporation lumped together for the preferred and common stock of the new lumped together. If the common stock of the old corporation held by the syndicate were to be exchanged for common stock of the new upon the same terms, or with a value of $10 per share placed upon the common stock of the old and $20 per share upon the common stock of the new, it would be in accordance with the basis of exchange provided for all the stockholders of the common stock of the old company. If this were done, the syndicate would receive for their 23,200 shares of common stock in the old corporation 16,600 shares of stock in the new, so that what they are now seeking to acquire under the plan of reorganization is 13,000 shares of the preferred stock and 25,000 shares of the common stock of the new corporation in exchange for their £220,000 sterling of bonds, upon an arbitrary value which they have fixed for their bonds and also which they place upon this preferred and common stock of the new corporation. Their bonds bear interest at the rate of 5 per cent. The preferred stock of the new company will pay a dividend of 7 per cent., and yet the syndicate or majority stockholders propose to exchange their bonds at 90 per cent. of their face value for this preferred stock at 40 per cent. of its face value.

In view of these facts I find a substantial question is presented: Whether the majority stockholders under the proposed plan of reorganization are acting in the exercise of their honest judgment as trustees of all the stockholders, or are attempting to advance their own interests at the expense of the complainants and other minority stockholders, and that pending its determination upon a final hearing of the bill, considering the little injury, if any, which may result to the defendants from granting a preliminary injunction as compared with the irreparable injury which may be occasioned to the complainants and other minority stockholders if it is denied, the present status should be preserved.

It is therefore ordered that a preliminary injunction as prayed for be issued.

CUMMINGS et al. v. SUPREME COUNCIL OF ROYAL ARCANUM et al.

(District Court, D. Massachusetts. January 21, 1918.)

No. 816.

1. INSURANCE ⟸708—RECEIVERS—APPOINTMENT—PLEADING.
A bill must state plaintiff's case with such certainty and fullness as to show to what relief he is entitled; therefore a bill against a fraternal insurer, alleging mismanagement, insolvency, and praying for dissolution and the appointment of a receiver, which alleged that plaintiffs were the owners of an interest in trust funds of approximately $3,500,000 held by the insurer, but did not further disclose plaintiffs' interest, is insufficient.

2. INSURANCE ⟸707—FRATERNAL INSURANCE—CONTRACTS.
At the time a fraternal insurer incorporated under the Massachusetts laws entered into contracts of insurance, the Massachusetts act to provide for the control and regulation of fraternal benefit societies (St. 1911, c. 628) was in force. Section 24 of such act gives the state insurance commissioner power to investigate the affairs of any fraternal benefit society, and when satisfied that such business is being conducted in an improper manner to present the facts to the Attorney General, who may institute quo warranto proceedings; and section 25 declares that no application for injunction against or proceedings for the dissolution of, or the appointment of a receiver for any such society shall be entertained by any court in the state unless the same is made by the Attorney General. *Held* that, as the state creating it has the right to provide for the regulation and dissolution of a corporation, such provisions of law became part of the insurance contract between the society and its members, and hence nonresident members, suing in the federal court, could not be granted relief, where the Massachusetts Attorney General did not consent to the dissolution of the society, the appointment of a receiver, or the issuance of an injunction.

In Equity. Bill by Arthur F. Cummings and others against the Supreme Council of the Royal Arcanum and others. Bill dismissed.

Bordman Hall, James A. Tirrell, and Harvey H. Pratt, all of Boston, Mass., for plaintiffs.

Howard C. Wiggins, of Rome, N. Y., and Curtis H. Waterman, of Boston, Mass., for defendants.

HALE, District Judge. The bill alleges that the plaintiffs, Arthur F. Cummings and James E. Upstone, are citizens of New Hampshire, and are acting on behalf of themselves and all others of a like class and similarly situated, contributors to trust funds, thereinafter described, and held by the defendant; that the defendant is a corporation organized and existing under and by virtue of the laws of the state of Massachusetts, and a citizen of that state; that the plaintiffs are owners of an interest in trust funds of approximately $3,500,000 held in trust by the defendant. It is alleged, on information and belief, that the defendant was incorporated in November, 1877, as a so-called secret benevolent and fraternal society and has carried on a so-called fraternal insurance business under a plan, described in detail, substantially as follows: having a Supreme Council, with officials whose duty is to hold designated funds in trust for the benefit of mem-

bers and contributors, and having subordinate lodges through which contributions are collected; that the defendant seeks to do a life insurance business under the guise of such plan; that, under this plan, assessments are levied, and funds collected, from the members, which funds are turned over to trustees, who hold the funds in trust for the members of the association, to meet its obligations with the members; that the defendant, through its lodges, has collected large sums of money from the plaintiffs and others of like class, which funds are held in trust for the plaintiffs and others upon the condition that the funds should be held as aforesaid as insurance, trust, or benefit funds, whereby a stipulated sum should be paid to each of the beneficiaries of the plaintiffs, and others of their class; and that the funds should be sufficient at all times to meet the obligations required for such payments as they should mature.

It is further alleged, on information and belief, that the defendant has become hopelessly insolvent; that the trust funds have become greatly impaired, and are insufficient to meet the obligations entered into as aforesaid; that the sufficiency of the trust funds depends upon the continuing of the payment of assessments by old members and the acquiring of new members; that there has been a grossly insufficient number of applicants for new membership, and a failure on the part of old members to continue the payment of assessments, whereby the plan has utterly failed; that it appears from the official returns that the defendant has 157,818 members carrying fraternal insurance of two classes, of which approximately $218,500,000 is under a regular rate, and approximately $58,800,000 is under various options, being the sum of approximately $277,400,000; that to meet this liability the defendant has alleged assets of $3,458,001.78; that it appears from the official returns that during the past year the defendant has lost in membership 83,880 members; that for the month of May, 1917, there have been 3,292 net lapses, 330 deaths, and that the defendant has acquired only 73 new members, showing a net loss of 3,549 for the month. The bill alleges also in detail a net result of loss for the month of July, 1917, of 2,880 members, and that such condition has continued for a long time and still continues; that the trust funds have been greatly impaired by doubtful investments; that great loss has resulted from negligence, waste, mismanagement, and wrongdoing of those in control of the defendant; that illegal payments have been made; that paid solicitors have been illegally employed to acquire new members whereby the undertakings of the defendant have failed and become impaired; that the trust funds are in grave danger of being completely wasted and frittered away in the conduct of the pretended insurance business by such management as has been pleaded and by the defective plan of insurance, and by waste and mismanagement, to the great loss of the plaintiffs; that the trust should be terminated and the funds distributed to the plaintiffs and others entitled thereto.

The plaintiffs further allege, on information and belief, that statements in regard to the trust funds of the defendant have been made by it from time to time in such way as to conceal the condition and state of the trust; that the defendant's accounts are complicated and ob-

scure and can be determined only in equity, and should be inquired into by a receiver appointed for the benefit of the plaintiffs; such receiver should have power of control and custody over the trust funds pending the inquiry, and should finally have full power of collection and distribution.

The plaintiffs further aver, on information and belief, that the defendant has now trust funds to the amount of approximately $3,500,000, which belong to and should be distributed among the plaintiffs and others in like class; that because of the insolvent condition of the defendant, and the danger of the loss of the funds, the defendant should be restrained from making payments and taking the funds from the jurisdiction of the court; and that the plaintiffs have no plain and adequate remedy at law.

The bill prays for an injunction; for the appointment of a receiver or receivers to take possession of the defendant's trust funds, property, and assets; that masters be appointed; that the trust should be terminated; and the trust funds and assets distributed to contributors and equitable owners.

Since the filing of the bill, Arthur L. Hobart, of Braintree, in the district of Massachusetts, alleged to be a holder of a certificate issued by the defendant in the sum of $500, has intervened as a plaintiff; and the plaintiffs have amended their bill by adding thereto as defendants the Old Colony Trust Company and the Merchants' National Bank, both alleged to be citizens of the district of Massachusetts. These defendants are joined for subsidiary purposes. For convenience, the Supreme Council of the Royal Arcanum, the original and principal defendant, is spoken of in this opinion as the defendant.

The case is now before the court upon the defendant's motion to dismiss the bill of complaint. The defendant assigns 11 grounds for dismissal. It alleges generally that the bill fails to show the plaintiffs to be entitled to any relief against the defendant; and, among other causes, it states, as a reason for dismissal, that the bill shows the relationship between the plaintiffs and the defendant to be that of membership in a Massachusetts corporation; that the legal incidents of such membership are fixed and determined by the laws of Massachusetts; and the bill fails to show any violation of, or failure to comply with, said law; that it shows no effort to secure the relief expressly provided for the plaintiffs, by said laws, at the hands of the insurance commissioner and the Attorney General of Massachusetts; and that the plaintiffs are not entitled to maintain their bill in the absence thereof.

[1] At the hearing of the cause upon this motion, the learned counsel for the plaintiffs brought to my attention chapter 628 of the Acts of 1911, of the state of Massachusetts, with amendments thereto, entitled "An act to provide for the control and regulation of fraternal benefit societies." He referred especially to sections 24 and 25 of that chapter, and pointed out that the several plaintiffs acquired their interest in the trust funds of the society, or, in other words, became holders of death benefit certificates, while this law, or a law of like effect, was in force. The case has proceeded upon the assumption that

the plaintiffs, in the general statement of their interest in the trust funds, intended to allege themselves to be holders of such benefit certificates, and members of the defendant society, and to have acquired their interest at the time when the law in question existed. The fact was not called to my attention, at the hearing, by either side, that the only allegation of plaintiffs' interest, alleged in the bill, was that "the plaintiffs are owners of an interest in trust funds of approximately $3,500,000 held in trust by the defendant." This statement of interest is obviously too uncertain to form the basis of a decree in equity. It does not disclose what interest the plaintiffs have, or make any substantial averment upon which the court may proceed to a decree. If the plaintiffs rely upon this allegation only, it is obvious that the bill must be dismissed, as stating too vague and uncertain a case to enable the court to found upon it a final and effective judgment; it fails to show that the plaintiffs are entitled to any relief. A bill must state a plaintiff's case with such certainty and fullness as to show to what relief he is entitled. Merwin's Equity, § 917; Huntington v. Saunders (decision by Judge John Lowell) (C. C.) 14 Fed. 907.

[2] Section 24 of the act providing for the control and regulation of fraternal benefit societies gives the power to the state insurance commissioner to investigate the affairs of any fraternal benefit society, and, when satisfied that its business is being conducted in a manner such as is charged by these plaintiffs, to present the facts to the state Attorney General, who, if he shall find the facts to warrant such a course, is then to begin quo warranto proceedings in a court of competent jurisdiction. If, after due notice and hearing, the court finds that the society should be closed, it shall enjoin further business and appoint a receiver to wind up its affairs and distribute its funds. Section 25 is as follows:

"No application for injunction against or proceedings for the dissolution of, or the appointment of a receiver for, any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the Attorney General."

Chapter 474, § 19, of the Public Acts of 1898, contains a like provision.

It is contended, on behalf of each of the plaintiffs, that the Massachusetts law, even though it existed at the time of the making of his contract, does not enter into and become a part of that contract, so as to be obligatory on all courts assuming to give a remedy thereon; and that such law does not provide an exclusive method for proceeding against the defendant, for the purpose of closing it and distributing its assets.

The defendant is alleged to have been incorporated under Massachusetts law. At the time of its incorporation the laws of the state provided for the inspection and investigation of its affairs by the insurance commissioner, and for the substantial control and regulation of such corporation by the state authorities, and for its winding up to be effected by the Attorney General, when he should find the circumstances to warrant such course. Many other states have similar provisions relating to such societies. It has been the general doctrine of

the courts that the Legislature of a state has power to provide the method by which the affairs of such societies may be conducted and by which they may finally be closed; and that it may designate the particular officer to initiate such proceedings. It cannot be said, I think, that such legislation is unfavorable to the interests of parties like the plaintiffs in this suit. They are thereby protected from frivolous suits intended to interfere with the proper business of the defendant, or to wreck it while it is pursuing its legitimate business in a proper manner. For many years the courts have recognized the principle that a corporation derives its power from the laws of the state creating it; that such state has the right to determine the powers relating to the government of the corporation and the method of administering and closing it. This doctrine was declared by Chief Justice Marshall in Head v. Providence Ins. Co., 2 Cranch, 127, 167, 2 L. Ed. 229, cited by Chief Justice White, in Royal Arcanum v. Green, 237 U. S. 531, 542, 543, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771; Barnitz v. Beverly, 163 U. S. 118, 127, 128, 16 Sup. Ct. 1042, 41 L. Ed. 93. The Circuit Court of Appeals in this Circuit has made pertinent observations on this subject in the Hobart Case recently decided.

Under the decisions of the federal courts, I think it clear that the laws of the state, in force at the time when these plaintiffs made their contract, formed part of the contract, and are obligatory on all courts assuming to act in the premises.

In Dill v. Supreme Lodge, Knights of Honor (C. C.) 226 Fed. 807, the District Court for the Eastern District of Missouri sustained a bill in equity brought by a death benefit certificate holder of a fraternal insurance society to have a receiver appointed and to close the corporation; it being shown that the decrease in membership of the corporation had been continuous for 15 or 20 years, that the defendant was unable to carry out its contracts, that it was impossible to rehabilitate the corporation; and that the state of Missouri had a statute similar to that of the state of Massachusetts which is here brought in question. It also appeared affirmatively that the state of Missouri, acting through the Attorney General, not only had declined to take any proceedings for the purpose of winding up the defendant and protecting the rights of the members thereof, but that the Attorney General, in open court, stated that, so far as the state was concerned, it had no objection to the corporation's being wound up in the federal court. Under that state of facts, the court held that the corporation had no right to object; the provision of the law not having been made for the benefit of the corporation, but having been made for the benefit of the creditors, the state acting as trustee for them.

Upon the facts presented in the Dill Case, it may be assumed, for the purposes of this case, that the federal court in the Missouri district was justified in taking the action it did; and that the Court of Appeals, if the case had been brought before it, would have affirmed such action, and thus have made law binding upon the federal courts. The case before me shows an entirely different state of facts. The Attorney General, acting on behalf of the state, has not appeared and stated that the commonwealth has no objection to the corporation's

being wound up in the federal court. It does not appear that the plaintiffs have ever attempted in any way to get the state officials to proceed against the defendant, or even to inquire into its financial condition, or that the defendant has shown any opposition to such attempt.

In view of the state law upon the subject, the bill presents no facts upon which a federal court is justified in proceeding with a suit in equity to close up the affairs of a corporation like the defendant. At the hearing on this motion, much of the complaint on the part of the plaintiffs was directed to matters pertaining to infirmities in the plan of insurance adopted by the defendant. Whatever the court may think of the soundness of this plan, it must be said that the plaintiffs have availed themselves of the benefits of it; and in this proceeding the court cannot pass upon the soundness or unsoundness of any plan of insurance. It may be said, too, that, however much inclined a court may be to relieve the burdens of certificate holders, it finds no opportunity to do so in this proceeding.

It is, perhaps, too much to say that, in view of the Massachusetts law upon the subject, no case can ever be stated which will warrant a federal court in proceeding with a bill in equity to wind up the affairs of a fraternal benefit insurance society like the defendant. It is enough to say that, in my opinion, no case is stated in this bill in equity to justify a federal court in so proceeding.

In view of this result, it is not necessary to determine the further questions raised by the motion.

The bill is dismissed. The defendant recovers its costs.

HALL v. GLENN et al.

(District Court, S. D. California, S. D. January, 1917.)

1. EVIDENCE ⊂=43(2)—JUDICIAL NOTICE—BANKRUPTCY.
   A court of bankruptcy will take judicial notice of the day on which petition in bankruptcy was filed.

2. BANKRUPTCY ⊂=293(2)—FEDERAL COURTS—JURISDICTION.
   Where the parties plaintiff and defendant to a suit by trustee of a bankrupt to set aside an alleged fraudulent transfer were all residents of the same state, and the transfer was made more than a year before the filing of the petition for adjudication, the federal court had no jurisdiction, either by reason of diversity of citizenship or under Bankruptcy Act July 1, 1898, c. 541, §§ 60b, 67, 30 Stat. 562, 564 (Comp. St. 1916, §§ 9644, 9651), respectively, providing for the setting aside of preferential transfers and fraudulent transfers made within four months of filing of petition in bankruptcy.

3. BANKRUPTCY ⊂=184(1)—ACTIONS TO SET ASIDE—CONVEYANCE—WHAT LAW GOVERNS.
   In a suit by the trustee in bankruptcy to set aside the bankrupt's transfer of land, under Bankruptcy Act, § 70e (Comp. St. 1916, § 9654), declaring that the trustee may avoid any transfer by the bankrupt which any creditor of the bankrupt might have avoided, the law of the state in which was located the land, the transfer of which the trustee sought to

vacate, governs, and the transfer cannot be set aside, unless subject to attack under such laws.

4. BANKRUPTCY ⊂=293(2)—COURTS—JURISDICTION.
Bankruptcy Act, § 70e, declares that the trustee may avoid any transfer of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication, and such property may be recovered, or its value collected, from whoever may have received it, except a bona fide holder. Section 23b, as amended by Act June 25, 1910, c. 412, § 7, 36 Stat. 840 (Comp. St. 1916, § 9607), declares that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted by them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 60b et seq., and section 70e. The trustee of a bankrupt, who was a resident of California, sued to set aside an alleged fraudulent transfer of property located in Washington, made more than four months before the filing of the petition in bankruptcy. The grantees and all other parties were residents of California. *Held* that, as section 70e contemplated, not only the recovery of the property, but the collection of the proceeds from the person receiving the property, the District Court for California, sitting as a Bankruptcy Court, had jurisdiction.

5. BANKRUPTCY ⊂=293(2)—ACTIONS—OBJECTIONS TO JURISDICTION.
While ordinarily, in a creditors' suit, the creditor must first obtain a judgment to give the necessary lien on the property, that question cannot, on objections to the jurisdiction, be raised in suit by trustee in bankruptcy to set aside an alleged fraudulent transfer of the bankrupt, but is a question which might be raised by demurrer.

6. BANKRUPTCY ⊂=301—INJUNCTION—RELIEF—RIGHT TO.
Where a suit by the trustee, attacking an alleged fraudulent transfer by the bankrupt, was treated as one to collect the proceeds of the land transferred, the federal court in which suit was instituted may grant an injunction against transfer or incumbrance of the land involved.

In Bankruptcy. Suit by Pierson M. Hall, as trustee in bankruptcy of the estate of Olive S. Glenn, against Olive S. Glenn, John O. Glenn, her husband, Meredith P. Glenn, and others. On return of an order to show a cause why defendants should not be enjoined from transferring or incumbering the property pending suit. Injunction granted.

C. E. McDonald, of Lewiston, Idaho, for trustee.

S. W. Odell, of Pasadena, Cal., and R. A. Odell, of Los Angeles, Cal., for defendants.

CUSHMAN, District Judge. This is a plenary suit, brought by the trustee to set aside a certain fraudulent conveyance alleged to have been made by the bankrupt of land in the state of Washington, to have the record of these conveyances in Washington canceled, the trustee decreed to be the owner thereof as a part of the bankrupt's estate, and for general relief. The cause is before the court on the return of an order to show cause why defendants should not be enjoined during this suit from transferring or incumbering the real property in question.

One of the defendants, Meredith P. Glenn, to whom the property is alleged to have been fraudulently transferred in order to hinder and delay the creditors, appears specially and objects to the jurisdiction of the court. The bill of complaint states that the bankrupt in June, 1914, executed upon the land in question a mortgage for $15,000, in favor of Meredith P. Glenn; that it was recorded in the auditor's records in King county, Wash., at the same time; that in February, 1915, the bankrupt quitclaimed the premises to Meredith P. Glenn, which deed was recorded at that time; that prior to either of these transactions the bankrupt was indebted to, and still is indebted to, certain named creditors in an amount in excess of $2,000. There is no allegation as to the residence or citizenship of these creditors.

[1] It is alleged that the adjudication in bankruptcy was made in April, 1916. There is no allegation as to when the petition for adjudication was filed, though the records of this court, of which the court will take judicial notice, disclose that the petition was filed the same day.

[2] The parties, plaintiff and defendants, are all citizens and residents of California. The properties are alleged to be of the value of $15,000. The transfers attacked were both made more than a year before filing of the petition for adjudication. There is, therefore, no jurisdiction in the court because of diversity of citizenship, nor under section 60b or section 67 of the Bankruptcy Act.

The cases called to the court's attention by the plaintiff are not in point. Horner-Gaylord Co. et al. v. Miller & Bennett (D. C.) 147 Fed. 295, was brought to set aside a conveyance made within four months of the filing of petition for adjudication. In Thomas v. Woods et al. (C. C. A. 8th Cir.) 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 23 Am. Bankr. Rep. 132, 19 Ann. Cas. 1080, the property was admitted to be the property of the bankrupt, while in the present suit the defendant Meredith P. Glenn is an adverse claimant. The bankruptcy court in that suit was called upon to determine the question of the wife's dower interest in her husband's property, he being the bankrupt. The court had jurisdiction, therefore, of the res. Having jurisdiction of the res, it could determine the interest of all parties therein, including the incidental dower right of the wife. Further, in the above case the court sustained the dower right reversing the lower court. Only if the right had been denied would the case at all support plaintiff in the present suit. The fact has not been overlooked that the case was remanded to the lower court for further consideration. It does not appear whether the court took such course in view of the incidental nature of the dower interest, or because the widow set up her dower interest and asked, if the court found that it had jurisdiction, to preserve such dower interest; that is, she herself invoked the court's jurisdiction. Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Bankr. Rep. 611, was not a case where a federal court in a plenary suit adjudicated rights as between citizens of the same state. It was a review of the decision of the Supreme Court of a state which had erroneously held that, while the individual bank-

rupt's estate passed to the trustee appointed by a court in a state other than that in which the land was, yet nevertheless the trustee could not sell the land in such other state except by ancillary proceedings therein for the purpose.

[3, 4] At the time of the presentation of this matter I was of the opinion that as under section 70e of the Bankruptcy Act the trustee in suing to recover property transferred more than four months prior to the filing of the petition in bankruptcy stood in the shoes of the injured creditor; that is, that the suit being in the nature of a creditor's bill, that the res, the property in Washington sought to be subjected to these claims, upon which the creditor must have a lien, alone fixed the jurisdiction of the court, and that this court was therefore without jurisdiction. I was, and am still, of the opinion that the law of the state of Washington determines whether the transfer in question was one "which any creditor of the bankrupt might have avoided," and that all persons now interested in that property are necessary parties to any suit to "recover" such property. In the position then taken I was probably influenced by the attitude of counsel in treating the case as solely for the recovery of property in Washington, but the complaint contains a prayer for such general relief as in equity plaintiff is entitled, and the value of the property, as pointed out, is alleged to be $15,000. Section 70e of the Bankruptcy Act reads:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

It will be seen that the foregoing section provides not only for the specific recovery of property fraudulently transferred "or its value from the person to whom it was transferred." Under section 23b as amended by Act June 25, 1910, c. 412, § 7, 36 Stat. 840, as a court of primary jurisdiction in a bankruptcy proceeding, this court by the amendment has jurisdiction conferred upon it in a suit to recover the value of property alleged to be fraudulently transferred no matter where situated; that is, if having jurisdiction of the parties, and jurisdiction is probably conferred upon any United States District Court having jurisdiction of the parties for that purpose, but this latter question it is not now necessary to determine. The above section as so amended reads:

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

[5] Ordinarily in a creditors' suit the creditor would first have to obtain a judgment to give the necessary lien upon the property, but

the bankruptcy of the debtor, which includes insolvency, probably makes of a case such as the present an exception to that general rule, but such question is not now one properly arising on an objection to the jurisdiction, though it might arise upon a general demurrer.

[6] If the suit were one properly before this court for the recovery of the property itself an injunction against further transfer would clearly be one incidental to the suit. While there is more question treating the suit, as I now do, as one for the recovery of its value, instead of for the property itself—the suit being one to uncover fraud, always a subject of jurisdiction in equity, which does not act by halves, the parties to the alleged fraud all being before the court, and equity acting upon the conscience and compelling the individual—it is concluded that even should the court in the end conclude that not the value of the entire property, but only the amount of the claim of the creditors alleged to have been defrauded by the transfer would be the measure of the recovery, yet, if the trustee should recover, an opportunity should be afforded to subject the property so transferred in fraud to the satisfaction of any judgment obtained, and the defendants should therefore be enjoined as prayed until the further order of the court. There having been no hearing on the question of the amount of bond to be required, if any, no order in that connection is made other than that the injunction will continue in effect without bond unless otherwise ordered.

MEMORANDUM DECISIONS

THE ATTUALITA. THE MINA. (Circuit Court of Appeals, Fourth Circuit. January 17, 1918.) No. 1582. Appeal from the District Court of the United States, at Norfolk, Va. Hughes, Little & Seawell and Hughes & Vendeventer, all of Norfolk, Va., for appellant. J. Parker Kirlin and John M. Woolsey, both of New York City, and Edward R. Baird, of Norfolk, Va., for appellees.

PER CURIAM. Cause remanded to the United States District Court at Norfolk, Va., on motion of appellant, by and with consent of appellees. See, also, 241 Fed. 530; 238 Fed. 909, 152 C. C. A. 43.

BIRD et al. v. CITY OF RICHMOND. (Circuit Court of Appeals, Fourth Circuit. March 14, 1917.) No. 1461. On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States at Richmond, Va., in Bankruptcy. James E. Cannon, of Richmond, Va., for petitioners. H. R. Pollard, City Atty., and Geo. Wayne Anderson, Asst. City Atty., both of Richmond, Va., for respondent.

PER CURIAM. Judgment of District Court reversed, 240 Fed. 545, 153 C. C. A. 349. June 27, 1917, writ of certiorari of Supreme Court presented.

CARRELL v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. January 22, 1918. Rehearing Denied March 11, 1918.) No. 3089. In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. W. J. Carrell was convicted of crime, and he brings error. Affirmed. Wm. H. Atwell, of Dallas, Tex., and D. W. Odell, of Ft. Worth, Tex., for plaintiff in error. Wilmot M. Odell, U. S. Atty., of Ft. Worth, Tex., and Wm. E. Allen, Asst. U. S. Atty., of Dallas, Tex. Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. There was no reversible error in any ruling presented for review in this case. The questions raised are not such as to call for comment or discussion. The judgment is affirmed.

CHESAPEAKE & OHIO COAL & COKE CO. v. TOLEDO & O. CENT. RY. CO. (Circuit Court of Appeals, Fourth Circuit. July 5, 1917.) No. 1519. In Error to the District Court of the United States at Charleston, W. Va. Price, Smith, Spilman & Clay, of Charleston, W. Va., for plaintiff in error. Brown, Jackson & Knight, of Charleston, W. Va., for defendant in error.

PER CURIAM. Judgment of District Court (238 Fed. 629) affirmed. 245 Fed. 917, — C. C. A. —. August 2, 1917, order allowing writ of error to Supreme Court filed.

EASTMAN KODAK CO. v. NATIONAL PARK BANK et al. (Circuit Court of Appeals, Second Circuit. December 11, 1917.) No. 71. Appeal from the District Court of the United States for the Southern District of New York. Hubbell, Taylor, Goodwin & Moser, of Rochester, N. Y. (Walter S. Hubbell and Clarence P. Moser, both of Rochester, N. Y., of counsel), for appellant. Louis F. Doyle, C. H. Payne, Carter, Ledyard & Milburn, and Geller, Ralston & Horan, all of New York City (Edward H. Blanc and James F. Horan, both of New York City, of counsel), for appellees. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree (231 Fed. 320) affirmed.

GANNON v. MUNSEY TRUST CO. et al. (Circuit Court of Appeals, Fourth Circuit. September 26, 1917.) No. 1537. On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States, at Abingdon, Va., in Bankruptcy. Gilmer & Stant, of Bristol, Va., for petitioner. John W. Price, of Bristol, Va., and Joseph A. Caldwell and E. K. Bachman, both of Bristol, Tenn., for respondents.

PER CURIAM. Petition to superintend and revise dismissed under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi) per agreement of counsel.

GARLAND et al. v. QUINN. (Circuit Court of Appeals Sixth Circuit. January 8, 1918.) No. 3027. Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge. Suit by Nelson J. Quinn against Edward Garland and others. From a decree for plaintiff, defendants appeal. Reversed and remanded, with instructions. O. C. Billman, of Cleveland, Ohio, for appellants. George E. Kirk, of Toledo, Ohio, for appellee. Before KNAPPEN, MACK, and DENISON, Circuit Judges.

PER CURIAM. Upon a former appeal in this case, we decided (242 Fed. 267, — C. C. A. —) the patent was not infringed, and we reversed the interlocutory decree which had been entered below. While that appeal was pending in this court, the accounting below proceeded to a final decree in favor of plaintiff for the profits which the master had found, and this appeal was taken from that final decree. Upon these facts, it is obvious that the decree below must be reversed, and the record remanded, with instructions to dismiss the bill. Questions of costs are presented, and there is a motion to strike out the printed record. This is denied; but the proceedings were irregular, and much of the record and briefs pertains to complaints against proceeding with the accounting while the interlocutory appeal was pending. This procedure was within the discretion of the court below, and is not the basis of any valid complaint. The costs in this court will be divided. The court below will determine the costs of that court, or apportion them among the parties defending, as to that court may seem proper.

GAULEY MOUNTAIN COAL CO. v. HAYS, Collector of Internal Revenue. (Circuit Court of Appeals, Fourth Circuit. December 2, 1915.) No. 1376. In Error to the District Court of the United States at Charleston, W. Va. R. T. Hubard, Jr., of Fayetteville, W. Va., and H. B. Closson, of New York City, for plaintiff in error. W. G. Barnhart, U. S. Atty., of Charleston, W. Va., for defendant in error.

PER CURIAM. Judgment of District Court reversed. Writ of certiorari of Supreme Court presented December 23, 1916.

HAYNIE v. SANGER BROS. (Circuit Court of Appeals, Fifth Circuit. January 7, 1918.) No. 3114. Petition to Superintend and Revise from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Petition by R. W. Haynie, trustee of Herman Winkler, bankrupt, against Sanger Bros., to superintend and revise judgment in a controversy between the parties. Affirmed. Dallas Scarborough, of Abilene, Tex., for petitioner. J. D. Williamson, of Waco, Tex., for respondent. Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. The only question presented in this case is whether a contract between the bankrupt and Sanger Bros. was one of conditional sale or consignment. On the facts shown the District Court held the transaction to be a consignment. The judgment was right, and it is affirmed.

HEREFORD v. GUYER et al. (Circuit Court of Appeals, Fourth Circuit. September 28, 1916.) No. 1426. On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States at

Charleston, W. Va., in Bankruptcy. Murray Briggs, Henry S. Cato, and J. W. Kennedy, all of Charleston, W. Va., for petitioner. Payne, Minor & Bouchelle, of Charleston, W. Va., for respondents.

PER CURIAM. Petition to superintend and revise dismissed under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi) per agreement of counsel.

HINES et al. v. BOWERS. (Circuit Court of Appeals, Fifth Circuit. December 20, 1917.) No. 3115. In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge. J. H. Mize, of Gulfport, Miss., for plaintiffs in error. W. A. White, of Gulfport, Miss. (White & Ford, of Gulfport, Miss., on the brief), for defendant in error. Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

PER CURIAM. No ruling complained of in this case involved the commission of reversible error. The questions raised are not deemed to be such as to call for discussion or comment. The judgment is affirmed.

HODGIN v. SOUTHERN RY. CO. (Circuit Court of Appeals, Fourth Circuit. October 31, 1916.) No. 1395. In Error to the District Court of the United States at Greensboro, N. C. King & Kimball and O. L. Sapp, all of Greensboro, N. C., for plaintiff in error. Wilson & Ferguson and Wm. P. Bynum, all of Greensboro, N. C., for defendant in error.

PER CURIAM. Writ of error dismissed under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi) per agreement of attorneys.

HODGIN v. SOUTHERN RY. CO. (Circuit Court of Appeals, Fourth Circuit. October 31, 1916.) No. 1396. Appeal from the District Court of the United States at Greensboro, N. C. King & Kimball and O. L. Sapp, all of Greensboro, N. C., for appellant. Wilson & Ferguson and Wm. P. Bynum, all of Greensboro, N. C., for appellee.

PER CURIAM. Appeal dismissed under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi) per agreement of counsel.

HOWARD v. CLINCHFIELD COAL CORP. (Circuit Court of Appeals, Fourth Circuit. October 10, 1917.) No. 1543. In Error to the District Court of the United States at Roanoke, Va. Wm. H. Werth, of Tazewell, Va., for plaintiff in error. Morison, Morison & Robertson, of Big Stone Gap, Va., for defendant in error.

PER CURIAM. Writ of error dismissed on motion of plaintiff in error.

LUMMUS COTTON GIN SALES CO. v. McBURNEY. (Circuit Court of Appeals, Fifth Circuit. November 12, 1917. Rehearing Denied December 15, 1917.) No. 3142. In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Wendell Spence and James P. Haven, both of Dallas, Tex., for plaintiff in error. H. B. Seay and Walter F. Seay, both of Dallas, Tex., for defendant in error. Before WALKER, Circuit Judge, and FOSTER, District Judge.

FOSTER, District Judge. In this case the defendant in error sued at law to recover a preference alleged to have been given the plaintiff in error by the bankrupt through a confession of judgment and subsequent execution of same on certain seed cotton. The case was tried to a jury and resulted in a verdict for the trustee, defendant in error. Error is assigned that the verdict of the jury is contrary to the law and the evidence, but it does not appear that any request was made for the court to direct a verdict. The charge of the court is not in the record, nor does it appear that any exception was taken to the charge as given. Therefore the only errors assigned that may be noticed by this court run to the exclusion of two documents offered

in evidence by the plaintiff in error. We deem it unnecessary to enter into a discussion of these two items, as the evidence sought to be elicited by them was clearly irrelevant and immaterial, and the ruling of the court with regard to them was right. Affirmed.

OLD LEXINGTON CLUB DISTILLERY CO. v. KENTUCKY DISTILLERIES & WAREHOUSE CO. (Circuit Court of Appeals, Third Circuit. February 18, 1918.) No. 2260. Appeal from the District Court of the United States for the District of New Jersey. Suit by the Old Lexington Club Distillery Company against the Kentucky Distilleries & Warehouse Company. From decree dismissing the bill (234 Fed. 464), plaintiff appeals. Affirmed. J. M. Coit, of Washington, D. C., for appellant. C. C. Billings and Alexander & Greene, all of New York City, for appellee. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This case concerns the registration of a trade-mark. The scope of the controversy is set forth in full detail in the opinion of the court below, reported in 234 Fed. 464, dismissing the bill. In that action we find no error, and as a further opinion by this court would simply be a repetition of what has been already well and sufficiently stated, we limit ourselves to adopting that opinion and affirming the decree below.

SAFETY GAS LIGHTER CO. v. FISCHER BROS. & CORWIN. (Circuit Court of Appeals, Third Circuit. January 21, 1918.) No. 2244. Appeal from the District Court of the United States for the District of New Jersey. Bill by the Safety Gas Lighter Company against Fischer Bros. & Corwin. From a decree (236 Fed. 955) dismissing the bill, complainant appeals. Affirmed. Cyrus N. Anderson, of Philadelphia, Pa. (L. H. Harriman and William Quimby, both of Boston, Mass., of counsel), for appellant. James Hamilton, of New York City, for appellee. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This is an appeal from a decree dismissing a bill charging infringement of two patents, Pomeroy, No. 1,011,643, and Gould, No. 1,021,363, owned by the appellant. Reference to the comprehensive discussion of the case by the court below (see 236 Fed. 955) makes a recital of the details of the controversy needless. A careful consideration of the case has satisfied us that no error was committed by the court below and as a detailed discussion by this court would be but an effort on its part to restate in different form what has been already thoroughly discussed in the reported opinion, we restrict ourselves to saying that in our judgment the case finally turns on the question of whether the devices of the two patents sued on involved invention. That question has had our careful consideration, as it did that of the court below, and we agree with it in holding that the devices of both Pomeroy and Gould did not involve invention. The decree below is therefore affirmed.

SCHAFF v. SHELTON. (Circuit Court of Appeals, Fifth Circuit. December 15, 1917.) No. 3132. Appeal from the District Court of the United States for the Western District of Texas; Duval West, Judge. William E. Spell, of Waco, Tex., for appellant. Winbourne Pearce, of Temple, Tex., and A. L. Curtis, of Belton, Tex., for appellee. Before WALKER and BATTS, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The only ruling of the court which the record presents for review is in conformity with repeated authoritative rulings. There is no merit in either of the assignments of error. The judgment is affirmed.

In re STEUER. (Circuit Court of Appeals, Second Circuit. December 14, 1917.) No. 121. Petition to Revise Order of the District Court of the United States for the Southern District of New York. In the matter of William Steuer, bankrupt. On petition to revise an order of the District Court. Pe-

tition dismissed. David Goldstein, of New York City, for petitioner. Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

PER CURIAM. Petition to revise dismissed in open court.

SUNSET TELEPHONE & TELEGRAPH CO. v. HOSHOR et ux. (Circuit Court of Appeals, Ninth Circuit. February 4, 1918.) No. 3074. In Error to the District Court of the United States for the Southern Division of the Western District of Washington. Edward E. Cushman, Judge. H. D. Pillsbury, of San Francisco, Cal., and Charles O. Bates and Charles T. Peterson, both of Tacoma, Wash., for plaintiff in error. M. J. Gordon and J. H. Easterday, both of Tacoma, Wash., for defendants in error.

PER CURIAM. Pursuant to stipulation of counsel for the respective parties, filed January 11, 1918, writ of error dismissed, with prejudice, and without cost to either party.

TRABUE v. HEDGEPETH et al. (Circuit Court of Appeals, Third Circuit. February 2, 1918.) No. 2301. Appeal from the District Court of the United States for the Middle District of Pennsylvania; Witmer, Judge. Petition by Willett C. Trabue against V. W. B. Hedgepeth and Arthur C. Earnshaw, receivers of the Tippecanoe Securities Company and others. From an order dismissing the petition, petitioner appeals. Affirmed. J. Barton Rettew, of Philadelphia, Pa., and F. E. Scott, of Scranton, Pa., for appellant. H. R. Van Deusen, of Scranton, Pa., for appellees. Before McPHERSON and WOOLLEY, Circuit Judges.

PER CURIAM. We have read the record in this case, and find it presents no question of general interest. Judge Witmer was right in dismissing the petition for the reason thus stated in his unreported opinion: "The premium commissions that came into possession of the [Securities Company] were not impressed with a lien other than that of debtor and creditor. The Securities Company was not required to set a portion of its funds apart as [Trabue's] individual property, and it did in fact not so regard the same. There is now no special fund here to award, or which the court could distinguish as a fund or property of the petitioner. The amount due, whatever it may be, is but regarded as a debt due the petitioner, and must be presented and proven against the Securities Company on the distribution of the assets." The order is affirmed.

UNITED RYS. & ELECTRIC CO. OF BALTIMORE v. QUIGLEY. (Circuit Court of Appeals, Fourth Circuit. February 19, 1918.) No. 1602. In Error to the District Court of the United States at Baltimore, Md. Samuel K. Dennis, of Baltimore, Md., for plaintiff in error. Charles J. Bonaparte, of Baltimore, Md., for defendant in error.

PER CURIAM. Writ of error dismissed under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi) per agreement of attorneys.

UNITED STATES v. BALTIMORE & O. R. CO. (Circuit Court of Appeals, Fourth Circuit. November 10, 1916.) No. 1436. In Error to the District Court of the United States at Philippi, W. Va. S. W. Walker, U. S. Atty., of Martinsburg, W. Va., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., for plaintiff in error. Arthur S. Dayton, of Philippi, W. Va., for defendant in error.

PER CURIAM. Writ of error dismissed on motion of plaintiff in error by and with consent of defendant in error.

UNITED STATES v. GINSBERG. (Circuit Court of Appeals, Eighth Circuit. December 29, 1917.) No. 4363. Appeal from the District Court of the United States for the Western District of Missouri. Suit by the United States

of America against Solomon Louis Ginsberg to cancel a certificate of citizenship. From a decree dismissing the petition (244 Fed. 209), petitioner appeals. Decree reversed, and cause remanded, with directions in accordance with the opinion of the Supreme Court (243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853), answering questions certified to that tribunal. William G. Lynch, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., of Kansas City, Mo., on the brief), for the United States. George N. Elliott, of Kansas City, Mo., for appellee. Before HOOK, Circuit Judge, and ELLIOTT and YOUMANS, District Judges.

HOOK, Circuit Judge. This is a suit by the United States to cancel a certificate of citizenship issued to Solomon Louis Ginsberg, a native of Russia, on the ground that it was illegally procured. It was brought under the provisions of section 15 of the Act of June 29, 1906, c. 3592, 34 Stat. 601 (Comp. St. 1916, § 4374). It was charged that the hearing of the petition for naturalization was not in open court as required by the act of Congress but was in the chambers of the judge; also that the undisputed facts disclosed at the hearing showed that Ginsberg was not entitled to citizenship. The court below held that the error in issuing the certificate, if any, was one of law which could not be reviewed by independent suit. It accordingly dismissed the petition of the government. Upon appeal here this court certified to the Supreme Court of the United States the substantial questions involved, and sufficient of them were answered to determine conclusively, first, that the hearing of the petition for naturalization was not in open court; and, second, that if, at such hearing, the judge misapplied the law to facts showing the petitioner was not entitled to citizenship, the certificate issued was illegally procured and could be canceled in an independent suit by the government. 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853. The decree of the court below is reversed, and the cause is remanded for further proceedings in accordance with the opinions of the Supreme Court and this court.

ROBINSON v. SEABOARD NAT. BANK OF NEW YORK et al. In re W. S. KUHN & CO. (Circuit Court of Appeals, Third Circuit. May 14, 1918.) Nos. 2261–2263. Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, District Judge. On reargument. Former opinion corrected, and decision affirmed. For former opinion, see 247 Fed. 667, — C. C. A. —. J. M. Wright and A. A. Morris, both of Pittsburgh, Pa., for appellant. J. M. Shields, Sterrett & Acheson, and M. W. Acheson, Jr., all of Pittsburgh, Pa., for appellees. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. Since the opinion in these cases was published (247 Fed. 667, — C. C. A. —) they have been reargued, and have been carefully reconsidered. In two or three particulars we inadvertently fell in error, and are glad to make the correction. The opinion states (247 Fed. 667, — C. C. A. —) that the Seaboard Bank, Edward Hutchins et al., and J. H. Purdy "proved their respective claims and participated *without objection* in the individual estate of J. S. Kuhn and in the individual estate of W. S. Kuhn." This was a mistake, and we withdraw the italicized phrase. We also said (247 Fed. 668, — C. C. A. —): "Of the general right of Purdy to participate in the individual estates of each of the makers of said note, no question was raised, or indeed could have been. So, also, of the general right of Purdy to prove his note and participate in the partnership estate of W. S. Kuhn & Co., no question was, or indeed could have been, raised, because the proof was that the proceeds of the note were borrowed for and were used in and by said partnership of W. S. Kuhn & Co., and this note was carried in the books of said firm as a partnership indebtedness." For these sentences we substitute the following: "The general right of Purdy to participate in the individual estates of each of the makers of the note was claimed and adjudged by the District Court without appeal therefrom. So, also, of the general right of Purdy to prove his note and participate in the partnership estate of W. S. Kuhn & Co., no question can be raised, because the proof was that the proceeds of this note were used in and by the partnership of W. S. Kuhn & Co., and the note was car-

ried in the books of the firm as a partnership indebtedness." Immediately afterwards we used this language: "The proofs further showed that this was the customary, and indeed virtually the only, way in which that partnership raised funds, and that of the millions of dollars it borrowed and used in its business it virtually gave no obligations in its own firm name of W. S. Kuhn & Co., but the individual names of its two partners were always used." And we modify this sentence to read as follows: "The proofs further showed that this was a customary way in which that partnership raised funds, and that of the millions of dollars it borrowed and used in its business it virtually gave no obligations in its own firm name of W. S. Kuhn & Co." We do not thing it important to decide whether the real firm name was "J. S. & W. S. Kuhn," or "W. S. Kuhn & Co.," and for present purposes we may concede that the counsel for the trustee is justified in what is said on page 12 of his supplemental brief: "From all of which it appears that, so far as the banking world was concerned, a number of persons knew 'J. S. & W. S. Kuhn,' a partnership; but, so far as the entire business world was concerned, 'W. S. Kuhn & Co.' was practically unknown. This title was merely a label or tag placed by James S. Kuhn and William S. Kuhn upon their private books to identify the transactions in which they were jointly engaged, and, as an incident, it happens that all their joint enterprises so disclosed were as between themselves partnership transactions."

But, after these corrections have been made, we are unable to see that the question presented for decision has been materially changed. It remains as before, Should the claimants have been permitted to make double proof of their claims? And on this point we continue to believe that the evidence before us warrants the application of the American rule. We shall not discuss this disputed question. Those who wish to pursue it may be referred to Re Farnum, Fed. Cas. No. 4,674, to the note in 39 L. R. A. (N. S.) 391, and to 3 R. C. L. § 49. But we do not assent to the conclusion stated in 3 R. C. L. that double proof is only to be allowed "where the double claim [is] based upon the joint obligation of the firm, and also an independent obligation or undertaking of the individual partner," if this statement means that the "independent obligation or undertaking of the individual partner" must be based on a separate writing (e. g., an indorsement), or on a separate oral contract. We can see no sufficient reason for such a requirement. In our opinion the partnership obligation and the separate obligations of the individual partners may (as in the pending cases) be contained on the face of the same instrument. If the evidence show that the firm as such and the individual partners as such have bound themselves by the same act, the result is that three (or more) contracts have been entered into at the same time and by the same transaction. And in that event, as in any other case of a joint and several obligation, each of the contracts thus entered into should be followed by its appropriate consequence. Here it was proved that each "joint" contract was a firm contract, while the "several" contracts, of course, bound the makers individually. The decree of affirmance heretofore entered will not be disturbed.

END OF CASES IN VOL. 247